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## TABLE OF TITLES AND DEFINITIONS.

See index for numerous sub-titles and definitions contained in the notes.

- Take, 1  
 Tales, 2  
 Talesman, 3  
 Tallage, 3  
 Tare, 3  
 Tariff, 3  
 Tavern, 3  
**TAXATION**, 5  
**TAXATION (CORPORATE)**, 624  
**TAX TITLES**, 674  
 Teach, 741  
 Teacher, 741  
 Team, 741  
 Teamster, 743  
**TELEGRAPHS AND TELEPHONES**, 744  
 Teller, 893  
 Temperance, 893  
 Temperate, 893  
 Tempest, 894  
 Temporary, 894  
 Tenancy, 894  
**TENANCY, JOINT**. See Estates; Joint  
     Tenants (and Tenants in Com-  
     mon).  
 Tenancy at Sufferance, 894  
 Tenancy at Will, 894  
**TENANCY BY CURTESY**. See Curtesy.  
**TENANCY FOR LIFE**. See Estates;  
     Landlord and Tenant; Remainder;  
     Reversion.  
**TENANCY FROM MONTH TO MONTH**.  
     See Landlord and Tenant.  
**TENANCY FROM YEAR TO YEAR**. See  
     Estates; Landlord and Tenant.  
**TENANCY IN COMMON**. See Estates;  
     Joint Tenants (and Tenants in Com-  
     mon).  
**TENANCY IN COPARCENARY**. See Par-  
     cenary.  
**TENANCY IN DOWER**. See Dower.  
**TENANCY IN FEE SIMPLE**. See Estates;  
     Real Property.  
 Tenant, 895  
 Tenatable, 896  
 Tenant's Fixtures, 896  
**TENANT FOR YEARS**. See Estates;  
     Landlord and Tenant.  
**TENDER**, 897  
 Tenement, 944  
 Tenendum, 944  
 Tenor, 946  
 Tent, 947  
 Tenterden's (Lord) Act, 948  
 Tenure, 948  
 Tenure of Office, 948  
**TERM**, 949  
 Terminate, 952  
 Terminer, 952  
 Terminus, 953  
 Terre-Tenant, 952  
 Terrier, 953  
**TERRITORIAL COURTS**. See Courts;  
     Territories; United States Courts.  
**TERRITORIES**, 953  
 Testament, 970  
**TESTAMENTARY CAPACITY**, 970  
 Teste, 1018  
 Testimony, 1019  
**TEST OATH**. See Ex Post Facto Laws;  
     Oath.  
 Test-Paper, 1019  
 The, 1019  
**THEATERS**, 1020  
 Theft, 1054  
 Their, 1054  
 Then, 1055  
 Thence, 1056  
 Thereafter, 1057  
 Therefore He Brings Suit, 1057  
 Therein, 1057  
 Thereon, 1058  
 Thereupon, 1058  
 These, 1058  
 Thief, 1058  
 Thing, 1058  
**THINGS IN ACTION**. See Choses in  
     Action.  
 Think, 1058  
 Third or Thirds, 1059  
 Third Party, 1059  
 This, 1059  
 Thoroughfare, 1059  
 Thoroughly Dried, 1059  
 Thousand, 1060  
 Thread, 1060  
**THREATS AND THREATENING LETTERS**,  
     1060  
 Three Story, 1073  
 Threshing Machine, 1073  
 Throat, 1073  
 Through, 1073  
 Thrust, 1074  
 Ticket, 1074  
**TICKETS AND FARES**, 1074.



# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

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**TAKE.**—Take and its inflections have in many phrases in law a meaning but little apart from the vernacular; but in the law of eminent domain, wills, etc., they are used in technical or *quasi* technical senses.<sup>1</sup>

1. See Abb. Law Dict.; Anderson's L. Dict.

**"Taken" Implies a Transfer of Dominion or Control.**—"In its usual significance, the word *taken* implies a transfer of possession, dominion, or control. A thing is not taken unless such a change of status is effected. In trespass, trover, or replevin, the *taking* is not accomplished until the goods are within the power or control of the defendant. A devisee *takes* under a will only when the possession and control of the devisor has ceased." *Jersey City v. Morris Canal, etc., Co.*, 41 N. J. L. 70.

**What Constitutes a "Taking" for Public Use.**—For numerous decisions determining what constitutes a taking of property within the meaning of constitutional provisions requiring that property shall not be taken for public use without compensation, see *EMINENT DOMAIN*, vol. 6, p. 542 *et seq.*

**"Take" in the Sense of "Arrest."**—"Take" is the technical word used in all writs and precepts by which a sheriff or other officer is commanded to arrest the body. As thus used, the term is synonymous with "arrest." *Com. v. Hall*, 9 Gray (Mass.) 267; 69 Am. Dec. 285.

**"Take" not Synonymous with "Steal."**—In an action for malicious arrest, it was held no error to refuse an instruction for defendant that if such circumstances existed as would create a

suspicion in a reasonable mind that the plaintiff had "taken" the articles, it would amount to probable cause. The court said: "To 'take' an article from another, and to 'steal' it, are not necessarily synonymous expressions." *Stone v. Stevens*, 12 Conn. 229; 30 Am. Dec. 611.

**Take and carry away** are the technical words used in charging larceny. See *LARCENY*, vol. 12, p. 762.

**Game** is "taken" when it is snared, though it is neither killed nor removed. *Rex v. Glover, Russ. & Ry.* C. C. 269.

**"Taking" and Destroying.**—A penalty for "taking or destroying" the spawn of fish, or for taking or killing fish, means an improper killing and not for, *e. g.*, removing spawn from one bed to another. *Bridger v. Richardson*, 2 M. & S. 568; *Rex v. Mallinson*, 2 Burr. 679.

**Power to "Take" Realty.**—That the charter power of a bank to "take" real estate in payment of its debts, involves the power of subsequently selling the same, see *Jackson v. Brown*, 5 Wend. (N. Y.) 590.

**Held to Apply to Personalty.**—The words "taking" and "converting," as used in a statute authorizing arrest, in actions for taking or converting property, apply to personal property only. *Merritt v. Carpenter*, 3 Abb. App. Dec. (N. Y.) 285.

**What "Taking" Will Amount to**

**TALES**—(See also JURY AND JURY TRIAL, vol. 12, p. 340).—If by means of challenges or other causes, a sufficient number of unexceptional jurors doth not appear at the trial, either party may pray a tales. A tales is a supply of such men as are summoned on the first panel, in order to make up the deficiency.<sup>1</sup>

**Abduction**.—(See ABDUCTION, vol. 1, p. 22.)

**"Taking" for Purposes of Prostitution**—(See also ABDUCTION, vol. 1, p. 22).—To bring an offender within a statute against "taking" girls from the custody of their parents or guardians for purposes of prostitution, it is not necessary that the "taking" should be by force, but the statute is satisfied if it is accomplished by improper solicitations or inducements. *People v. Marshall*, 59 Cal. 388. See also *Reg. v. Mankletow*, 22 L. J. M. C. 115; *Reg. v. Timmins*, 30 L. J. M. C. 45; *State v. Jameson*, 38 Minn. 21.

**"Taken" in the Act of Adultery**.—Art. 567 of the Penal Code of *Texas* reads as follows: "Homicide is justifiable when committed by the husband upon the person of any one *taken* in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated." It was held that a proper construction of the term "taken in the act of adultery," as used in the statute, does not mean that in order to avail himself of the protection afforded by the statute, and to justify the homicidal act, the husband should be an eye witness to the physical act of coition between his wife and her paramour, but it will be sufficient if he sees the paramour in bed with his wife, or leaving it, or in such a position as indicates with a reasonable certainty to a rational mind that they had just then committed the adulterous act, or were then about to commit it. But no knowledge otherwise acquired by the husband, however positive, of the adulterous intercourse between his wife and her paramour, will bring the homicide, if he slay the latter, within the purview of the statute. *Price v. State*, 18 Tex. App. 474; 51 Am. Rep. 322.

**When an Appeal is "Taken"**—"An appeal cannot be said to be 'taken,' any more than a writ of error can be said to be 'brought,' until it is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court. This

is done by filing the papers, viz., the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond, and the citation." *Credit Co. v. Arkansas Cent. R. Co.*, 128 U. S. 261.

**"Taken as True"**.—An instruction, where the accused is examined on his own behalf, that what he testified to against his interest is to be "taken as true," is not prejudicial error. The court said: "To say that they are to be 'taken as true,' as was done in this instance, is saying no more than that they are 'presumed to be true' or are conclusive for the purposes of the case in hand. 1 Greenl. Ev., §§ 27, 32; *Webst. Dict.*, tit. 'Presume.'" *State v. Brooks*, 99 Mo. 137.

**"Take" in the Sense of "Require"**.—An averment that "it will take" all of specified property to pay the debts of deceased is a sufficient averment of a necessity for ordering a sale. "Take" in this sense, is equivalent to "require." The sentence means that all the property will be necessary. *King v. Kent*, 29 Ala. 542.

**"Taken" Held Equivalent to "Taken in Invitum"**.—A statute provided that an estate by curtesy should not "be liable to be attached or in any way taken for the debts of the husband." It was held that "taken" meant "taken in invitum." The court, by *Durfee, J.*, said: "The word 'taken' as used in the statute means in our opinion taken in invitum; for instance, if a tenant by curtesy initiate were to mortgage his estate, the statute would not prevent the mortgagee's enforcing his mortgage in so far as it could be enforced consistently with the rights of the wife." *Briggs v. Titus*, 13 R. I. 136.

**"Take effect," "be in force," "go into operation," etc.**, are used interchangeably. See EFFECT, vol. 6, p. 171.

1. 2 Bl. Com. 365, followed in *O'Connor v. State*, 9 Fla. 225.

**Octo tales and decem tales** were the names at common law of the writs issued to summon such bodies of jurors. In the case of *octo* tales, eight, and in the case of *decem* tales, ten men, were summoned. 2 Bl. Com. 365.

**TALESMAN**—(See also JURY AND JURY TRIAL, vol. 12, p. 340).—A talesman is a juror summoned to fill up a panel, for the trial of a particular cause.<sup>1</sup>

**TALLAGE**—(See also TAXATION).—Is a general word and includes all "subsidies, taxes, tenths, fifteenths, impositions, or other burdens or charges put or set upon any man."<sup>2</sup>

**TARE**—(See also DRAFT, vol. 6, p. 1).—See note 3.

**TARIFF**—(See also REVENUE LAWS, vol. 21, p. 301).—The list or schedule of articles on which a duty is imposed upon their importation into the *United States*, with the rates at which they are severally taxed. Also the custom or duty payable on such article, and, derivatively, the system or principle of imposing duties on the importation of foreign merchandise.<sup>4</sup>

**TAVERN**—(See also INNS AND INN KEEPERS, vol. 11, p. 5).—A "tavern" is a house licensed to sell liquors in small quantities to be drunk on the spot. It denotes a house for the entertainment of travelers, as well as for the sale of liquors.<sup>5</sup> Although the original definition of tavern was a place where liquor was sold

1. *Shields v. Niagara Sav. Bank*, 3 Hun (N. Y.) 479.

2. *People v. Brooklyn*, 9 Barb. (N. Y.) 550; *quoting* 2 Co. Ins. 532.

3. **Draft and Tare Distinguished.**—"Draft and tare, in a commercial sense and usage, have a separate and distinct meaning and application. The former is an allowance to the merchant when the duty is ascertained by weight, as in the present instance, to insure good weight to him. As defined in some books, it is 'a small allowance in weighable goods made by the king to the importer.' It is to compensate for any loss that may occur from the handling of the scales in the weighing, so that, when weighed the second time, the article will hold out good weight. The latter, tare, is allowed for the outside or covering of the article imported, whether it be box, barrel, bag, bale, mat, etc. Now, the tare in this case was allowed, but the allowance for the draft was refused. I cannot perceive any distinction between the two, as the right to the allowance of the one stands as express and explicit, on the statute, as the right to the allowance of the other. Both might as well have been denied as either; it is a mistake to suppose that the allowance of the tare covers that for the draft, for, as is seen, it is intended to cover a different loss, one incident to the weighing of the article, while the other relates to the loss

from the rough outside covering of it." *Napier v. Barney*, 5 Blatchf. (U. S.) 192.

4. *Black's Law Dict.*

5. *State v. Chamblyss, Cheves* (S. Car.) 220; 34 Am. Dec. 593; and in that case it was held that a license to keep a tavern includes the privilege of retailing spirituous liquors.

In *Re Schneider*, 11 Oregon 288, the following definition was given: "A tavern has been judicially defined to be 'a house licensed to sell liquors in small quantities.'"

A tavern is "a house licensed to sell liquor to be drunk on the spot. In some of the *United States*, tavern is synonymous with inn or hotel, and denotes a house for the entertainment of travelers, as well as for the sale of liquors, licensed for that purpose." *Webst.*, followed in *Rafferty v. New Brunswick F. Ins. Co.*, 18 N. J. L. 484; 38 Am. Dec. 525, where it was held that the mere retailing of spirituous liquors without a license does not constitute the occupant of a house a tavern keeper.

In its popular sense, as seen from the above definitions, the word tavern conveys the idea of being a place where liquors are sold. In its legal sense, this idea has usually, though not uniformly, been recognized. 2 Kent's Com. 597 (a); *Bonner v. Welborn*, 7 Ga. 296; *Overseers of the Poor v. Warner*, 3 Hill (N. Y.) 150; *Wortham v. Com.*, 5 Rand.



in small quantities, in the *United States* any house for the entertainment of transient guests is commonly denominated a "tavern," whether liquor is sold on the premises or not.<sup>1</sup>

(Va.) 669; *Com. v. Shortridge*, 3 J. J. Marsh. (Ky.) 638; *Hirn v. State*, 1 Ohio St. 18; *Linkous v. Com.*, 9 Leigh (Va.) 608; *State v. Chamblyss*, Cheves (S. Car.) 222; 34 Am. Dec. 593.

**License For a Tavern Includes Privilege of Retailing Liquor.**—Thus it has been generally held that a tavern license confers the privilege of retailing liquor upon the tavern keeper. *Com. v. Kamp*, 14 B. Mon. (Ky.) 309; *Gray v. Com.*, 9 Dana (Ky.) 300; 35 Am. Dec. 136; *State v. Chamblyss*, Cheves (S. Car.) 222; 34 Am. Dec. 593.

In *Hirn v. State*, 1 Ohio St. 18, it was held that "the license to keep a tavern carried with it and conferred the privilege of retailing spirituous liquors, as clearly as if the same had been positively expressed." It was there said that "a license to keep a tavern, in its ordinary signification, was understood to be a license to retail liquors, and to keep a house of entertainment." But in *State v. Cloud*, 6 Ala. 630, it was held that a tavern license did not include the liquor license, the latter being ten thirty dollars and the former only ten.

1. *St. Louis v. Siegrist*, 46 Mo. 592; *Curtis v. State*, 5 Ohio 324; *Foster v. State*, 84 Ala. 451.

"An inn, tavern, or hotel, is a place for the general entertainment of all travelers or strangers who apply, paying suitable compensation." *Bish. St. Cr.* (2d ed.), § 297, followed in *Comer v. State*, 26 Tex. App. 509.

In *State v. Fletcher*, 5 N. H. 258, it is said: "It is the business of the taverner to provide food, drink, lodging and other accommodations for his guests, but this business may be exercised without selling spirits or wine in small quantities, and the sale of mixed liquors is, without doubt, a part of the common business of a taverner; but it is not necessarily so. It is therefore clear, we think, that when this defendant admits that he is guilty, as charged in the indictment, of exercising the business of a taverner without a license, we are not at liberty to understand this as an admission that he is guilty of selling spirits, or wine, or mixed liquor illegally, and to sentence him to pay the penalty prescribed by the statute for that offense."

But in *Overseers of the Poor v. Warner*, 3 Hill (N. Y.) 150; *Bonner v. Welborn*, 7 Ga. 296, it was held that houses of entertainment where liquor was not sold at retail were not taverns.

**Tavern, Hotel, and Public House Synonymous.**—"Tavern," "hotel," and "public house" are used synonymously in the *United States*; and while they entertain the traveling public, and keep guests, and receive compensation therefor, they do not lose their character, though they may not have the privilege of selling liquors. The distinction, as respects inn and tavern keepers, observed in *England*, under the common law, does not exist with us, and different names are applied to them, though "hotel" and "house" are used commonly to denote a higher order of public houses than the ordinary tavern or inn. *St. Louis v. Siegrist*, 46 Mo. 593, where it was held that "tavern," in a charter provision authorizing municipal authorities to "license and regulate taverns," includes a hotel.

**Gaming.**—(See also GAMING, vol. 8, p. 1045.)

A house of public entertainment, used both as a boarding house and tavern, though unlicensed, is within the prohibition of the *Alabama* statute against playing cards at a "tavern, inn, public house," etc. *Foster v. State*, 84 Ala. 451. In that case the opinion of the court was delivered by Somerville, J., who said: "An inn is a house of entertainment for travelers—being synonymous in meaning with hotel or tavern. It was formerly defined to mean 'a house where a traveler is furnished with everything which he has occasion for while upon his way.' *Thompson v. Lacy*, 3 B. & Ald. 283; *People v. Jones*, 54 Barb. (N. Y.) 311. But this definition has necessarily been modified by the progress of time, and the mutations in the customs of society and modes of travel in modern times. An inn, however, was always, and may now, when unlicensed, be distinguished from a boarding house, the guest of which is under an express contract, at a certain rate, and for a specified time—the right of selecting the guest or boarder, and fixing full terms, being the chief characteristic of the boarding house as distinguished from an inn."

**TAXATION.**—(See also titles indicated by cross-references in the following analysis and throughout the article.)

- I. Taxes and Taxation Defined,
  - II. Nature, 12. [11.]
    1. *Taxes Distinguished From Debts*, 12.
    2. *Taxes Distinguished From Other Impositions*, 14.
  - III. Classification of Taxes, 16.
  - IV. The Power to Tax, 18.
    1. *Its Extent and Nature*, 18.
      - a. *Distinguished From Eminent Domain*, 18.
      - b. *Distinguished From Police Power*, 20.
    2. *Constitutional Restrictions* (See also CONSTITUTIONAL LAW, vol. 3, p. 670), 21.
      - a. *Upon Federal Taxation*, 21.
      - b. *Upon State Taxation*, 22.
        - (1) *Generally*, 22.
        - (2) *Restrictions in Federal Constitution*, 23.
          - (a) *Upon Export and Import Taxation; Inspection Laws*, 23.
          - (b) *Regulation of Commerce* (See also INTERSTATE COMMERCE, vol. 11, p. 539), 27.
            - (1) *Generally*, 27.
            - (2) *Taxes Upon Passengers*, 31.
            - (3) *Taxes Upon Freight*, 31.
            - (4) *Taxes Upon the Means by Which Interstate Commerce is Transacted*, 32.
            - (5) *Taxes Upon Privileges, Franchises, Gross Receipts, Capital of Corporation, etc.*, 33.
            - (6) *Direct Taxation Upon Property as Such*, 38.
          - (c) *Equal Privileges and Immunities*, 40.
  - (d) *Duties of Tonnage*, 43.
  - (e) *Impairment of Contract Obligations*, 47.
  - (f) *Due Process of Law* (See also DUE PROCESS OF LAW, vol. 6, p. 43), 54.
  - (3) *Restrictions in State Constitutions*, 55.
    - (a) *Equality and Uniformity*, 55.
    - (b) *Taxation by Value*, 65.
    - (c) *Double Taxation*, 66.
    - (d) *Rate of Taxation*, 69.
    - (e) *Form of the Enactment* (See STATUTES, vol. 23, pp. 140, 258), 71.
  3. *Restriction by Treaty* (See also TREATIES), 71.
  4. *Legislative Exercise of Power*, 71.
    - a. *The Legislative Function*, 71.
    - b. *Mode of Exercise*, 75.
  5. *Delegation of the Power*, 79.
  6. *Waiver or Relinquishment of the Power*, 83.
- V. **Purposes of Taxation**, 87.
  1. *Must be Public*, 87.
  2. *General Rule of Construction*, 88. [90.]
  3. *What Purposes are Public*, 90.
  4. *What Purposes are Not Public*, 97.
  5. *Must Benefit the Locality Taxed*, 98.
- VI. **Things Taxable**, 100.
  1. *Polls*, 100.
  2. *Property*, 101.
    - a. *In General*, 101.
    - b. *Personal Property*, 102.
    - c. *Realty*, 104.
  3. *Occupations and Privileges* (See *infra*, this title, *Occupation, Business, and Privilege Taxes*), 106.
  4. *Instrumentalities of Government*, 106.
    - a. *In General*, 106.
    - b. *Offices and Officers*, 106.
    - c. *Property Used as a Means of Government*, 107.

- d. *Other Governmental Agencies*, 108.
  - e. *Public Property*, 109.
  - f. *Indian Lands*, 114.
  - g. *National Banks* (See NATIONAL BANKS, vol. 16, p. 143), 115.
- 5. *Incomes; Income Taxes*, 115.
- 6. *Legal Process*, 116.
- VII. Upon Whom Imposed**, 117.
  - 1. *General Principles*, 117.
  - 2. *Property, to Whom Taxed*,
    - a. *Generally*, 119. [119.
    - b. *Ownership*, 120.
    - c. *Occupancy*, 121.
    - d. *Particular Estates*, 122.
    - e. *Trustees, Executors, and Administrators, Guardians, Agents, etc.*, 124.
    - f. *Non-resident and Unseated Property*, 127.
- VIII. Place of Taxation**, 129.
  - 1. *In General*, 129.
  - 2. *Taxes on Real Property*, 130.
    - a. *In General*, 130.
    - b. *Land Lying in Two Districts*, 132.
  - 3. *Taxes on Personal Property*, 133.
    - a. *General Rule*, 133.
      - (1) *Domicile* (See also DOMICILE, vol. 5, p. 857), 135.
      - (2) *Residence, Inhabitation, etc.* (See also INHABITANT, vol. 10, p. 770; RESIDENCE, vol. 21, p. 122), 137.
    - b. *Tangible Personal Property*, 138.
      - (1) *In General*, 138.
      - (2) *Animals*, 139.
      - (3) *Water Craft*, 140.
      - (4) *Logs and Lumber* (See also LOGS AND LUMBER, vol. 13, p. 1018), 141.
      - (5) *Property in Transitu or Temporarily Present*, 142.
      - (6) *Construction of Special Statutory Terms*, 144.
    - c. *Intangible Personal Property*, 146.
      - (1) *Debts in General*, 146.
      - (2) *Negotiable Paper*, 146.
      - (3) *Mortgages*, 149.
      - (4) *Miscellaneous Choses in Action*, 151.
      - (5) *Shares of Stock*, 151.
    - d. *Place as Affected by Ownership and Possession*, 152.
      - (1) *In General*, 152.
      - (2) *Corporate Property* (See also CORPORATIONS, vol. 4, p. 272a), 152.
      - (3) *Railroad Property*, 152.
      - (4) *Partnership Property*, 152.
      - (5) *Property in Trust*, 153.
      - (6) *Property in Hands of Guardians and Conservators*, 154.
      - (7) *Property of Decedents*, 154.
  - 4. *Poll Taxes*, 155.
  - 5. *Miscellaneous Taxes*, 155.
- IX. Exemptions**, 156.
  - 1. *Power to Exempt*, 156.
  - 2. *Strictly Construed*, 157.
    - a. *In General*, 157.
    - b. *Local Assessments*, 160.
    - c. *Restricted to Exempt Uses*, 162.
  - 3. *Customary Exemptions*, 163.
    - a. *Religious Societies*, 163.
    - b. *Educational Institutions*, 165.
    - c. *Eleemosynary Institutions*, 167.
    - d. *Cemeteries* (See also CEMETERIES, vol. 3, p. 56), 169.
    - e. *Railroads*, 170.
    - f. *Manufacturers*, 174.
    - g. *Stock* (See also CORPORATIONS, vol. 4, p. 272d), 177.
    - h. *Miscellaneous*, 179.
- X. The Levy**, 181.
  - 1. *Meaning of Term*, 181.
  - 2. *How Made*, 181.
    - a. *Generally*, 181.
    - b. *The Apportionment*, 183.
    - c. *Levy by Subordinate Political Division*, 186.
  - 3. *Conclusiveness and Effect*, 192.
  - 4. *Exhaustion of Power*, 193.
  - 5. *Compulsory Levy*, 195.
  - 6. *Record of the Levy*, 195.
  - 7. *Commutation of Tax*, 198.
- XI. The Assessment**, 199.
  - 1. *Definition; Necessity for*, 199.
  - 2. *When Made*, 200.
  - 3. *By Whom Made*, 202.
  - 4. *How Made*, 204.
    - a. *General Rule*, 204.
    - b. *Listing*, 205.
    - c. *The Roll*, 210.
      - (1) *Form and Contents Generally*, 210.
      - (2) *Designation of the Person Taxed*, 212.

- (3) *Designation of the Property Taxed*, 217.
  - (a) *General Requirements*, 217.
  - (b) *Description of Personalty*, 218.
  - (c) *Description of Realty*, 218.
  - (d) *Distinct and Separate Parcels*, 222.
  - (4) *Valuation*, 224.
    - (a) *How Made*, 224.
    - (b) *Deduction of Liabilities*, 227.
    - (5) *Extending the Taxes*, 230.
  - d. *Authentication and Return*, 231.
    - (1) *The Authentication*, 231.
    - (2) *The Return*, 234.
  5. *Conclusiveness and Effect*, 236.
  6. *Liability of Assessors*, 238.
  7. *Compensation of Assessors*, 240.
  8. *Equalization and Review*, 241.
    - a. *Provision for*, 241.
    - b. *The Proper and Exclusive Remedy*, 242.
    - c. *Composition of the Board*, 244.
    - d. *Authority and Jurisdiction*, 246.
      - (1) *In General*, 246.
      - (2) *Boards of Equalization*, 247.
      - (3) *Boards of Review*, 249.
    - e. *Necessity of Notice*, 251.
      - (1) *Of Meetings of Boards of Review*, 251.
      - (2) *Of Meetings of Boards of Equalization*, 255. [255.]
      - f. *Proceedings of Boards*, g. *The Determination*, 259.
      - h. *Conclusiveness and Effect*, 261. [262.]
      - i. *Record of Proceedings*, j. *Appeal and Review*, 265.
- XII. *The Tax Lien*, 267.
  1. *Nature of the Tax Lien*, 267.
  2. *The Lien of Municipal Taxes*, 268.
  3. *Validity of the Lien—Essentials*, 269. [270.]
  4. *Time When Lien Attaches*, 270.
  5. *To What Property the Lien Attaches*, 272.
  6. *Priority of Lien*, 273.
  7. *Termination of the Lien*, 275.
    - a. *In General*, 275.
    - b. *Statutory Limitation*, 275.
    - c. *Effect of Alienation*, 276.
    - d. *Effect of Judicial Sale*, 277.
- XIII. *Payment*, 278.
  1. *Voluntary Payment*, 278.
    - a. *Opportunity to Pay*, 278.
    - b. *When Made*, 279.
    - c. *By Whom Made*, 279.
      - (1) *Generally*, 279.
      - (2) *As Between Owners of Different Estates*, 281.
    - d. *To Whom Made*, 282.
    - e. *How Made*, 283.
      - (1) *Generally*, 283.
      - (2) *Medium of Payment*, 284.
    - f. *How Established*, 285.
    - g. *Effect*, 286.
  2. *Involuntary Payment* (See *infra*, this title, *Remedies for Erroneous and Illegal Taxation*; DURESS, vol. 6, p. 57; PAYMENT, vol. 18, p. 148), 288.
- XIV. *Collection*, 288.
  1. *How Provided for*, 288.
  2. *The Collector*, 289.
    - a. *Selection, Removal, Resignation, etc.*, 289.
    - b. *Qualification*, 290.
    - c. *Authority*, 292.
      - (1) *Nature and Extent*, 292.
      - (2) *The Warrant*, 294.
        - (a) *Issuance*, 294.
        - (b) *Contents*, 295.
        - (c) *Execution and Delivery*, 296.
  3. *Method of Collection*, 297.
    - a. *Generally*, 297.
    - b. *Summary Processes*, 299.
      - (1) *Nature and Constitutionality*, 299.
      - (2) *Construction*, 299.
      - (3) *Different Kinds of Summary Methods*, 301.
        - (a) *Detention of Property*, 301.
        - (b) *Imposition of Penalties*, 302.
        - (c) *Restriction of Rights*, 305.
        - (d) *Seizure—Levy or Distress of Property* (See also *infra* this title, *Tax Sales*), 306.
        - (e) *Arrest and Imprisonment*, 310.

- c. *Collection by Action*, 312.
    - (1) *The Right to Proceed by Action*, 312.
    - (2) *Construction of Provisions for Action*, 315.
    - (3) *Different Kinds of Actions*, 315.
      - (a) *Actions in Personam*, 315.
      - (b) *Actions in Rem*, 315.
    - (4) *Procedure*, 319. [316.
      - (a) *Generally*, 319.
      - (b) *Pleadings and Proof*, 320.
      - (c) *Defenses*, 323.
      - (d) *Application for Judgment*, 326.
    - (5) *The Determination*, 327.
      - (a) *In Actions in Personam*, 327.
      - (b) *In Actions in Rem*, 327.
      - (c) *Penalties and Costs*, 330.
      - (d) *Validity and Effect*, 330.
    - (6) *Appeal and Review*, 332.
  - 4. *The Return*, 333.
    - a. *Of the Warrant*, 333.
    - b. *Of Delinquency*, 334.
    - c. *The Return as Evidence*, 338.
  - 5. *Liability of the Collector and Sureties*, 339.
    - a. *For Official Action*, 339.
    - b. *To Account for Collections* (See also PUBLIC OFFICERS, vol. 19, p. 378), 343.
    - (1) *Extent of the Liability*, 343.
    - (2) *The Accounting*, 348.
  - c. *Remedies Against Defaulting Collector*, 350.
    - (1) *By Action*, 350.
      - (a) *The Right to Maintain*, 350.
      - (b) *How Prosecuted*, 351.
      - (c) *The Measure of Damages*, 353.
    - (2) *Summary Process*, 354.
      - (a) *Provisions for*, 354.
      - (b) *Nature and Validity*, 356.
      - (c) *Construction and Applicability*, 357.
      - (d) *Procedure*, 359.
    - (e) *The Judgment*, 360.
  - d. *Upon His Official Bond* (See also BONDS, vol. 2, p. 448; PUBLIC OFFICERS, vol. 19, p. 378; SURETYSHIP, vol. 24, p. 714), 360.
  - 6. *Compensation of Collectors* (See also PUBLIC OFFICERS, vol. 19, p. 378), 363.
- XV. Tax Sales**, 367.
- 1. *Personal Property*, 367.
  - 2. *Lands*, 368.
    - a. *Power to Sell*, 368.
    - b. *Primary Liability of Personalty*, 370.
    - c. *Proceedings Before Sale—Notice*, 372.
    - d. *Conduct of Sale*, 381.
      - (1) *Time and Place*, 381.
      - (2) *Must Be by Proper Officer*, 383.
      - (3) *Quantity to Be Sold—And in What Parcels*, 384.
      - (4) *Illegal and Excessive Taxes and Charges—Omitting Back Taxes*, 387.
      - (5) *Competition at Sale—Fraud*, 391.
      - (6) *Who May Purchase* (See TAX TITLES, vol. 25, p. 674), 394.
      - (7) *Terms of Sale*, 394.
  - e. *Proceedings After Sale*, 396. [396.
    - (1) *Report and Record*,
    - (2) *Confirmation*, 398.
    - (3) *Certificate*, 399.
- XVI. Forfeiture for Noncompliance With Tax Laws** (See also TAX TITLES), 403.
- 1. *The Doctrine*, 403.
  - 2. *Constitutionality; Construction of Statutes*, 405.
  - 3. *Redemption*, 407.
  - 4. *Waiver*, 407.
- XVII. Redemption From Tax Sale**, 408. [408.
- 1. *Definition*, 408.
  - 2. *Origin of the Right*, 409.
  - 3. *Construction of Redemption Statutes*, 410.
  - 4. *The Law Governing the Right*, 410.
  - 5. *Nature of the Right*, 411.
  - 6. *Effect of Redemption*, 411.
  - 7. *Mode of Redemption*, 411.
    - a. *The Essential Act*, 411.
    - b. *As Affected by Statutes*, 412.
  - 8. *Who May Redeem*, 412.
    - a. *The Rule*, 412.



- b. Instances*, 413.
- c. Mortgagees*, 415.
- d. Payment by Stranger*,
- e. Part Owners*, 416. [416.
- 9. *Period for Redemption*, 418.
- a. In General*, 418.
- b. Waiver of Requirements as to Time*, 419.
- c. Persons Under Disability*, 419.
- 10. *Payment and Tender*, 421.
- a. In General*, 421. [422.
- b. Kind of Money Required*,
- c. To Whom Made*, 422.
- d. When Dispensed With*, 423.
- (1) *Mistake or Fraud of Officer*, 423. [424.
- (2) *Fraud of Purchaser*,
- e. Equitable Redemption*,
- 11. *Amount*, 424. [424.
- 12. *Notice to Redeem*, 426.
- a. Generally*, 426.
- b. To Whom Given*, 428.
- (1) *In General*, 428.
- (2) *The Owner*, 428.
- (3) *The Occupant*, 429.
- (4) *The Person in Whose Name Assessed*, 430.
- c. General Requisites*, 430.
- d. Contents of Notice*, 431.
- (1) *The Expiration of the Time to Redeem*, 431.
- (2) *Amount Due*, 432.
- e. Publication*, 432.
- f. Affidavit of Service and Publication*, 433.
- 13. *Evidence*, 435.
- 14. *Remedies*, 435.
- XVIII. *Distribution and Disposition of the Avails of Taxation*, 437.
- 1. *Settlement Between State and County*, 437.
- 2. *Accounting Between Subdivisions of the State*, 441.
- 3. *Appropriations*, 442.
- XIX. *Remedies for Erroneous and Illegal Taxation*, 445.
- 1. *Remedies of the State*, 445.
- a. Remedies by Legislative Action*, 445.
- b. Reassessment*, 447.
- 2. *Remedies of the Taxpayer*, 448.
- a. General Rights of the Taxpayer as to Remedies*, 448.
- b. Abatement (Appeal)*, 456.
- c. Certiorari* (See also CERTIORARI, vol. 3, p. 60), 456.
- d. Prohibition* (See also PROHIBITION, vol. 19, p. 274), 465.
- e. Injunction* (See INJUNCTION, vol. 10, p. 857), 465.
- f. Refunding and Recovery of Taxes Paid*, 465.
- g. Remedies Against Public Officers* (See also PUBLIC OFFICERS, vol. 19, p. 378), 474.
- (1) *Official Liability in General*, 474.
- (2) *Tort (Trespas)*, 477.
- (3) *Case*, 478.
- (4) *Trover*, 479.
- (5) *Mandamus* (See MANDAMUS, vol. 14, p. 192), 479.
- (6) *Replevin* (See REPLEVIN, vol. 20, p. 1071), 479.
- XX. *Occupation, Business, and Privilege Taxes*, 479.
- 1. *Power to Impose*, 479.
- a. In General — Constitutional Limitations*, 479.
- b. Delegation of the Power*, 482.
- 2. *Taxable Subjects — What Usually Taxed*, 484.
- a. In General*, 484.
- b. Particular Pursuits*, 486.
- (1) *Professional Occupations*, 486.
- (2) *Merchants, Dealers, and Manufacturers*, 487. [488.
- (3) *Banks, Bankers, etc.*,
- c. Taxes on Corporate Franchises* (See TAXATION (CORPORATE), vol. 25), 488.
- d. Taxes on Legacies and Inheritances* (See SUCCESSION TAXES, vol. 24, p. 431), 488.
- e. Dog Taxes*, 489.
- 3. *How Imposed*, 489.
- a. Mode of Imposing*, 489.
- b. Upon Whom Imposed*, 491.
- c. Where Imposed*, 492.
- 4. *Collection* (See also *supra*, this title, *Collection*), 492.
- XXI. *Local Assessments*, 494.
- 1. *Nature and Purpose — Distinguished from Taxation Generally*, 494.
- 2. *Principle of the Imposition — Benefits*, 496.
- 3. *Power to Make*, 498.
- a. Statutes and City Ordinances*, 498.

- b. *Constitutionality*, 501.
- c. *Construction of Statutes*, 507.
- 4. *Improvements for Which Made*, 507.
  - a. *Streets*, 507.
  - b. *Sidewalks*, 508.
  - c. *Sewers*, 510.
  - d. *Drains*, 512.
  - e. *Levees and Dikes*, 513.
  - f. *Parks*, 514.
  - g. *Water Pipes*, 514.
  - h. *Miscellaneous Cases*, 515.
- 5. *Apportionment*, 516.
  - a. *In General*, 516.
  - b. *By Benefits*, 522. [524.
  - c. *According to Frontage*, 526.
  - d. *According to Area*, 526.
  - e. *According to Value*, 526.
- 6. *Property Assessable*, 527.
  - a. *In General*, 527.
  - b. *Public Property*, 527.
  - c. *Property of Railroads*, 528.
  - d. *Agricultural Lands in Cities*, 531. [531.
- 7. *Assessment Proceedings*,
  - a. *Compliance With Statutory Provisions*, 531.
  - b. *Determination of Necessity*, 532.
  - c. *Petition of Property Owners*, 533.
  - d. *Ordinances, Resolutions, etc.*, 537.
    - (1) *Necessity of*, 537.
    - (2) *Enactment*, 537.
    - (3) *Requisites as to Form and Sufficiency*, 540.
    - (4) *Publication*, 544.
  - e. *Notice*, 545.
    - (1) *Necessity*, 545.
    - (2) *Requisites*, 546.
    - (3) *Purpose of Notice—Right to be Heard*, 548.
    - (4) *Waiver*, 550. [548.
  - f. *The Assessment*, 551.
    - (1) *Time of Assessment*, 551.
    - (2) *Plans and Estimates of Expenses*, 552.
      - (a) *In General—By Whom Made*, 552.
      - (b) *What to be Included*, 553.
    - (3) *Determination of Benefits*, 554.
      - (a) *Commissioners, Assessors, etc.—Their Appointment, Qualifications, and Oath*, 554.

- (b) *Duties of Commissioners in Assessing Benefits*, 556.
- (c) *Report of Commissioners*, 558.
- g. *Confirmation of Report and Assessment*, 560.
- h. *Reassessment*, 562.
- i. *Legislative Power to Validate—Void Assessments*, 562.
- 8. *Collection of Assessments*, 564.
  - a. *Demand*, 564.
  - b. *Personal Liability*, 564.
  - c. *Lien on Property*, 566.
    - (1) *In General*, 566.
    - (2) *Enforcement*, 567.
  - d. *Who May Collect*, 567.
  - e. *Pleadings*, 569.
  - f. *Evidence*, 569.
  - g. *Defenses*, 570.
- 9. *Remedies*, 571.
  - a. *Appeal*, 571.
  - b. *Certiorari*, 572.
  - c. *Equitable Relief*, 572.
    - (1) *In General*, 572.
    - (2) *Injunction*, 574. [575.
    - (3) *Action to Quiet Title*, 575.
  - d. *Recovery Back*, 575.
  - e. *Estoppel*, 576.
- XXII. *Municipal Taxation*, 576.
  - 1. *Its Nature*, 576.
  - 2. *Municipal and Corporate Purposes*, 577.
    - a. *In General*, 577.
    - b. *Taxation in Aid of Railroads*, 578.
    - c. *Sinking Fund Taxes*, 579.
  - 3. *Power to Impose*, 580.
    - a. *In General*, 580.
    - b. *By Necessary Implication*, 584. [585.
    - c. *Limitations on Power*, 585.
    - d. *Withdrawal or Alteration of Power*, 590.
    - e. *Power to Impose Special Taxes*, 593.
    - f. *Division and Consolidation of Districts*, 594.
  - 4. *Compulsory Taxation*, 595.
    - a. *Legislative Compulsion*, 595.
    - b. *Judicial Compulsion*, 596.
  - 5. *Submission to Popular Vote*, 596.
    - a. *In General*, 596.
    - b. *Notice of Election*, 598.
    - c. *The Proceedings*, 599.
  - 6. *Subjects of Municipal Taxation*, 602.

- a. *In General*, 602.
- b. *Public Property*, 604.
- c. *Property in Adjacent Territory*, 605.
- d. *Agricultural Lands*, 605.
- e. *Detached Territory*, 606.
- f. *Exemptions*, 606.
- 7. *The Assessment*, 608.
- 8. *The Collection*, 609.
- 9. *Taxes in Particular Districts and Quasi Municipalities*, 610.
  - a. *Generally*, 610.
  - b. *School Districts and School Taxes*, 611.
    - (1) *In General*, 611.
    - (2) *The Assessment*, 613.
    - (3) *Limitations and Restrictions*, 615.
  - (4) *Collection and Distribution*, 615.
- c. *Highway Districts and Street and Highway Taxes*, 616.
  - (1) *In General*, 616.
  - (2) *Road Labor*, 621.
- d. *Drainage and Reclamation Districts and Drainage Taxes*. (See *supra*, this title, *Local Assessments*. See also *DRAINS AND SEWERS*, vol. 6, p. 2), 623.
- e. *Levee Districts and Taxes*, 623.
- f. *Park Districts and Taxes* (See *supra*, this title, *Local Assessments*), 623.

**I. TAXES AND TAXATION DEFINED.**—Taxes are burdens or charges imposed by law upon persons or property for public purposes or to accomplish some governmental end.<sup>1</sup> They are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of government and for all public needs;<sup>2</sup>—the regular, uniform, and equal contributions which the people are required to make for the support of the government,<sup>3</sup> and for carrying out and making effective those

1. **Taxes.**—Hanson v. Vernon, 27 Iowa 28; 1 Am. Rep. 215; Mobile v. Dargan, 45 Ala. 310; Perry v. Washburn, 20 Cal. 318; People v. McCreery, 34 Cal. 432; Judd v. Driver, 1 Kan. 455; Mitchell v. Williams, 27 Ind. 62; Allen v. Jay, 60 Me. 124; 11 Am. Rep. 185; Van Horn v. People, 46 Mich. 183; 41 Am. Rep. 159; Hawkins v. Carroll County, 50 Miss. 735; Matter of New York, 11 Johns. (N. Y.) 77; Clegg v. State, 42 Tex. 605; Davidson v. Ramsey County, 18 Minn. 482; Knowlton v. Rock County, 9 Wis. 410; Hale v. Kenosha, 29 Wis. 599; Dalrymple v. Milwaukee, 53 Wis. 178; Brodhead v. Milwaukee, 19 Wis. 624; 88 Am. Dec. 711; Citizens' Sav., etc., Assoc. v. Topeka, 20 Wall. (U. S.) 655.

A tax is an imposition for the supply of the public treasury. Philadelphia Assoc., etc. v. Wood, 39 Pa. St. 73.

A tax is the means by which a burden primarily borne by the state is transferable to the citizen. Morton v. Comptroller General, 4 S. Car. 430.

Taxes are a public imposition levied by authority of the government for the purpose of carrying on the government in all its machinery and operations. Northern Liberties v. St. John's

Church, 13 Pa. St. 104; Citizens' Sav., etc., Assoc. v. Topeka, 20 Wall. (U. S.) 655.

2. Opinion of Justices, 58 Me. 590; State v. Western Union Tel. Co., 73 Me. 518; Peirce v. Boston, 3 Met. (Mass.) 520; Baltimore v. Green Mount Cemetery, 7 Md. 517; Glasgow v. Rowse, 43 Mo. 479; State v. Yellow Jacket Silver Min. Co., 14 Nev. 250; Morris v. Lalaurie (La. 1887), 1 So. Rep. 659.

Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. Meriwether v. Garrett, 102 U. S. 472; Lane County v. Oregon, 7 Wall. (U. S.) 71; De Pauw v. New Albany, 22 Ind. 206; Geren v. Gruber, 26 La. Ann. 697; Whiteaker v. Haley, 2 Oregon 128; Pray v. Northern Liberties, 31 Pa. St. 69; Camden v. Allen, 26 N. J. L. 398; Board of Education v. Old Dominion, etc., Co., 18 W. Va. 444.

The word "tax" or "taxes," as used in the Illinois revenue law, means any tax, special assessment, or cost, interest, or penalty. Blake v. People, 109 Ill. 504.

3. New London v. Miller, 60 Conn. 112; Board of Education v. Old

things which are useful and which conduce to the public welfare and well being.<sup>1</sup>

Taxation is the process or means by which the taxing power is exercised.<sup>2</sup> It is the exaction of money or services from individuals as and for their respective shares of contribution to any public burden,<sup>3</sup> for the purpose of enabling the government to execute and discharge its functions.<sup>4</sup>

**II. NATURE—1. Taxes Distinguished From Debts.**—A tax differs from an ordinary debt in that its obligation does not depend on contract.<sup>5</sup> Generally, in the absence of statute, the collection of

Dominion, etc., Co., 18 W. Va. 441; U. S. v. Baltimore, etc., R. Co., 17 Wall. (U. S.) 322.

Taxes are the portion that each individual gives of his property in order to secure, or have, the perfect enjoyment of the remainder. *Duer v. Small*, 17 How. Pr. (U. S. C. C.) 201.

Taxes are the property of the citizen taken from the citizen by the government for governmental purposes. Opinion of Justices, 58 Me. 590.

A tax is a sum of money assessed under the authority of the state on the person or property of an individual for the use of the state. *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185.

1. *Hilbish v. Catherman*, 64 Pa. St. 154.

Taxes are public burdens imposed generally upon the inhabitants of the whole state, or upon some civil division thereof, for governmental purposes, without reference to peculiar benefits to particular individuals or property. *Roosevelt Hospital v. New York*, 84 N. Y. 108.

Taxes are enforced contributions from persons and property, levied by the state by virtue of its sovereignty, for the support of the government. The state demands and receives them from the subjects of taxation within its jurisdiction, that it may be enabled to carry its mandates into effect and perform the functions of government; and the citizen pays from his property the portion demanded, in order that he may, by means thereof, be secured in the enjoyment of the benefits of organized society. Succession of Mercier, 42 La. Ann. 1135.

2. **Taxation.** — *Knowlton v. Rock County*, 9 Wis. 410; *Frost v. Flick*, 1 Dak. 131; Black's Law Dict., tit. "Taxation."

The ordinary exercise of the taxing power is taxation. *Adams v. Lindell*, 5 Mo. App. 197.

Tax legislation means the making of laws that are to furnish the measure of every man's duty in support of the public burdens, and the means of enforcing it. *Philadelphia Assoc., etc. v. Wood*, 39 Pa. St. 73.

The term "taxation" applies to all assessments for public purposes which are called taxes and are authorized by law, including taxation for municipal purposes. *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

3. *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *Taylor v. Palmer*, 31 Cal. 240; *Woodbridge v. Detroit*, 8 Mich. 274; *Hammitt v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615.

Taxation implies tribute from the governed to some form of sovereignty. *West Hartford v. Board of Water Com'rs*, 44 Conn. 360. It is that tribute for the support of government imposed on property, in return for the protection and advantages which the government affords to the owner. *Exchange Bank v. Hines*, 3 Ohio St. 1.

4. Opinion of Justices, 58 Me. 590.

In *Emery v. San Francisco Gas Co.*, 28 Cal. 345, it was held that the words "taxation" and "tax," as used in the *California* constitution, relate to such general taxes upon all property as are levied to defray the ordinary expenses of the state, county, town, and municipal governments.

5. *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *Bradley v. McAtee*, 7 Bush (Ky.) 667; 3 Am. Rep. 309; *De Pauw v. New Albany*, 22 Ind. 204; *Perry v. Washburn*, 20 Cal. 318; *People v. Shearer*, 30 Cal. 645; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 60; *Geren v. Gruber*, 26 La. Ann. 694; *Shreveport v. Gregg*, 28 La. Ann. 836; *Morris v. Lalaurie*, 39 La. Ann. 47; *Whiteaker v. Haley*, 2 Oregon 128; *Augusta v. North*, 57 Me. 392; 2 Am. Rep. 55;

a tax is not enforceable by an action of debt;<sup>1</sup> nor, in the absence of statute, does it carry interest;<sup>2</sup> nor is it the subject of set-off against an indebtedness of the taxing district to the taxpayer;<sup>3</sup> nor is its nature as a tax affected by the fact that the

Dugan v. Baltimore, 1 Gill & J. (Md.) 499; Peirce v. Boston, 3 Met. (Mass.) 520; Board of Education v. Old Dominion, etc., R. Co., 18 W. Va. 441; Hibbard v. Clark, 56 N. H. 155; 22 Am. Rep. 442; Camden v. Allen, 26 N. J. L. 398; Carondelet v. Picot, 38 Mo. 125; Jonesboro v. McKee, 2 Yerg. (Tenn.) 167; Shaw v. Peckett, 26 Vt. 482; Johnson v. Howard, 41 Vt. 122; 98 Am. Dec. 568; Webster v. Seymour, 8 Vt. 135; Lane County v. Oregon, 7 Wall. (U. S.) 71; Meriwether v. Garrett, 102 U. S. 472; *In re* Duryee, 2 Fed. Rep. 68; Crabtree v. Madden, 54 Fed. Rep. 426; Jack v. Weienett, 115 Ill. 105; 56 Am. Dec. 129. But see San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; Gould v. Baltimore, 59 Md. 378; Dunlap v. Gallatin County, 15 Ill. 7; Daily v. Swope, 47 Miss. 367.

The distinction between a debt and a tax is that between a man voluntarily binding himself to pay money to the government, and the government binding him to do so when he has no option but to pay. *People v. Seymour*, 16 Cal. 340; 76 Am. Dec. 521; *Perry v. Washburn*, 20 Cal. 318.

1. *Camden v. Allen*, 26 N. J. L. 398; *Perry v. Washburn*, 20 Cal. 318; *Crapo v. Stetson*, 8 Met. (Mass.) 394; *Anderson, etc., Turnpike Corp. v. Gould*, 6 Mass. 44; 4 Am. Dec. 80; *Augusta v. North*, 57 Me. 392; 2 Am. Rep. 55; *Packard v. Tisdale*, 50 Me. 376; *Richards v. Stogsdel*, 21 Ind. 74; *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 442; *Dreake v. Beasley*, 26 Ohio St. 315; *Shaw v. Peckett*, 26 Vt. 482; *Johnson v. Howard*, 41 Vt. 122; 98 Am. Dec. 568; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441. And see *Meriwether v. Garrett*, 102 U. S. 472; *Dunlap v. Gallatin County*, 15 Ill. 7; *Dennis v. Maynard*, 15 Ill. 477; *Carondelet v. Picot*, 38 Mo. 125; *Miller v. Hale*, 26 Pa. St. 432; *McCall v. Lorimer*, 4 Watts (Pa.) 351.

This rule is not universal, there being cases holding that in the absence of a statutory remedy, or if the statutory remedy is not made exclusive, a right of action exists. See *infra*, this title, *Collection*.

**Federal Taxes.** — Independently of acts of Congress authorizing them, suits

at law may be maintained by the *United States* to recover taxes duly assessed and levied. *Garrett v. Memphis*, 5 Fed. Rep. 860; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227.

2. *Camden v. Allen*, 26 N. J. L. 398; *Haskell v. Bartlett*, 34 Cal. 281; *People v. Hagar*, 52 Cal. 171; *Augusta v. North*, 57 Me. 392; 2 Am. Rep. 55; *Danforth v. Williams*, 9 Mass. 324; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Shaw v. Peckett*, 26 Vt. 482; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441; *Crabtree v. Madden*, 54 Fed. Rep. 426. See also *Perry County v. Selma, etc., R. Co.*, 65 Ala. 391.

In *Warren R. Co. v. Belvidere*, 35 N. J. L. 584, it was held that a certain percentage added to a tax at the time of its collection was not interest, but in the nature of a penalty for delinquency in payment, and a creature of the statute.

3. *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 442; *Himmelmann v. Spanagel*, 39 Cal. 389; *Wayne v. Savannah*, 56 Ga. 448; *Hawkins v. Sumter County*, 57 Ga. 166; *Augusta v. North*, 57 Me. 392; 2 Am. Rep. 55; *Peirce v. Boston*, 3 Met. (Mass.) 520; *Home Sav. Bank v. Boston*, 131 Mass. 280; *Nebraska City v. Nebraska City Gas, etc., Co.*, 9 Neb. 339; *Camden v. Allen*, 26 N. J. L. 398; *McCracken v. Elder*, 34 Pa. St. 239; *Trenholm v. Charleston*, 3 S. Car. 349; 16 Am. Rep. 732; *Johnson v. Howard*, 41 Vt. 122; 98 Am. Dec. 568; *Humphreys v. Patton*, 21 W. Va. 220; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441; *Apperson v. Memphis*, 2 Flipp. (U. S.) 363; *Crabtree v. Madden*, 54 Fed. Rep. 426; *Cobb v. Elizabeth City*, 75 N. Car. 1; *Battle v. Thompson*, 65 N. Car. 406; *Weinstein v. Newbern*, 71 N. Car. 535; *Fitzhugh v. Cotton Belt Levee Dist.*, 54 Ark. 224; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *Morris v. Lalaurie*, 39 La. Ann. 47.

The doctrines of set-off and counterclaim do not obtain in revenue matters. *Morgan v. Pueblo, etc., R. Co.*, 6 Colo. 478.

In *Kentucky v. Owensboro, etc., R. Co.* (Ky. 1884), 17 Am. & Eng. R. Cas. 428, it was held that where the state institutes an action against a citizen for the recovery of taxes, he may

statute authorizing its imposition authorizes the institution of an action for its recovery.<sup>1</sup>

Taxes are not assignable as debts;<sup>2</sup> nor are they provable in bankruptcy as such;<sup>3</sup> nor are they within the purview of statutes relating to imprisonment for debt.<sup>4</sup> And the repeal of a statute imposing a tax is not within the meaning of constitutional prohibitions against the passage of laws impairing the obligation of contracts.<sup>5</sup>

**2. Taxes Distinguished From Other Impositions.**—Taxes differ from subsidies,<sup>6</sup> and from forced contributions.<sup>7</sup> Speaking broadly, taxes may be said to include local assessments, the foundation of the right to impose the latter resting in the taxing power; but as the terms "taxes" and "local assessments" are used generally, the latter are not included in the former, the term taxation being deemed to embrace the raising of revenue for the general expenses and purposes of the government, while assessments are for improvements especially beneficial to particular individuals or neighborhoods, and imposed in proportion to benefits.<sup>8</sup>

rely upon a counterclaim or set-off to reduce or prevent the recovery, but cannot have judgment over against the state in the absence of legislation authorizing it.

1. *Meriwether v. Garrett*, 102 U. S. 472; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

The government has the same right to enforce a duty as a debt and may enforce it in the same way. *People v. Seymour*, 16 Cal. 340; 76 Am. Dec. 521; *Perry v. Washburn*, 20 Cal. 318.

2. *McInerny v. Reed*, 23 Iowa 410.

A person claiming as assignee of a tax cannot enforce its collection. *McInerny v. Reed*, 23 Iowa 410.

The assignment of a right to sue for and enforce taxes voted by a township, does not pass the right to the assignee discharged of the equities between the assignor and the taxpayers. *Sully v. Drennan*, 113 U. S. 287.

3. *In re Duryee*, 2 Fed. Rep. 68.

4. *Appleton v. Hopkins*, 5 Gray (Mass.) 530; *Harris v. Wood*, 6 T. B. Mon. (Ky.) 641; *Ex parte Lynch*, 16 S. Car. 32; *Charleston v. Oliver*, 16 S. Car. 47; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441; *San Antonio v. Mehaffy*, 96 U. S. 312. And see *Webster v. Seymour*, 8 Vt. 135.

A statute abolishing imprisonment for debt does not prevent imprisonment for the nonpayment of taxes. *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441; *Appleton v. Hopkins*, 5 Gray (Mass.) 530. And see *Webster v. Seymour*, 8 Vt. 135.

5. *Augusta v. North*, 57 Me. 392; 2 Am. Rep. 55; *Mount v. State*, 6 Blackf. (Ind.) 25; *McQuilken v. Doe*, 8 Blackf. (Ind.) 581; *Abbott v. Britton*, 23 La. Ann. 511; *Fenelon's Petition*, 7 Pa. St. 173; *Ross v. Lane*, 3 Smed. & M. (Miss.) 695; *Howe v. Starkweather*, 17 Mass. 240; *Mitchell v. Board of Trustees*, 71 N. Car. 400; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Ketchum v. Pacific R. Co.*, 4 Dill. (U. S.) 41.

6. *Tyson v. School Directors*, 51 Pa. St. 9; *State v. U. S., etc., Express Co.*, 60 N. H. 219; *Sanborn v. Rice County*, 9 Minn. 273; *Knowlton v. Rock County*, 9 Wis. 410.

7. See *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Dec. 159; *Woodbridge v. Detroit*, 8 Mich. 274; *Knowlton v. Rock County*, 9 Wis. 410.

8. See *infra*, this title, *Local Assessments*, where the distinction is discussed.

Constitutions generally recognize two modes of taxation, the one for general purposes, the other for local. *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349.

Where the purposes of an imposition are general, it is to be regarded as a tax in the most general sense of that word, and subject to the rules of law which govern taxes. *Jones v. Water Com'rs*, 34 Mich. 273; *People v. Whyler*, 41 Cal. 351; *Hale v. Kenosha*, 29 Wis. 599.

Taxes are levied for general public purposes upon all alike, and are compensated for by the equal protection of government afforded to all; while

A license differs from a tax in that it consists of a right granted by competent authority to do an act which, without such authority, would be illegal, as distinguished from a mere rate or sum of money assessed upon the person, property, or business of the citizen.<sup>1</sup>

So the terms "excise," "duty," and "impost," while used frequently as synonymous with "tax," and depending for their existence upon the power to tax, have a distinct meaning, an excise being an inland tax or duty imposed on certain commodities of home production and consumption, as spirits, tobacco, etc., or on their manufacture and sale, and being a fixed, absolute, and direct charge, not based on rules of apportionment or equality.<sup>2</sup>

assessments are laid for local purposes upon local objects and are recompensed in local benefits and improvements. *Ridenour v. Saffin*, 1 *Handy* (Ohio) 464.

Assessments upon property for local improvements are involuntary exactions, and in this respect stand on the same footing with ordinary taxes. *Hagar v. Reclamation Dist.*, 111 U. S. 701.

**Water Rates.**—In *Jones v. Water Com'rs*, 34 Mich. 273, it was held that water rates paid by consumers are in no sense taxes. They are but the price paid for water as a commodity, and though a lien is given on property therefor, which is enforced in the same way as the lien for taxes, it is really a lien for indebtedness like that enforced on mechanics' contracts or against ships and vessels.

**Street Cleaning.**—In *Reinken v. Fuehring* (Ind. 1892), 30 N. E. Rep. 414, it was held that an assessment against an owner of property along the street required to be swept, to pay the expense of such sweeping, is not a tax, but a local assessment.

In *Illinois*, the rule that a special assessment finds its justification in the power of eminent domain has been changed, and the authority to require property specially benefited to bear the expense of local improvement, is now regarded as a branch of the taxing power. *White v. People*, 94 Ill. 604.

1. *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Chilvers v. People*, 11 Mich. 43; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Pleuler v. State*, 11 Neb. 547; *Robinson v. Franklin*, 1 Humph. (Tenn.) 156; *Jenkins v. Ewin*, 8 Heisk. (Tenn.) 456; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276. And see *infra*, this title, *Occupation, Business, and Privilege Taxes*.

A license fee is a price paid for a franchise or privilege, and is not a tax. *Chilvers v. People*, 11 Mich. 43; *Pleuler v. State*, 11 Neb. 547. And see *East St. Louis v. Wehrung*, 46 Ill. 392.

Unless the imposition and payment of a tax confers some right upon the person paying it, which otherwise would not have existed, it cannot properly be called a license. *Pleuler v. State*, 11 Neb. 547; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Chilvers v. People*, 11 Mich. 43.

2. Cent. Dict.

The term "tax or taxes" has been applied to nearly, if not quite, every burden imposed upon persons, property, or business, for the support of the government; and in acts for raising a revenue for public purposes it seems to be used as meaning the same thing as impost, duty, or excise. *State v. Western Union Tel. Co.*, 73 Me. 518.

Duties, excises, and license laws, having for their object the common benefit and protection, and designed for the prevention or mitigation of evils, are not acts of the taxing power. *State v. U. S., etc., Express Co.*, 60 N. H. 219.

A tax is a charge apportioned, either among the people of the whole state, or those residing within certain districts, which is required to be imposed in such a manner that it shall be shared in proportion to the estate, real or personal, which each person may possess, or in proportion to the benefits which each shall receive from the expenditure of the money thereby raised, while an excise is a charge imposed without any regard to the amount of property belonging to those upon whom it may fall or to any special benefit occasioned to those by whom the charge is to be paid. *Oliver v. Washington Mills*, 11 Allen (Mass.)

The term "duties" in its widest signification is hardly less comprehensive than taxes. It is applied in its more restricted meaning to customs, and in that sense it is nearly a synonym of "impost."<sup>1</sup>

**III. CLASSIFICATION OF TAXES.**—As the power to tax may be exercised in various ways,<sup>2</sup> taxes may be classified: First, with reference to the manner of imposition, as direct<sup>3</sup> or indi-

268. And see *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161. See also *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 431; *Portland Bank v. Apthorp*, 12 Mass. 252; *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Durach's Appeal*, 62 Pa. St. 491. See generally *LICENSE*, vol. 13, p. 514.

**1. Duties and Imposts.**—*Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433.

In its common use, the term "duty" means an indirect tax imposed upon the importation, exportation, or consumption of goods. *Cooley on Taxation* (2d ed.) 3.

A tax on interest paid by a corporation is an excise tax upon its business. *Michigan Cent. R. Co. v. Slack*, 100 U. S. 595.

The term "duty" signifies a tax, custom, or toll. *Sheffield v. Parsons*, 3 Stew. & P. (Ala.) 302.

In a larger sense, an impost is any tax or imposition. *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433. See generally *REVENUE LAWS*, vol. 21, p. 301.

An impost, tax, or duty is an exaction to fill the public coffers for the payment of the debts and the promotion of the general welfare of the county. *Worsley v. Second Municipality*, 9 Rob. (La.) 324; 41 Am. Dec. 333. In the ordinary import of this term "impost," however, it is applied only to charges upon articles brought from a foreign country into the *United States*. *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Brown v. Maryland*, 12 Wheat. (U. S.) 419.

Customs are duties charged upon commodities, on their being imported into or exported from the country. *Marriott v. Brune*, 9 How. (U. S.) 619.

Tolls for the navigation of an improved stream are not taxes, duties, or imposts on the use of the stream, but are tolls for the enjoyment of improvements by which it has acquired a new value and increased navigability. *Ben-*

*jamin v. Manistee River Imp. Co.*, 42 Mich. 628. And see *State v. Haight*, 30 N. J. L. 447.

A tax differs from a toll in that a tax is a demand of sovereignty, while a toll is a demand of proprietorship. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Philadelphia, etc., R. Co. v. Pennsylvania (State Freight Tax Case)*, 15 Wall. (U. S.) 232.

2. *Cleveland, etc., R. Co. v. Pennsylvania (Foreign Held Bond Cases)*, 15 Wall. (U. S.) 300; *Hodgson v. New Orleans*, 21 La. Ann. 301. See *infra*, this title, *Power to Tax*.

**3. Direct Taxes.**—A direct tax is a tax demanded from the person. *Abb. Law Dict.*, tit. *Taxes*.

There are three general classes of direct taxes: *Capitation*, having effect solely upon persons; *ad valorem*, having effect solely on property, and income, having a mixed effect upon persons and property. *Glasgow v. Rowse*, 43 Mo. 479.

Within the meaning of the federal constitution, direct taxes are limited to taxes on land and appurtenances, and taxes on polls or capitation taxes. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Springer v. U. S.*, 102 U. S. 586; *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Clark v. Sickle*, 14 Int. Rev. Rec. 6.

The federal constitution requires capitation and other direct taxes to be apportioned in proportion to the census of enumeration last taken, and imposts and excises to be uniform throughout the country. *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433. And see *Loughborough v. Blake*, 5 Wheat. (U. S.) 317; *Seabrook v. U. S.*, 21 U. S. Ct. of Cl. 39. And if a different or higher rate is charged, the excess may be recovered from the *United States*. *Seabrook v. U. S.*, 21 U. S. Ct. of Cl. 39.

But, within the general use of the term, they are the taxes assessed upon the property, person, business, income, etc., of those who are to pay them. *Cooley on Taxation* (2d ed.) 6. And



rect,<sup>1</sup> or *ad valorem*<sup>2</sup> or specific;<sup>3</sup> second, into general taxes<sup>4</sup> and local taxes;<sup>5</sup> third, into money taxes<sup>6</sup> and taxes in kind;<sup>7</sup> or fourth, with reference to the subjects of taxation, as property

see *People v. Worthington*, 21 Ill. 171; 74 Am. Dec. 86; *Springer v. U. S.*, 102 U. S. 586; *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Hylton v. U. S.*, 3 Dall. (U. S.) 171.

Taxes on expenditure or consumption are not direct taxes. *Hylton v. U. S.*, 3 Dall. (U. S.) 171. Nor is an income tax under the internal revenue laws; it is an excise or duty. *Springer v. U. S.*, 102 U. S. 586. Nor is a tax on the circulation of a bank either a direct tax or a tax on its franchise. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533.

**1. Indirect Taxes.**—An indirect tax is a tax levied on commodities before they reach the consumer. *Cooley on Taxation* (2d. ed.) 6. Indirect taxes may be said to embrace taxes upon imports and exports, excise taxes, and license and occupation taxes. See *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Scholey v. Rew*, 23 Wall. (U. S.) 331.

A tax upon carriages by number is an indirect tax. *Hylton v. U. S.*, 3 Dall. (U. S.) 171. So is a tax upon receipts, or a succession tax, or an income tax. *Springer v. U. S.*, 102 U. S. 602.

**2. Ad Valorem Taxes.**—*Ad valorem* taxes are taxes or duties upon the value of the article or thing subject to taxation. *Bailey v. Fuqua*, 24 Miss. 497.

An *ad valorem* duty is a sum ascertained by a percentage of the value of the article. *Anderson's Law Dict.*, citing *U. S. v. Clement*, 1 Crabbé (U. S.) 512.

In *Cape Girardeau v. Riley*, 72 Mo. 220, it was held that an *ad valorem* tax levied by a city upon all merchants upon goods in their possession, whether owned by them or consigned to them for sale at any time during a specified period, is an indirect tax on property, and not a mere arbitrary charge for the exercise of a privilege.

**3. Specific Taxes.**—A specific tax is a fixed sum payable upon an article or thing by name. Specific taxes include impositions of a specific sum by head or number, or by some standard of weight or measurement, and license taxes and taxes on business and occupations, stamp taxes, taxes on franchises and privileges, and other excise and custom taxes which require no as-

essment beyond a listing and classification of the subjects to be taxed. *U. S. v. Clement*, 1 Crabbé (U. S.) 512. See *Bailey v. Fuqua*, 24 Miss. 497; *Shaw v. Dennis*, 10 Ill. 405.

In *Jones v. Board of Water Com'rs*, 34 Mich. 273, it was held that a water tax on vacant lots was not a specific tax.

**4. General Taxes.**—General taxes may be said to be taxes imposed throughout the state, or some civil division thereof. *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Dalrymple v. Milwaukee*, 53 Wis. 178; *Roosevelt Hospital v. New York*, 84 N. Y. 108; though a tax relating to particular persons or things as a class is a general tax. *Matter of Church*, 92 N. Y. 1.

A law framed in general terms restricted to no locality and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked to make them a class by themselves, is a general law. *State v. Parsons*, 40 N. J. L. 123.

**5. Local Taxes.**—These are taxes imposed upon a particular neighborhood, having a special interest in the object of the tax. See *infra*, this title, *Local Assessments*.

**6. Money Taxes.**—Generally, taxes are payable in money alone. *Bryan v. Sundberg*, 5 Tex. 418; *Sawyer v. Springfield*, 40 Vt. 305; *State v. Halifax*, 4 Dev. (N. Car.) 345. See *infra*, this title, *Payment*, for a discussion of the rule and its statutory qualifications.

The legislature may make such laws as it deems proper respecting the kinds of funds in which taxes shall be paid. *Wallis v. Smith*, 29 Ark. 354; *Fuller v. Heath*, 89 Ill. 296; *Davis v. Burney*, 58 Tex. 364; *Marinette v. Oconto County*, 47 Wis. 216.

**7. Taxes in Kind.**—See *infra*, this title, *Payment*.

As to the levy of taxes payable in labor, see *Fox v. Rockford*, 38 Ill. 451; *Moore v. Jarron*, 9 Up. Can. Q. B. 233; *Dickson v. Galt*, 9 Up. Can. Q. B. 257; *In re Bannerman*, 15 Up. Can. Q. B. 14; *Robinson v. Stratford*, 23 Up. Can. Q. B. 99; *Streetsville Plank Road Co. v. Streetsville*, 19 Up. Can. Q. B. 62.

taxes,<sup>1</sup> income taxes,<sup>2</sup> capitation taxes,<sup>3</sup> succession taxes,<sup>4</sup> privilege taxes,<sup>5</sup> taxes upon corporations and corporate franchises,<sup>6</sup> taxes on consumable commodities and luxuries,<sup>7</sup> taxes upon amusements,<sup>8</sup> taxes upon exports,<sup>9</sup> taxes upon imports.<sup>10</sup>

**IV. THE POWER TO TAX—1. Its Extent and Nature.**—The power to tax is inherent in government. It is a legislative power and is limited only by constitutional provisions. Subject thereto, it extends to everything and to every person, as the legislature may see fit to apply it. Courts cannot control its exercise unless such exercise conflicts with constitutional limitations.<sup>11</sup>

*a. DISTINGUISHED FROM EMINENT DOMAIN.*—While the power to tax and the right of eminent domain rest substantially on the same foundation, each being in a sense a right to take the property of individuals for public use,<sup>12</sup> there is a broad distinction

**1. Property Taxes.**—The term "property," when used with reference to taxation, includes everything which is the subject of ownership, and which is visible and tangible, and capable of valuation. *People v. Hibernia Bank*, 51 Cal. 243; 21 Am. Rep. 704; *People v. Park*, 23 Cal. 138; *Primm v. Belleville*, 59 Ill. 142.

As to the distinction between property and franchise taxes, see *State v. Harshaw*, 76 Wis. 230; *Bradley v. People*, 4 Wall. (U. S.) 459; *Gilkeson v. Justices*, 13 Gratt. (Va.) 577; *Carter v. State*, 60 Miss. 456.

**2. Income Taxes.**—An income tax is rather a duty or excise tax than a direct tax. *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361; 24 Am. Rep. 511. See *Wilcox v. Middlesex County*, 103 Mass. 544.

**3. Capitation Taxes.**—Capitation or poll taxes, are taxes of a specific sum upon each person. "Head Money Cases," 18 Fed. Rep. 135; *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *Glasgow v. Rowse*, 43 Mo. 480. See *Clarke v. Philadelphia, etc., R. Co.*, 4 Houst. (Del.) 158; *infra*, this title, *Things Taxable—Polls*.

**4. Succession Taxes.**—See **SUCCESSION TAXES**, vol. 24, p. 431.

**5. Privilege Taxes.**—See *infra*, this title, *Occupation, Business, and Privilege Taxes*.

**6. Corporate Taxes.**—See **TAXATION (CORPORATE)**, vol. 25.

7. See **REVENUE LAWS**, vol. 21, p. 301.

Liquor selling may be taxed for the purpose of maintaining an asylum for inebriates. *State v. Cassidy*, 22 Minn.

312; 21 Am. Rep. 765; *State v. Klein*, 22 Minn. 328.

**8. Taxes upon Amusements.**—Amusements may be taxed, either under the general taxing power, or as a police regulation. *Germania v. State*, 7 Md. 1; *Boston v. Schaffer*, 9 Pick. (Mass.) 415; *St. Louis v. Green*, 7 Mo. App. 468; *Wallack v. New York*, 3 Hun (N. Y.) 84; *Sears v. West*, 1 Murph. (N. Car.) 291; 3 Am. Dec. 694; *Trapp v. White*, 35 Tex. 387. Such taxes are not taxes on property. *Orton v. Brown*, 35 Miss. 426; *Meriam v. New Orleans*, 14 La. Ann. 318; *Baker v. Cincinnati*, 11 Ohio St. 534.

9. *Clarke v. Clarke*, 3 Wood (U. S.) 408; *Blount v. Munroe*, 60 Ga. 61.

10. See **REVENUE LAWS**, vol. 21, p. 301.

11. The law of the text is elementary and fundamental. See, among many cases discussing it, *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Kirby v. Shaw*, 19 Pa. St. 258; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Board of Education v. McLandsborough*, 36 Ohio St. 232; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Young v. Thomas*, 17 Fla. 171; 35 Am. Rep. 93; *Ex p. Robinson*, 12 Nev. 263; *Tillotson v. Small*, 13 Neb. 20; *State v. Jackson*, 31 N. J. L. 189; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 53. See *infra*, this title, *Constitutional Restrictions*.

12. On the subject of eminent domain, see generally **EMINENT DO-**

between them.<sup>1</sup> Taxation exacts money from individuals as their share of a justly imposed and apportioned public burden,<sup>2</sup> while property is taken by the exercise of the right of eminent domain, not as the owner's share of a public burden, but as something distinct from and beyond his share,<sup>3</sup> special compensation being required to be made in the latter case, because the government is a debtor for the property so taken,<sup>4</sup> but not in the former, because the payment of taxes is a duty which creates no obligation to repay, otherwise than in the proper applica-

MAIN, vol. 6, p. 509; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Booth v. Woodbury*, 32 Conn. 118; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Stewart v. Polk County*, 30 Iowa 9.

1. *Booth v. Woodbury*, 32 Conn. 118; *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *Goodrich v. Winchester, etc., Turnpike Co.*, 26 Ind. 119.

The principles governing eminent domain correspond to those controlling the police power rather than to those applying to the power of taxation, and its exercise has regard rather to the public need than to the public character of its object. *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400.

2. *Booth v. Woodbury*, 32 Conn. 118; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *Goodrich v. Winchester, etc., Turnpike Co.*, 26 Ind. 119; *Ridenour v. Saffin*, 1 Handy (Ohio) 472; *Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615.

Taxation imposes a just and fair contribution to some public burden. The exercise of the right of eminent domain requires a contribution without reference in anywise to the ability of the party to make it. *Ridenour v. Saffin*, 1 Handy (Ohio) 464. And see *Parks v. Boston*, 8 Pick. (Mass.) 228; 19 Am. Dec. 322; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Rep. 159.

3. *Astor v. New York*, 37 N. Y. Super. Ct. 539; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Goodrich v. Winchester, etc., Turnpike Co.*, 26 Ind. 119; *Booth v. Woodbury*, 32 Conn. 118; *Chicago v. Larned*, 34 Ill. 202; *Woodbridge v. Detroit*, 8 Mich. 278; *Sanborn v. Rice County*, 9 Minn. 273;

*Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 358. And see *Parks v. Boston*, 8 Pick. (Mass.) 228; 19 Am. Dec. 322.

Taxation operates upon a community or upon a class of persons in a community by some rule of apportionment; but the exercise of the right of eminent domain operates upon an individual or individuals without reference to the amount or value exacted from any other individual or class of individuals. *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Ridenour v. Saffin*, 1 Handy (Ohio) 464.

Money cannot be exacted by the government by the right of eminent domain, except perhaps for the direct use of the state at large, and the state at large is to make compensation. The exigencies of a state government can seldom require the taking of money by virtue of this power, even in time of war, and never in time of peace. *Astor v. New York*, 37 N. Y. Super. Ct. 539.

4. *Astor v. New York*, 37 N. Y. Super. Ct. 539; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Booth v. Woodbury*, 32 Conn. 118; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Ridenour v. Saffin*, 1 Handy (Ohio) 472; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 358.

Under the *Illinois* rule, compensation for private property taken for public use may be made by benefits, but when benefits are exhausted, it then becomes a question of taxation, and the principles of equality and uniformity must apply. *Chicago v. Larned*, 34 Ill. 203. But in *State v. Leffingwell*, 54 Mo. 458, it was held that special benefits cannot form any part of the compensation for private property taken for public use, unless they attach to, and become a part of, the property taxed. On this subject, see EMINENT DOMAIN, vol. 6, p. 509, and *infra*, this title, *Local Assessments*.

tion of the tax.<sup>1</sup> Constitutional requirements that private property shall not be taken for public use without just compensation, have reference solely to the exercise of the power of eminent domain.<sup>2</sup>

*b. DISTINGUISHED FROM POLICE POWER.*—So the power to tax is to be distinguished from the police power.<sup>3</sup> Speaking broadly, it may be said that the demand made for money under the police power is secondary to the police regulation out of which the demand grows, while in the case of taxation the principal object is revenue, and this distinction is not to be lost sight of, even though the procedure for collection may be similar in both cases.<sup>4</sup> If, as is sometimes the case, a tax is laid for the

1. *Astor v. New York*, 37 N. Y. Super. Ct. 539; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Wynehamer v. People*, 13 N. Y. 404; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Booth v. Woodbury*, 32 Conn. 118; *Haas v. Misner*, 1 Idaho 176; *Goodrich v. Winchester*, etc., *Turnpike Co.*, 26 Ind. 119; *Turner v. Althaus*, 6 Neb. 77.

Taxation differs from eminent domain in that there is no thought of compensation by way of return for that which it takes and applies to the public good, further than that all derive benefit from the purposes to which it is applied; in other words, that the support of government and other objects of public utility promoted by taxation are supposed to return to the individual the same which has been taken from him as his share of the public burden. *Turner v. Althaus*, 6 Neb. 54; *Washington Ave.*, 69 Pa. St. 352; *Wynehamer v. People*, 13 N. Y. 404; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266.

2. *White v. People*, 94 Ill. 609; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *Booth v. Woodbury*, 32 Conn. 118; *Nichols v. Bridgeport*, 23 Conn. 189; *Logansport v. Seybold*, 59 Ind. 225; *Warren v. Henly*, 31 Iowa 31; *Stewart v. Polk County*, 30 Iowa 9; *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Kittle v. Shirvin*, 11 Neb. 81; *Hanscom v. Omaha*, 11 Neb. 37; *Allen v. Drew*, 44 Vt. 175; *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

In *Williams v. Cammack*, 27 Miss. 209; 41 Am. Dec. 508, it was held that the exercise of the power to tax, for the purpose of raising money to construct a public work, cannot be regarded as an attempt to take private

property for public use without compensation.

3. See, for definition and discussion of the police power generally, *POLICE POWER*, vol. 18, p. 739. See also *LICENSE*, vol. 13, p. 574; and *infra*, this title, *Occupation, Business, and Privilege Taxes*.

4. *Cooley on Taxation* (2d ed.), p. 586. See also *Pleuler v. State*, 11 Neb. 547; *Moore v. State*, 48 Miss. 147; 12 Am. Rep. 367; *East St. Louis v. Wehrung*, 46 Ill. 392; *Louisville City R. Co. v. Louisville*, 4 Bush (Ky.) 478; *Van Horn v. People*, 46 Mich. 183; 41 Am. Rep. 159; *People v. Salem*, 20 Mich. 456; 4 Am. Rep. 400; *Chilvers v. People*, 11 Mich. 43; *State v. U. S.*, etc., *Express Co.*, 60 N. H. 219; *Matter of New York*, 11 Johns. (N. Y.) 77; *New York v. Second Ave. R. Co.*, 32 N. Y. 261; *State v. Penny*, 19 S. Car. 218; *Columbia v. Beasley*, 1 Humph. (Tenn.) 232; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Glasgow v. Rowse*, 43 Mo. 480; *St. Louis v. Spiegel*, 75 Mo. 146; *St. Louis v. Boatmen's Ins.*, etc., Co., 47 Mo. 150; *License Tax Cases*, 5 Wall. (U. S.) 462; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *State v. Hoboken*, 41 N. J. L. 71; *Mays v. Cincinnati*, 1 Ohio St. 268; *People v. Martin*, 60 Cal. 153.

Laws relating to the licensing of butchers, victualers, hackmen, stage-drivers, etc., in a city, are branches of the law for good government, and not a part of a revenue system. *People v. New York*, 7 How. Pr. (N. Y.) 81.

It may be said that every burden imposed for revenue purposes is levied under the taxing power, irrespective of the name by which the imposition is designated. *St. Louis v. Green*, 7 Mo. App. 468.

double purpose of regulation and revenue, the imposition of such tax may be said to be founded upon each power.<sup>1</sup>

**2. Constitutional Restrictions** (See also CONSTITUTIONAL LAW, vol. 3, p. 670)—*a.* UPON FEDERAL TAXATION.—Restrictions upon the power of the federal government to lay and collect taxes, duties, imposts, and excises, must be found in the Constitution of the *United States*,<sup>2</sup> and the only direct limitation therein contained is that no tax or duty shall be laid on articles exported from any state.<sup>3</sup> It is provided also that capitation or other direct taxes must be paid in proportion to the federal census or enumeration, according to which the representation of the states in the proper branches of Congress is determined,<sup>4</sup> that duties, imposts, and excises must be uniform throughout the *United States*,<sup>5</sup> and that no preference shall be given by any regulation of commerce or revenue to the ports of any one state over those of another.<sup>6</sup> These are not, strictly speaking, limita-

1. See *Temple v. Sumner*, 51 Miss. 13; 24 Am. Rep. 615; *Keller v. State*, 11 Md. 525; 69 Am. Dec. 226. *Kitson v. Ann Arbor*, 26 Mich. 325; *Walcott v. People*, 17 Mich. 78; *Ex p. Burnett*, 30 Ala. 461; *Pleuler v. State*, 11 Neb. 547; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Aulanier v. Governor*, 1 Tex. 653.

A license may include a tax, or it may not. If the exaction goes no further than to cover the necessary expenses of issuing it, it does not, but if it is made a means of supplying money for the public treasury, it is a tax. *Mays v. Cincinnati*, 1 Ohio St. 269.

2. *Cooley on Taxation* (2d ed.) 110. And see *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Ward v. Maryland*, 12 Wall. (U. S.) 418.

The inherent restrictions upon the power to tax growing out of its nature and out of general constitutional principles apply to federal taxation as well as to state taxation. See *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533.

3. Const. U. S., art. 1, § 9, par. 5; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *License Tax Cases*, 5 Wall. (U. S.) 462; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Whiteaker v. Haley*, 2 Oregon 128.

In *Turpin v. Burgess*, 117 U. S. 504, it was held that the constitutional prohibition against taxing exports, when directed to the *United States*, acts in substantially the same manner as when directed to a state. The prohibition in both cases has reference to the im-

position of duties on goods, by reason or cause of their exportation or intended exportation.

4. Const. U. S., art. 1, § 9, par. 4; *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533. And see *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Ward v. Maryland*, 12 Wall. (U. S.) 419; U. S. v. Louisiana, 123 U. S. 32.

When the *United States* statutes require a direct tax to be apportioned according to the last state assessment and valuation, the action of tax commissioners in substituting a different and higher rate is in excess of their authority, and the excess is recoverable from the *United States*. *Seabrook v. U. S.*, 21 Ct. of Cl. 39.

5. Const. U. S., art. 1, § 8, par. 1; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Ward v. Maryland*, 12 Wall. (U. S.) 419.

Taxes imposed by the internal revenue laws upon gains, profits, and incomes, are excises or duties, and not direct taxes within the constitutional provision requiring an apportionment of direct taxes. *Springer v. U. S.*, 102 U. S. 586.

6. Const. U. S., art. 1, § 9, par. 5.

A law requiring vessels refusing or neglecting to take a pilot, to forfeit to the warden of the port one-half the regular amount of pilotage, does not give preference to the ports of one state over those of another, even though vessels engaged in a trade largely local in its nature are exempted from the requirement. *Cooley v. Board of Port Wardens*, 12 How. (U. S.) 299.

tions of power, but rather rules prescribing the mode in which the power shall be exercised.<sup>1</sup> Power to tax without apportionment extends to all objects except direct taxes,<sup>2</sup> but all such taxes, except direct taxes, must be laid and collected by the rule of uniformity.<sup>3</sup>

The requirement of the federal constitution that all bills for raising revenue shall originate in the House of Representatives,<sup>4</sup> applies to all laws which provide for the assessment and collection of taxes to defray the expenses of government,<sup>5</sup> and to all laws, the principal object of which is to raise revenue,<sup>6</sup> but not to laws under which revenue incidentally arises,<sup>7</sup> nor to appropriation statutes, even though taxation necessarily follows.<sup>8</sup>

*b. UPON STATE TAXATION—(1) Generally.*—The power of the state to tax can be exercised only within constitutional limitations, which, however, are not to be implied.<sup>9</sup>

1. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Lane County v. Oregon*, 7 Wall. (U. S.) 71.

2. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Cooley v. Board of Port Wardens*, 12 How. (U. S.) 299. And see *Springer v. U. S.*, 102 U. S. 586.

In *Loughborough v. Blake*, 5 Wheat. (U. S.) 317, it was held that Congress may impose direct taxes upon the *District of Columbia* as well as upon the territories, in proportion to the census required to be taken by the constitution.

3. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Lane County v. Oregon*, 7 Wall. (U. S.) 71.

A tax act which recognizes the fact that its execution may be temporarily prevented, and which provides for the collection of the tax as soon as the authority of the government shall be reestablished, is not unconstitutional on the ground that the tax imposed is not uniform throughout the *United States*. *U. S. v. Riley*, 5 Blatchf. (U. S.) 204.

4. Const. U. S., art. 1, § 7.

Similar provisions exist in the constitutions of many of the states, requiring bills for raising revenue to originate in the popular or most numerous branch of the legislative department. Desty on Taxation 97, citing *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; Opinion of Justices, 126 Mass. 557.

In *England*, all revenue measures must originate in the popular house of Parliament. 4 Co. Inst. 169; 1 Black. Com. 169.

5. *Peyton v. Bliss*, 1 Woolw. (U. S.) 173; *Perry County v. Selma*, etc., R.

Co., 58 Ala. 546. And see STATUTES, vol. 23, p. 140.

In *Perry County v. Selma*, etc., R. Co., 58 Ala. 546, it was held that a bill for reducing revenue which provides for collecting revenue is a bill for raising revenue.

6. *The Nashville*, 4 Biss. (U. S.) 188.

In *U. S. v. James*, 13 Blatchf. (U. S.) 207, it was held that the requirement of the federal constitution that all bills for raising revenue shall originate in the House of Representatives, applies to bills that draw money from citizens but give no direct equivalent for it.

7. *The Nashville*, 4 Biss. (U. S.) 188. And see *Rankin v. Henderson* (Ky. 1888), 7 S. W. Rep. 174.

Under the *Massachusetts* constitution, requiring all money bills to originate in the House of Representatives, the Senate has an equal right with the House to originate an inquiry into the returns made from the towns for the purpose of settling a valuation and of concluding on the proportion of ratable property within each town. Opinion of Justices, 126 Mass. 547.

In *Rankin v. Henderson* (Ky. 1888), 7 S. W. Rep. 174, it was held that a statute authorizing a municipality to impose a license tax upon certain occupations within its limits, the tax being for municipal purposes, may originate in either branch of the legislature, notwithstanding a constitutional provision requiring bills for raising revenue to originate in the House.

8. *Curryer v. Merrill*, 25 Minn. 1.

9. See *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *State v. Parker*, 32 N. J. L. 426; *Eyre v. Jacob*, 14 Gratt.

(2) *Restrictions in Federal Constitution*—(a) *Upon Export and import Taxation ; Inspection Laws*.—The states may not, without the consent of Congress, lay imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws.<sup>1</sup> Goods become exports within this provision when they are separated from the general mass of the property of the state for the purpose of exportation.<sup>2</sup>

Goods imported do not lose their character as imports until they have passed from the control of the importer,<sup>3</sup> or been broken up by him from the original packages or cases.<sup>4</sup> The term "import" covers nothing which is not actually brought within the limits of the ports of the country to which it is sent.<sup>5</sup>

(Va.) 422; 73 Am. Dec. 367. And see *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *State v. Hayne*, 4 S. Car. 403; *Nashville, etc., R. Co. v. Marion County*, 7 Lea (Tenn.) 665; *Morgan v. Louisiana*, 93 U. S. 217; *Cooley v. Board of Port Wardens*, 12 How. (U. S.) 319; *Philadelphia, etc., R. Co. v. Pennsylvania* (State Freight Tax Case), 15 Wall. (U. S.) 232; *Bank of Commerce v. New York*, 2 Black (U. S.) 620; *Bank Tax Case*, 2 Wall. (U. S.) 200; *Society for Savings v. Coite*, 6 Wall. (U. S.) 594; *Providence Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Hays v. Pacific Mail, etc., Co.*, 17 How. (U. S.) 596; *Southern Steamship Co. v. Wardens, etc.*, 6 Wall. (U. S.) 31; *Passenger Cases*, 7 How. (U. S.) 283; *Almy v. California*, 24 How. (U. S.) 169; *State Tonnage Tax Cases*, 12 Wall. (U. S.) 204; *Munn v. Illinois*, 94 U. S. 139; *Insurance Co. of N. A. v. Com.*, 87 Pa. St. 173; 30 Am. Rep. 352.

"If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction." *Gibbons v. Ogden*, 9 Wheat. (U. S.) 21.

1. U. S. Const., art. 10, § 10.

2. *Clarke v. Clarke*, 3 Wood (U. S.) 408; *The Daniel Ball*, 10 Wall. (U. S.) 565; *Blount v. Munroe*, 60 Ga. 61.

In *Coe v. Errol*, 116 U. S. 517, it was held that exportation is not begun until goods are committed to the common carrier for transportation out of

the state, or until they have started on their ultimate passage to their destination, and that, until that time, they are taxable as a part of the general mass of the property of the state, but not as exports; and that the carrying of property in cars or vehicles, or floating it to the depot where the journey is to commence, is no part of the exportation. See also *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Turpin v. Burgess*, 117 U. S. 504.

3. *Clarke v. Clarke*, 3 Woods (U. S.) 408; *Low v. Austin*, 13 Wall. (U. S.) 29; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *License Cases*, 5 How. (U. S.) 504; *Almy v. California*, 24 How. (U. S.) 169; *Duer v. Small*, 4 Blatchf. (U. S.) 263; *Keller v. State*, 11 Md. 525; 49 Am. Dec. 226; *State v. Pinckney*, 10 Rich. (S. Car.) 474.

Merchandise, when once sold by the importer, is taxable as other property, even though it still remains in the original packages. *Waring v. Mobile*, 8 Wall. (U. S.) 110.

4. *Clarke v. Clarke*, 3 Woods (U. S.) 408; *Low v. Austin*, 13 Wall. (U. S.) 29; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *License Cases*, 5 How. (U. S.) 504; *Howe Machine Co. v. Gage*, 100 U. S. 676; *Waring v. Mobile*, 8 Wall. (U. S.) 122; *Pervear v. Com.*, 5 Wall. (U. S.) 479; *Cook v. Pennsylvania*, 97 U. S. 566; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Lin Sing v. Washburn*, 20 Cal. 534; *State v. Shapleigh*, 27 Mo. 344; *Wynne v. Wright*, 1 Dev. & B. (N. Car.) 19; *State v. Pinckney*, 10 Rich. (S. Car.) 474.

5. *Marriott v. Brune*, 9 How. (U. S.) 619; *Meredith v. U. S.*, 13 Pet. (U. S.) 486.

A purchaser of goods coming from abroad, the goods to be at his risk until

So long as the goods imported retain their character of imports, a tax in any shape is within the prohibition.<sup>1</sup> A tax upon the occupation of an importer is within the prohibition;<sup>2</sup> so is a tax upon the sale of imported goods in the original packages.<sup>3</sup>

Even after the thing imported has become a part of the general mass of the property of the state, it cannot be taxed merely because it had been imported or had been an instrument of commerce,<sup>4</sup> though the mere fact that goods had been imported or that they are intended for exportation, does not interfere with their taxation to the same extent as other property within the state is taxed.<sup>5</sup> In order to fall within the prohibition the tax must either be a duty levied on goods as a condition of or by

delivered to him, is not an importer, and the goods may be taxed while in the original packages. *Waring v. Mobile*, 8 Wall. (U. S.) 110.

1. In *People v. National F. Ins. Co.*, 61 How. Pr. (N. Y.) 334, it was held that premiums of insurance upon goods imported from foreign countries, stored in bonded warehouses, were not taxable. But see *People v. National F. Ins. Co.*, 27 Hun (N. Y.) 188.

In *Almy v. California*, 24 How. (U. S.) 169, it was held that a statute imposing a stamp tax on bills of lading for the transportation from any place within the state to any place without the state, of gold or silver coin, gold dust, or gold or silver in bars, or other form, imposed a duty upon the export of gold and silver, and, therefore, was unconstitutional. See also *Ex p. Martin*, 7 Nev. 140; 8 Am. Rep. 707.

In *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581, a tax which was not levied on the foreign owner of consigned goods in the hands of the consignee, but only upon their sale, was held to be valid.

2. *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Welton v. Missouri*, 91 U. S. 275; *Waring v. Mobile*, 8 Wall. (U. S.) 110; *Howe Machine Co. v. Gage*, 100 U. S. 676; *Low v. Austin*, 13 Wall. (U. S.) 29; *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *State v. North*, 27 Mo. 464.

The inquiry is upon what did the burden really rest, and not upon the question from whom the state exacts payment. *Cook v. Pennsylvania*, 97 U. S. 566; *State Freight Tax Case*, 15 Wall. (U. S.) 238.

3. *Cook v. Pennsylvania*, 97 U. S. 566; *Waring v. Mobile*, 8 Wall. (U. S.) 110; *Bank Tax Case*, 2 Wall. (U. S.)

200; *Society for Savings v. Coite*, 6 Wall. (U. S.) 594; *Daniel v. Richmond*, 78 Ky. 542; *People v. Moring*, 47 Barb. (N. Y.) 642; *People v. National F. Ins. Co.*, 61 How. Pr. (N. Y.) 341. But see *State v. Peckham*, 3 R. I. 289.

The right to import includes the right to sell. When the importer purchases the right to import by the payment of a duty to the general government, he purchases also the privileges of a market, and taxing the market is in effect taxing the import. *Lin Sing v. Washburn*, 20 Cal. 534; *License Cases*, 5 How. (U. S.) 504; *Waring v. Mobile*, 8 Wall. (U. S.) 110; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Pervear v. Com.*, 5 Wall. (U. S.) 478.

4. *Welton v. Missouri*, 91 U. S. 275; *State v. North*, 27 Mo. 464; *People v. Moring*, 47 Barb. (N. Y.) 642.

The power of the national government over commerce with foreign nations and among the several states, reaches the interior of every state, so far as it may be necessary to protect the products of other states and countries from discrimination by reason of their foreign origin. *Guy v. Baltimore*, 100 U. S. 434.

5. *Coe v. Errol*, 116 U. S. 517; *Brown v. Houston*, 114 U. S. 622; *License Cases*, 5 How. (U. S.) 504; *Waring v. Mobile*, 8 Wall. (U. S.) 110; *Pervear v. Com.*, 5 Wall. (U. S.) 475; *State v. Pickney*, 10 Rich. (S. Car.) 474; *State v. Crawford*, 2 Head (Tenn.) 460; *Wynne v. Wright*, 1 Dev. & B. (N. Car.) 19; *Cowles v. Brittain*, 2 Hawks (N. Car.) 204; *Kenny v. Harwell*, 42 Ga. 416; *Cumming v. Savannah*, R. M. Charlt. (Ga.) 26; *Pittsburgh, etc., Coal Co. v. Bates*, 40 La. Ann. 226; 8 Am. St. Rep. 519; *Tracy v. State*, 3 Mo. 3; *Biddle v. Com.*, 13



reason of their exportation or importation, or a direct tax on the goods imported or exported or intended for exportation.<sup>1</sup>

The restriction upon the taxation of imports by the states does not include articles imported from a sister state,<sup>2</sup> and a state is not bound to abstain from the passage of such laws as may be necessary or advisable to guard the health or morals of its citizens, even though such laws may operate to discourage importation.<sup>3</sup> Nor are the proper fees, accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under the pretence of exportation or importation, in any sense a duty thereon;<sup>4</sup> they are simply compensation given for service

S. & R. (Pa.) 405; *Sharpe v. Speir*, 4 Hill (N. Y.) 76. And see *Hays v. Pacific Mail, etc., Co.*, 17 How. (U. S.) 596; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 282; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54.

In *Brown v. Houston*, 114 U. S. 622, it was held that coal sent by owners in one state to their agents in another, to be there sold for their account upon its arrival, becomes a part of the general mass of the property in the latter state and subject to taxation as such, in common with other property, and that the fact that some of it is subsequently sold for transportation does not alter the case.

In *State v. Pinckney*, 10 Rich. (S. Car.) 474, it was held that a tax upon an importer estimated by the amount of his sales, is not unconstitutional, even though his sales embrace imported articles.

1. *Brown v. Houston*, 114 U. S. 622. And see *People v. Nat. F. Ins. Co.*, 27 Hun (N. Y.) 188; *Nathan v. Louisiana*, 8 How. (U. S.) 73; *Mager v. Grima*, 8 How. (U. S.) 490.

In *State v. Charleston*, 10 Rich. (S. Car.) 240, a *per capita* tax upon slaves, after they were imported from another state and had come under the protection of the laws of the taxing state free from any protection or authority from the state from which they came, was held to be constitutional.

Pilot regulations are not included in the term "imposts or duties on imports or exports." *Cooley v. Board of Port Wardens*, 12 How. (U. S.) 299; *Baker v. Wise*, 16 Gratt. (Va.) 139.

2. *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Brown v. Houston*, 114 U. S. 622; *Pervear v. Com.*, 5 Wall. (U. S.) 479; *Brown v. Maryland*, 12 Wheat.

(U. S.) 419; *Hinson v. Lott*, 40 Ala. 123; *Board of Hay Inspectors v. Pleasants*, 23 La. Ann. 349; *Standard Oil Co. v. Combs*, 96 Ind. 179; *Pierce v. State*, 13 N. H. 536; *State v. Pittsburg, etc., Coal Co.*, 41 La. Ann. 465; *Brown v. Houston*, 33 La. Ann. 843; *State v. Charleston*, 10 Rich. (S. Car.) 240; *State v. Pinckney*, 10 Rich. (S. Car.) 474. As to such taxation, see *infra*, this title, *Regulation of Commerce*.

3. *License Cases*, 5 How. (U. S.) 504.

4. *Pace v. Burgess*, 92 U. S. 372; *Wardens, etc. v. The Martha J. Ward*, 14 La. Ann. 287; *Addison v. Saulnier*, 19 Cal. 82; *Green v. Mayor, etc., R. M. Charlt. (Ga.)* 368; *Clintman v. Northrop*, 8 Cow. (N. Y.) 45; *Vanmeter v. Spurrier* (Ky. 1893), 21 S. W. Rep. 337; *Turner v. State*, 107 U. S. 38. And see *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690; *State v. Pittsburg, etc., Coal Co.*, 41 La. Ann. 465.

**Inspection Laws.**—The right to enact inspection laws is reserved to the states, but it is subject to the paramount right of Congress to regulate commerce with foreign nations and among the several states. *Neilson v. Garza*, 2 Wood (U. S.) 287. And their scope is not confined to articles of domestic produce or manufacture; it applies also to articles imported and to those intended for domestic use. *Green v. Mayor, etc., R. L. Charlt. (Ga.)* 368.

In *Clintman v. Northrop*, 8 Cow. (N. Y.) 45, inspection laws were held to be laws for the protection of the community so far as they apply to domestic sales from fraud and imposition, and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.

properly rendered for the protection of the state.<sup>1</sup> The test whether a charge is for inspection or is a duty upon exports or imports is whether or not the charge is excessive or reasonable;<sup>2</sup> and any inspection fee will be regarded as an unconstitutional discrimination, and a direct burden upon commerce among the states, where there is no necessity for the inspection provided for,<sup>3</sup> or where the requirement goes far beyond the necessity,<sup>4</sup> or where it amounts to a discrimination against the products or industries of other states.<sup>5</sup>

1. *Pace v. Burgess*, 92 U. S. 372; *Turner v. Maryland*, 107 U. S. 38; *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690; *Addison v. Saulnier*, 19 Cal. 82.

Inspection laws, so far as they act on articles for exportation, are generally executed on land before the article is put on board the vessel, and so far as they act on importations they are generally executed on articles after they are landed, the tax or duty of inspection being usually a tax paid for services performed on land while the article upon which it is imposed is a part of the mass of the property of the state. *Clarke v. Clarke*, 3 Woods (U. S.) 408; *Brown v. Maryland*, 12 Wheat. (U. S.) 419.

2. *Pace v. Burgess*, 92 U. S. 372; *Turner v. Maryland*, 107 U. S. 38; *Willis v. Standard Oil Co.*, 50 Minn. 290. And see *Neilson v. Garza*, 2 Woods (U. S.) 287; *Brimmer v. Rebman*, 138 U. S. 78; *In re Rebman*, 41 Fed. Rep. 867; *Minnesota v. Barber*, 136 U. S. 313.

Unless it is manifestly unreasonable, the court will not adjudge it a tax. *Willis v. Standard Oil Co.*, 50 Minn. 290. The point to guard against is the imposition of a duty under the pretext of fixing a fee. *Pace v. Burgess*, 92 U. S. 372.

The court will not assume, for the purpose of sustaining an act imposing an onerous inspection fee, that fresh meat will or may become unwholesome if transported one hundred miles or more from the place where slaughtered before it is offered for sale. *Brimmer v. Rebman*, 138 U. S. 78. And see *Minnesota v. Barber*, 136 U. S. 313.

The question, what is included under the term inspection laws, must be determined largely by the nature of the inspection laws of the states existing when the constitution was confirmed. *Gibbon v. Ogden*, 9 Wheat. (U. S.) 119; *Turner v. Maryland*, 107 U. S. 38.

3. *Voight v. Wright*, 141 U. S. 62;

*Minnesota v. Barber*, 136 U. S. 313; *Schmidt v. People*, 18 Colo. 78. And see *Farris v. Henderson*, 1 Oklahoma 384.

4. *Brimmer v. Rebman*, 138 U. S. 78; *Minnesota v. Barber*, 136 U. S. 313. And see *State v. Klein*, 126 Ind. 68.

In *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690, it was held that a tax on fertilizers to defray inspection expenses will not be declared unconstitutional because it exceeds the actual cost of inspection, when no purpose to evade constitutional inhibition is manifested.

5. *In re Rebman*, 41 Fed. Rep. 867; affirmed 138 U. S. 148; *Minnesota v. Barber*, 136 U. S. 313. And see *Neilson v. Garza*, 2 Woods (U. S.) 287; *Higgins v. Casks of Lime*, 130 Mass. 1.

An inspection law which, in effect, excludes the thing inspected from importation or sale, is an unconstitutional invasion of the power of Congress to regulate interstate commerce. *In re Barber*, 39 Fed. Rep. 641; *Swift v. Sutphin*, 39 Fed. Rep. 630.

In *Turpin v. Burgess*, 117 U. S. 504, it was held that a stamp tax on manufactured tobacco intended for exportation, is not a tax or duty on exports, within the constitutional prohibition, because a larger tax is imposed upon manufactured tobacco not intended for export.

In *Turner v. State*, 107 U. S. 38, it was held that an inspection law requiring that tobacco of the growth of the state must be packed in hogsheads of a specified size, and that tobacco to be exported should be packed in the same manner, and further requiring an examination of the packages by an officer appointed for that purpose to ascertain if they are of the prescribed size, and imposing a tax for such inspection, is not unconstitutional as a discrimination between the state buyer and the purchaser who buys for the purpose of transportation.

With the consent of Congress a state may tax exports or imports for any proper purpose,<sup>1</sup> but the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the *United States*, and all such laws shall be subject to the revision and control of Congress.<sup>2</sup>

"Imports" and "exports" and "inspection law," within the meaning of the federal constitution, have reference solely to merchandise, and do not include persons.<sup>3</sup> Nor does the prohibition apply to the imposition of taxes upon foreign vessels.<sup>4</sup>

(b) **Regulation of Commerce**—(See also INTERSTATE COMMERCE, vol. II, p. 539)—(1) **GENERALLY**.—The power to regulate commerce with foreign nations and among the several states and with the Indian tribes, is among the powers delegated to the national government;<sup>5</sup> so that any exercise by a state of the power to tax which acts as a regulation of, or a restriction upon, such commerce, conflicts with the federal constitution.<sup>6</sup>

1. *Padelford v. Savannah*, 14 Ga. 438; *Virginia v. West Virginia*, 11 Wall. (U. S.) 59; *Green v. Biddle*, 8 Wheat. (U. S.) 1.

The consent of Congress may be implied from legislation; it need not be express. *Green v. Biddle*, 8 Wheat. (U. S.) 1.

In *Padelford v. Savannah*, 14 Ga. 438, it was held that where a tax is levied by a state upon imports, it is to be presumed that Congress has consented to it, when nothing appears to the contrary.

2. Const. U. S., art. 1, § 10, par. 2; *Neilson v. Garza*, 2 Woods (U. S.) 287.

Inspection laws being subject to the review and control of Congress, Congress is the proper authority to decide whether or not a charge or duty is excessive. And an inspection law passed by a state must stand until Congress sees fit to alter it, even though the fee allowed is, in effect, an impost or duty on imports and exports. *Neilson v. Garza*, 2 Woods (U. S.) 287.

In *Padelford v. Savannah*, 14 Ga. 438, it was held that a state may tax imports for any purpose even without the consent of Congress, subject only to the power of Congress to revise and control the state law.

3. *New York v. Compagnie Generale Transatlantique*, 10 Fed. Rep. 357; *Henderson v. New York*, 92 U. S. 259; *New York v. Miln*, 11 Pet. (U. S.) 102.

A state statute requiring the payment of a certain sum for each passenger, inspected to ascertain if he is afflicted with leprosy, coming into the *United States* by sea, and imposing a

fine for non-payment upon the owners and consignees of a vessel bringing the passenger, is unconstitutional. *People v. Pacific Mail Steamship Co.*, 16 Fed. Rep. 344.

A law of that nature cannot be sustained as an inspection law, for the reason that guilt, poverty, lunacy, orphanage and sometimes disease, cannot be ascertained by inspection of the person, and the inspection laws referred to in the constitution have reference to property and not to human beings. *New York v. Compagnie Generale Transatlantique*, 107 U. S. 59.

4. *Aguirre v. Maxwell*, 3 Blatchf. (U. S.) 140.

5. See INTERSTATE COMMERCE, vol. II, p. 539; Const. U. S., art. 1, § 8, par. 3; *U. S. v. Bailey*, 1 McLean (U. S.) 235; *Palmer v. Cuyahoga County*, 3 McLean (U. S.) 226; *Philadelphia, etc., R. Co. v. Pennsylvania* (State Freight Tax Case), 15 Wall. (U. S.) 232; *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 425; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Lin Sing v. Washburn*, 20 Cal. 534; *Indiana v. Pullman Palace Car Co.* (U. S. 1888), 13 Am. & Eng. R. Cas. 307; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

6. See *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Walling v. Michigan*, 116 U. S. 446; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Moran v. New Orleans*, 112 U. S. 69; *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609.

**Intoxicating Liquors**.—For the power of a state to impose a tax upon imports

The general rule is that the word "commerce," as used in this provision, includes not only the buying and selling and exchanging of merchandise and other commodities,<sup>1</sup> but also comprehends the entire commercial intercourse with foreign nations and among the states,<sup>2</sup> including navigation as well as traffic in its ordinary signification.<sup>3</sup> It comprehends the transportation of persons<sup>4</sup> and property,<sup>5</sup> and interstate communication by telegraph or telephone.<sup>6</sup> The term applies to the means and instruments by which transportation is effected, as well as to the transportation itself,<sup>7</sup> embracing railroads,<sup>8</sup> ships and vessels, together with their officers and seamen.<sup>9</sup>

The mode in which the tax is laid, whether directly upon the property in the hands of the owner, or upon the carrier as a tax upon his business,<sup>10</sup> or in the form of a license fee required for the privilege of selling or otherwise disposing of the goods,<sup>11</sup> or of an imposition upon the receipts arising there-

from another state, see *INTOXICATING LIQUORS*, vol. 11, p. 603 *et seq.*

**Exclusive Power in Congress.**—As to when the power of Congress is exclusive, see *INTERSTATE COMMERCE*, vol. 11, p. 545.

1. *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Welton v. Missouri*, 91 U. S. 275; *U. S. v. Bailey*, 1 McLean (U. S.) 234; *Philadelphia, etc., R. Co. v. Pennsylvania* (State Freight Tax Case), 15 Wall. (U. S.) 275; *Mobile County v. Kimball*, 102 U. S. 691; *The Daniel Ball v. U. S.*, 10 Wall. (U. S.) 557; *State v. Delaware, etc., R. Co.*, 30 N. J. L. 473; *People v. Brooks*, 4 Den. (N. Y.) 469.

Commerce is the interchange or mutual change of goods, productions, or property of any kind, between nations or individuals. *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 338; 24 Am. Rep. 773.

2. *People v. Brooks*, 4 Den. (N. Y.) 469; *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *Mitchell v. Steelman*, 8 Cal. 363; *State v. Delaware, etc., R. Co.*, 30 N. J. L. 473; *Moor v. Veazie*, 32 Me. 343; 52 Am. Dec. 655; *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *Welton v. Missouri*, 91 U. S. 275; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 3; *Corfield v. Coryell*, 4 Wash. (U. S.) 371; *Groves v. Slaughter*, 15 Pet. (U. S.) 449; *Mobile County v. Kimball*, 102 U. S. 691; *New York v. Miln*, 11 Pet. (U. S.) 103; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

3. See *INTERSTATE COMMERCE*, vol. 11, p. 541; *NAVIGATION*, vol. 16, p. 272.

4. See *infra*, this title, *Taxes Upon Passengers*; *INTERSTATE COMMERCE*, vol. 11, p. 541 *et seq.*

5. See *infra*, this title, *Taxes Upon Freight*.

6. See *infra*, this title, *Taxes Upon Means of Transportation*; *INTERSTATE COMMERCE*, vol. 11, p. 543; *TELEGRAPHS AND TELEPHONES*, vol. 25.

7. See *infra*, this title, *Taxes Upon the Means by Which Interstate Commerce is Transacted*; *INTERSTATE COMMERCE*, vol. 11, p. 542.

8. See *infra*, this title, *Taxes Upon the Means by Which Interstate Commerce is Transacted*; *INTERSTATE COMMERCE*, vol. 11, p. 543.

9. See *SHIPS AND SHIPPING*, vol. 22, p. 710; *NAVIGATION*, vol. 16, p. 275.

10. *State v. Carrigan*, 39 N. J. L. 35; *Erie R. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226; *State v. North*, 27 Mo. 464; *Lyng v. Michigan*, 135 U. S. 161; *Leloup v. Mobile*, 127 U. S. 640. And see *Northern Pac. R. Co. v. Raymond*, 5 Dakota 356. A license tax upon the carrier's business. *Com. v. Smith*, 92 Ky. 38. Compare *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587; *Pennsylvania R. Co. v. Com.*, 3 Grant's Cas. (Pa.) 128.

11. *Welton v. Missouri*, 91 U. S. 275; *Tiernan v. Rinker*, 102 U. S. 123; *Cook v. Pennsylvania*, 97 U. S. 566; *Guy v. Baltimore*, 100 U. S. 434; *Leloup v. Mobile*, 127 U. S. 640; *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59; *Webber v. Virginia*, 103 U. S. 344.

from,<sup>1</sup> is immaterial, the principle being that when the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it.<sup>2</sup>

A stipulation inserted in the charter of a corporation engaged in foreign or interstate commerce requiring it to pay a bonus to the state, is not unconstitutional as an interference.<sup>3</sup> A state may regulate its own internal commerce in such manner as it sees fit.<sup>4</sup> It may enact such laws as may be necessary or proper to protect its citizens in their persons, health, and property, and to guard them against fraud, imposition, and oppression, by virtue of its police power, even though such laws may in some respects affect persons or corporations engaged in carrying on foreign or interstate commerce.<sup>5</sup>

1. *Leloup v. Mobile*, 127 U. S. 640; *Lyng v. Michigan*, 135 U. S. 161; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284.

A state may tax money actually within the state after it has passed beyond the stage of compensation for carrying persons or property from state to state, in the same manner as it taxes other money or property within its limits; but a tax upon receipts of this class of carriage specifically is a tax upon the commerce out of which it arises, and therefore illegal. *Fargo v. Stevens*, 121 U. S. 230.

2. *Cooley on Taxation* (2d ed.) 95, citing *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Welton v. Missouri*, 91 U. S. 275; *Cook v. Pennsylvania*, 97 U. S. 566; *Webber v. Virginia*, 103 U. S. 344; *Muriot v. Philadelphia*, etc., R. Co., 2 Abb. (U. S.) 323.

Whenever the taxation of a commodity will amount to a regulation of commerce within the constitutional prohibition, so will the taxation of an inseparable incident or necessary concomitant of such commodity. *Erie R. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226.

The state cannot accomplish by indirect methods what it is forbidden to do directly. *People v. Raymond*, 34 Cal. 492; *State v. North*, 27 Mo. 464; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Brown v. Maryland*, 12 Wheat. (U. S.) 417; *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Passenger Cases*, 7 How. (U. S.) 283.

3. *Baltimore*, etc., R. Co. v. *Maryland*, 21 Wall. (U. S.) 456; *State v. Baltimore*, etc., R. Co., 34 Md. 344; *Com. v. Erie R. Co. (Tonnage Tax Cases)*, 62 Pa. St. 286; 1 Am. Rep.

399; *Blake v. Winona*, etc., R. Co., 19 Minn. 418; 18 Am. Rep. 345. And see *People v. Wemple*, 117 N. Y. 136.

4. *Wilson v. Kansas City*, etc., R. Co., 60 Mo. 184; *Sears v. Warren County*, 36 Ind. 267; 10 Am. Rep. 62; *Council Bluffs v. Kansas City*, etc., R. Co., 45 Iowa 338; 24 Am. Rep. 773; *Scott v. Willson*, 3 N. H. 321; *People v. Platt*, 17 Johns. (N. Y.) 195; *People v. Rensselaer*, etc., R. Co., 15 Wend. (N. Y.) 113; *Canal Com'rs v. People*, 5 Wend. (N. Y.) 448; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Hall v. De Cuir*, 95 U. S. 485; *Pennsylvania v. Wheeling*, etc., Bridge Co., 18 How. (U. S.) 432; *The Daniel Ball v. U. S.*, 10 Wall. (U. S.) 557; *U. S. v. DeWitt*, 9 Wall. (U. S.) 41; *Veazie v. Moor*, 14 How. (U. S.) 568; *License Cases*, 5 How. (U. S.) 504; *License Tax Cases*, 5 Wall. (U. S.) 462; *The Montello*, 11 Wall. (U. S.) 411; *U. S. v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 410; *Cleveland*, etc., R. Co. v. *Pennsylvania*, 15 Wall. (U. S.) 300; *Chicago*, etc., R. Co. v. *Iowa*, 94 U. S. 155; *Peik v. Chicago*, etc., R. Co., 94 U. S. 163; *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60. This rule is not affected by the fact that the commerce is carried on in the navigable waters of the *United States*. The "*Bright Star*," 1 Woolw. (U. S.) 266.

5. *Council Bluffs v. Kansas City*, etc., R. Co., 45 Iowa 338; 24 Am. Rep. 773; *St. Louis v. McCoy*, 18 Mo. 238; *St. Louis v. Boffinger*, 19 Mo. 13; *Wilson v. Kansas City*, etc., R. Co., 60 Mo. 198; *Kellogg v. The Union Co.*, 12 Conn. 7; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Kleizer v. State*, 15 Ind. 449; *New York v. Miln*, 11 Pet.

The exemption from state interference attaches when property is purchased for transportation or otherwise segregated from the mass of the property of the state, even though not actually shipped,<sup>1</sup> and continues until it has passed from the importer's hands,<sup>2</sup> or has become a part of the general property of the state by the breaking up of the original packages.<sup>3</sup>

But when the transit is delayed or interrupted for any purpose not consistent with an intent to obtain immediate transportation, it is treated as at an end for the time being, and the protection is removed.<sup>4</sup> When passengers arrive in port or at the place of destination, however, and mingle with the citizens of the state, they become subject to its laws and liable to taxation to the same extent as other persons within its jurisdiction.<sup>5</sup>

Commerce with the Indian tribes means commerce with the individuals composing the tribes,<sup>6</sup> and the power of Congress to regulate it is the same as its power to regulate commerce with foreign nations,<sup>7</sup> even though such commerce is confined within the limits of a state.<sup>8</sup> But when thus confined, the power is

(U. S.) 102; License Cases, 5 How. (U. S.) 504; Nathan v. Louisiana, 8 How. (U. S.) 82; Passenger Cases, 7 How. (U. S.) 548; Shirlock v. Alling, 93 U. S. 99; Gibbons v. Ogden, 9 Wheat. (U. S.) 1; Ouachita, etc., Packet Co. v. Aiken, 121 U. S. 444; Woodruff v. Parham, 8 Wall. (U. S.) 123; Hinson v. Lott, 8 Wall. (U. S.) 148; Munn v. Illinois, 94 U. S. 113; Com'rs of Pilotage v. Steamboat Cuba, 28 Ala. 185; State v. Steamship Constitution, 42 Cal. 578; 10 Am. Rep. 303; Wardens, etc. v. The Martha J. Ward, 14 La. Ann. 287; Vanderbilt v. Adams, 7 Cow. (N. Y.) 351; People v. Babcock, 11 Wend. (N. Y.) 586; Charleston v. Oliver, 16 S. Car. 47; Hannibal, etc., R. Co. v. Husen, 114 U. S. 622; Webber v. Virginia, 103 U. S. 344; King v. American Transp. Co., 1 Flap. (U. S.) 1; License Cases, 5 How. (U. S.) 504; *In re Wong Yung Quy*, 6 Sawyer (U. S.) 442. And see INTERSTATE COMMERCE, vol. 11, p. 552; POLICE POWER, vol. 18, p. 761.

1. Clarke v. Clarke, 3 Woods (U. S.) 408; Pardee v. Freesoil, 74 Mich. 81; Blount v. Munroe, 60 Ga. 61; Connecticut River Lumber Co. v. Columbia, 62 N. H. 286. Compare *Coe v. Errol*, 116 U. S. 517.

Thus, in *Ogilvie v. Crawford County*, 7 Fed. Rep. 745, it was held that a cargo of corn, purchased for shipment and temporarily stored at the station awaiting transportation, the purchaser intending to ship immediately, could

not be taxed. And so coal, lying in dock awaiting shipment to other states, is not taxable. *State v. Carrigan*, 39 N. J. L. 35.

2. *Brown v. Maryland*, 12 Wheat. (U. S.) 419; License Cases, 5 How. (U. S.) 504; *State v. Shapleigh*, 27 Mo. 344. And see *supra*, this title, *Export and Import Taxation*.

3. *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Welton v. Missouri*, 91 U. S. 275. And see *supra*, this title, *Export and Import Taxation*.

4. *Hardesty v. Fleming*, 57 Tex. 395; *Powell v. Madison*, 21 Ind. 335.

The property of citizens of one state sent across another state to markets in other states, which is delayed upon the road merely for separation and assortment for shipment, is not taxable in the state where the delay occurs. *State v. Engle*, 34 N. J. L. 425.

5. Passenger Cases, 7 How. (U. S.) 405; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *In re Ah Fong*, 3 Sawyer (U. S.) 145; *Blanchard v. The Martha Washington*, 1 Cliff. (U. S.) 473.

6. *U. S. v. Holliday*, 3 Wall. (U. S.) 407.

7. *U. S. v. Cisna*, 1 McLean (U. S.) 254.

Under the power to regulate commerce with the Indian tribes, Congress has power to prohibit all intercourse with them except under a license. *U. S. v. Cisna*, 1 McLean (U. S.) 254.

8. *U. S. v. Holliday*, 3 Wall. (U. S.)

limited to the regulation of commercial intercourse with such tribes of Indians as exist as a distinct community governed by their own laws and resting for their protection on the faith of treaties and laws of the *United States*.<sup>1</sup>

(2) TAXES UPON PASSENGERS.—A tax upon passengers or persons coming into<sup>2</sup> or leaving the state,<sup>3</sup> or passing through it,<sup>4</sup> or going from state to state,<sup>5</sup> is in conflict with the constitution; though a mere measure for the exclusion of immigrants, either generally or of a certain class, is a police regulation and not a regulation of commerce.<sup>6</sup> A specific tax upon passenger carriers is a tax upon the passengers.<sup>7</sup>

(3) TAXES UPON FREIGHT.—A tax upon freight which is carried or transported from state to state,<sup>8</sup> or upon freight which is carried

407; *U. S. v. Cisna*, 1 McLean (U. S.) 254.

1. *U. S. v. Bailey*, 1 McLean (U. S.) 234.

2. *Passenger Cases*, 7 How. (U. S.) 283; *Henderson v. New York*, 92 U. S. 259; *Brown v. Houston*, 114 U. S. 622; *Chy Lung v. Freeman*, 92 U. S. 275; *Smith v. Turner*, 7 How. (U. S.) 283; *Lin Sing v. Washburn*, 20 Cal. 534; *People v. Downer*, 7 Cal. 169; *State v. Steamship Constitution*, 42 Cal. 589; 10 Am. Rep. 303; *People v. Raymond*, 34 Cal. 492; *Clarke v. Philadelphia*, etc., R. Co., 4 Houst. (Del.) 158. And see "Head Money Cases," 18 Fed. Rep. 135; *Erie R. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Peik v. Chicago*, etc., R. Co., 6 Biss. (U. S.) 182.

A tax laid on all alien passengers arriving by vessel for the first time, is a burden upon foreign commerce, and the fact that an examination or inspection of the persons of such passengers is made, to see if they are good or bad, poor or rich, sane or insane, diseased or well, does not make the tax a tax to execute an inspection law. *New York v. Compagnie Generale Transatlantique*, 10 Fed. Rep. 357.

In *New York v. Miln*, 11 Pet. (U. S.) 102, it was held that persons are not the subjects of commerce; but this was expressly overruled in the later cases.

3. *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Clarke v. Philadelphia*, etc., R. Co., 4 Houst. (Del.) 158; *Council Bluffs v. Kansas City*, etc., R. Co., 45 Iowa 338; 24 Am. Rep. 773.

4. *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Passenger Cases*, 7 How. (U. S.) 283; *Pullman Southern Car. Co. v. Nolan*, 22 Fed. Rep. 276; *Pacific Coast*

*Steamship Co. v. Railroad Com'rs*, 18 Fed. Rep. 8; *Clarke v. Philadelphia*, etc., R. Co., 4 Houst. (Del.) 158.

5. *Southern Steamship Co. v. Board of Port Wardens*, 6 Wall. (U. S.) 31; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Baltimore*, etc., R. Co. v. *Maryland*, 21 Wall. (U. S.) 456; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Sweatt v. Boston*, etc., R. Co., 3 Cliff. (U. S.) 339.

6. See *Edye v. Robertson*, 112 U. S. 580; *In re Ah Fong*, 13 Am. Law. Reg. N. S. 761; *New York v. Miln*, 11 Pet. (U. S.) 102; *Henderson v. New York*, 92 U. S. 265. And see *POLICE POWER*, vol. 18, p. 739.

7. *Passenger Cases*, 7 How. (U. S.) 283; *Chy Lung v. Freeman*, 92 U. S. 275; *Henderson v. New York*, 92 U. S. 259; *Pullman Southern Car. Co. v. Nolan*, 22 Fed. Rep. 276; *People v. Downer*, 7 Cal. 169; *Clarke v. Philadelphia*, etc., R. Co., 4 Houst. (Del.) 158. And see *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *People v. Pacific Mail Steamship Co.*, 16 Fed. Rep. 344.

The requirement of a stamp to be purchased from the state and placed upon a passenger ticket is a regulation of commerce. *People v. Raymond*, 34 Cal. 492.

Congress may levy taxes upon owners of vessels bringing passengers from foreign ports into the *United States*. This prohibition applies to the states only. *Edye v. Robertson*, 112 U. S. 580.

8. *Philadelphia*, etc., R. Co. v. *Pennsylvania (State Freight Tax Case)*, 15 Wall. (U. S.) 232; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Hall v. De Cuir*, 95 U. S. 488; *Baltimore*, etc., R. Co. v. *Maryland*, 21 Wall. (U. S.) 456; *Sweatt v. Boston*, etc., R. Co., 3 Cliff. (U. S.) 339; *Council Bluffs v. Kansas*

through,<sup>1</sup> brought into,<sup>2</sup> or taken out of the state,<sup>3</sup> is void as a regulation of interstate commerce. Nor can the tax be laid upon property carried into the taxing state and then taken out again, or upon property taken out of the taxing state and then brought back.<sup>4</sup>

(4) TAXES UPON THE MEANS BY WHICH INTERSTATE COMMERCE IS TRANSACTED.—A tax upon the means by which interstate commerce is transacted is an unwarrantable interference upon the part of the state with the power of Congress to regulate commerce.<sup>5</sup> Thus, as to foreign and interstate business, telephone and telegraph

City, etc., R. Co., 45 Iowa 338; 24 Am. Rep. 773; Erie R. Co. v. State, 31 N. J. L. 531; 86 Am. Dec. 226; State v. Carrigan, 39 N. J. L. 37; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Erie R. Co. v. Pennsylvania, 15 Wall. (U. S.) 282; Wabash, etc., R. Co. v. Illinois, 118 U. S. 557; Indiana v. Pullman Palace Car Co. (U. S. 1888), 13 Am. & Eng. R. Cas. 307; Baird v. St. Louis, etc., R. Co., 41 Fed. Rep. 592; U. S. Express Co. v. Hemingway, 39 Fed. Rep. 60; Pickard v. Pullman Southern Car Co., 117 U. S. 43.

In *Brumagim v. Tillinghast*, 18 Cal. 265, it was held that a stamp tax on bills of lading for the transportation of property from any point in the state to any point without the state, is in conflict with the federal constitution.

1. Philadelphia, etc., R. Co. v. Pennsylvania (State Freight Tax Case), 15 Wall. (U. S.) 232; Howe Machine Co. v. Gage, 100 U. S. 676; Indiana v. American Express Co., 7 Biss. (U. S.) 227; State v. Engle, 34 N. J. L. 425.

In *The Daniel Ball v. U. S.*, 10 Wall. (U. S.) 557, it was held that there is no distinction between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state and a portion of the merchandise transported is destined to places in other states. See also *Ex p. Koehler*, 30 Fed. Rep. 867.

2. *Howe Machine Co. v. Gage*, 100 U. S. 676; Philadelphia, etc., R. Co. v. Pennsylvania (State Freight Tax Case), 15 Wall. (U. S.) 232; *Brown v. Houston*, 114 U. S. 622; *Erie R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 282.

3. *Almy v. California*, 24 How. (U. S.) 169; *Ogilvie v. Crawford County*, 7 Fed. Rep. 745; *Howe Machine Co. v. Gage*, 100 U. S. 676; Philadelphia, etc., R. Co. v. Pennsylvania (State Freight Tax Case), 15 Wall. (U. S.) 232; *State v. Cumberland, etc., R. Co.*, 40 Md. 22.

4. Philadelphia, etc., R. Co. v. Pennsylvania (State Freight Tax Case), 15 Wall. (U. S.) 232; *Osborne v. Mobile*, 16 Wall. (U. S.) 479; *Fargo v. Stevens*, 121 U. S. 230; *State v. Carrigan*, 39 N. J. L. 35.

In *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 205, it was held that transportation from one point to another in the state by continuous carriage, was not interstate commerce, notwithstanding that the line passed without the state at some points. See *Campbell v. Chicago, etc., R. Co.* (Iowa, 1892), 53 N. W. Rep. 351.

5. *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Welton v. Missouri*, 91 U. S. 275; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323.

Transportation is the means by which commerce is carried on. Without transportation there can be no commerce between nations or among the states. *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 338; 24 Am. Rep. 773.

States cannot tax that portion of interstate commerce which is involved in the transportation of persons and property, whatever may be the instrumentality by which it is carried on. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

Statutes imposing taxes or other restrictions upon the transmission of persons or property, or telegraphic messages from one state to another, are void, even as to that part of such transmission which may be within the state, the contract for such transmission being a unit for the entire transportation



companies are not subject to taxation,<sup>1</sup> and so of interstate railroads.<sup>2</sup>

(5) TAXES UPON PRIVILEGES, FRANCHISES, GROSS RECEIPTS, CAPITAL OF CORPORATION, ETC.—Taxes may be imposed upon franchises, occupations, and privileges, without reference to whether they are exercised wholly within or in part without the state.<sup>3</sup> But foreign or

through all the states through which it passes. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557.

1. *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 2 Wood (U. S.) 643; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Western Union Tel. Co. v. Atty. Gen'l*, 125 U. S. 530; *Leloup v. Mobile*, 127 U. S. 640; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Nev. 102; *Western Union Tel. Co. v. State*, 55 Tex. 314.

The telegraph is an instrument of commerce, and telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business. *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Nev. 102; *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *Leloup v. Mobile*, 127 U. S. 640; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39.

**Interstate Telephones.**—A telephone passing from one state to another and transacting business between points in the different states, is engaged in interstate commerce, and a telephone company will not be enjoined from transmitting messages from one state to the other because it has refused to pay taxes on business thus transacted. *In re Pennsylvania Teleph. Co.*, 48 N. J. Eq. 91.

See also INTERSTATE COMMERCE, vol. 11, p. 543; TELEGRAPHS AND TELEPHONES, vol. 25.

2. See *Philadelphia, etc., R. Co. v. Pennsylvania (State Freight Tax Case)*, 15 Wall. (U. S.) 232; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; *Gloucester Ferry Co. v.*

*Pennsylvania*, 114 U. S. 196; *Appeal Tax Court v. Pullman Palace Car Co.*, 50 Md. 452.

Congress has power to hold commerce free from state taxation, whether it is conducted by individuals or by corporations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

The cars used by a sleeping and palace car company are vehicles of transportation, and their use in receiving and delivering passengers at points widely separated is commerce. *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276.

See also INTERSTATE COMMERCE, vol. 11, p. 543; TAXATION (CORPORATE).

3. *Western Union Tel. Co. v. State*, 55 Tex. 314; *District of Columbia v. Humason*, 2 McArthur (D. C.) 162; *Com. v. Ober*, 12 Cush. (Mass.) 493; *Information v. Oliver*, 21 S. Car. 318; *Ex p. Robinson*, 12 Nev. 263; *People v. Wemple*, 117 N. Y. 136; *People v. Wemple*, 52 Hun (N. Y.) 434; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Atlantic, etc., R. Co. v. Lesueur (Arizona)*, 1888, 19 Pa. Rep. 157; *Philadelphia Contributorship, etc. v. Com.*, 98 Pa. St. 48; *Insurance Co. of N. A. v. Com.*, 87 Pa. St. 173; 33 Am. Rep. 352; *Norfolk, etc., R. Co. v. Com.*, 114 Pa. St. 256; *Howe Machine Co. v. Cage*, 9 Paxt. (Tenn.) 518; *Munn v. Illinois*, 94 U. S. 114; *Western Union Tel. Co. v. Atty. Gen'l*, 125 U. S. 530; *Philadelphia, etc., R. Co. v. Pennsylvania (State Tax on Railway Gross Receipts)*, 15 Wall. (U. S.) 284; *Society for Saving v. Coite*, 6 Wall. (U. S.) 606; *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Pacific, etc., R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 859; *Atty. Gen'l v. Western Union Tel. Co.*, 33 Fed. Rep. 129; *Osborn v. Mobile*, 16 Wall. (U. S.) 479; *Memphis, etc., R. Co. v. Nolan*, 14 Fed. Rep. 532; *Home Ins. Co. v. Augusta*, 93 U. S. 116; *Provident Institution v. Massachusetts*, 6 Wall. (U. S.) 611; *Baltimore, etc., R. Co. v. Maryland*, 21 Wall. (U. S.) 456; *Erie R. Co. v.*

interstate commerce cannot be taxed by a state under the pretext of taxing a franchise.<sup>1</sup> Where the franchise or privilege is exercised and exists because of the necessities of the foreign or interstate transactions, it cannot be taxed.<sup>2</sup> Taxes may be imposed upon avocations and employments pursued in the state not directly connected with foreign or interstate commerce.<sup>3</sup> And a citizen doing a general business within the state is subject to tax-

Pennsylvania, 21 Wall. (U. S.) 497; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

**Excessive Taxation.**—If the state should undertake by excessive taxation of a franchise or privilege to obstruct or prohibit the business of interstate commerce, the constitutional provision would apply. *Memphis, etc., R. Co. v. Nolan*, 14 Fed. Rep. 532.

1. *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Fargo v. Stephens*, 121 U. S. 230; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. Rep. 722; *State v. American Express Co.*, 7 Biss. (U. S.) 227; *State v. Pullman Palace Car Co.*, 11 Biss. (U. S.) 561; *Erie R. Co. v. State*, 31 N. J. L. 531; *State v. Delaware, etc., R. Co.*, 30 N. J. L. 473. And see *Moran v. New Orleans*, 112 U. S. 69; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 484; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *U. S. Express Co. v. Allen*, 39 Fed. Rep. 712; *Wells v. Northern Pac. R. Co.*, 23 Fed. Rep. 469; *Northern Cent. R. Co. v. Jackson*, 7 Wall. (U. S.) 262; *Com. v. Standard Oil Co.*, 12 W. N. C. (Pa.) 293.

A license tax upon tow boats running from New Orleans to the Gulf of Mexico, is an unconstitutional regulation of commerce. *Moran v. New Orleans*, 112 U. S. 69.

In *Corson v. Maryland*, 120 U. S. 502, it was held that an act requiring any one not the grower, maker, or manufacturer, selling goods within the state, to pay a license tax proportionate to the amount of stock in trade, whether situated within the state or out of it, is a regulation of commerce, and invalid as to persons living outside the state and selling by sample within it.

2. *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *McCall v. California*, 136 U. S. 104; *Asher v.*

*Texas*, 128 U. S. 129; *Crutcher v. Kentucky*, 141 U. S. 47; *Leloup v. Mobile*, 127 U. S. 640; *State v. Central Pac. R. Co.*, 127 U. S. 1; *In re Houston*, 47 Fed. Rep. 539; *Harmon v. Chicago* (Ill. 1891), 26 N. E. Rep. 697; *In re Hennick*, 5 Mackey (D. C.) 489. And see *Stoutenburgh v. Hennick*, 129 U. S. 141; *In re Flinn*, 57 Fed. Rep. 496.

A railroad which is a link in a through line of road by which passengers and freight are carried into the state from other states, and from that state to other states, is engaged in the business of interstate commerce and cannot be taxed by the state for the privilege of maintaining an office in it. *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114.

An agency of a corporation engaged in interstate commerce, established within a state for the purpose of assisting in such commerce, is not taxable by the state, even though it may not be essential to the carrying on of the commerce. *McCall v. California*, 136 U. S. 104.

A railroad company whose only business within the state is the discharging of freight and passengers brought over its line from other states, and the receiving of freight and passengers to be sent over its line, and maintaining the necessary terminal facilities and the employment of the necessary assistance for that purpose, cannot be subjected to a tax on its corporate franchises and business in that state, such business being interstate commerce. *People v. Wemple*, 138 N. Y. 1.

3. *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *Hynes v. Briggs*, 41 Fed. Rep. 468; *Ex p. Hanson*, 28 Fed. Rep. 127; *Pembina, etc., Min., etc., Co. v. Pennsylvania*, 125 U. S. 181; *State v. Emert*, 103 Mo. 241; 34 Am. & Eng. Corp. Cas. 168; 23 Am. St. Rep. 874; *Ex p. Asher*, 23 Tex. App. 662; *Ex p.*

ation therein, whether the business relates to interstate commerce or not;<sup>1</sup> but when the business itself is without the state, it cannot be taxed, even though it is effected and consummated through the employment of agencies within the state.<sup>2</sup> So taxes on gross receipts imposed alike upon all of a class were upheld by the earlier decisions, even though such receipts were derived in part from interstate transportation, such tax being regarded as a tax on a franchise; and net earnings were held taxable by state authority,

Butin, 28 Tex. App. 304; Stoutenburgh v. Hennick, 129 U. S. 141; Pullman Car Co. v. Pennsylvania, 141 U. S. 18; Howe Machine Co. v. Gage, 100 U. S. 676; State v. Wessell, 109 N. Car. 735; Titusville v. Brennan, 143 Pa. St. 642; State v. Richards, 32 W. Va. 348; People v. Wemple, 61 Hun (N. Y.) 53; Insurance Co. of N. A. v. Com., 87 Pa. St. 173; 30 Am. Rep. 352; Paul v. Virginia, 8 Wall. (U. S.) 183; Ducat v. Chicago, 10 Wall. (U. S.) 410; List v. Pennsylvania, 1 Interstate Com. Rep. 784.

When a local business is done, local regulations must be complied with. Wells v. Northern Pac. R. Co., 23 Fed. Rep. 469.

The fact that produce in which a retailer deals was produced in another state, and was never in the taxing district until carried there for delivery to customers, does not prevent the imposition of a tax upon the business in such district. Davis v. Macon, 64 Ga. 128; 37 Am. Rep. 60.

A tax upon purchases and sales does not violate the constitutional provision, even though some of the purchases are made without the state, the occupation taxed being entirely within it. State v. French, 109 N. Car. 722; State v. Stevenson, 109 N. Car. 730; *Ex p.* Brown, 48 Fed. Rep. 435.

In Nathan v. Louisiana, 8 How. (U. S.) 73, it was held that a state law imposing a tax on money and exchange brokers who deal entirely in the purchase and sale of foreign bills of exchange, is not in conflict with the constitutional power of Congress to regulate commerce, the broker not being engaged in commerce, but rather in supplying an instrument of commerce.

A foreign corporation, seeking to do a business within a state, which does not fall within the regulating power of Congress, must comply with all the conditions imposed upon it by the legislation of that state. Crutcher v. Kentucky, 141 U. S. 47; Liverpool, etc., L.

& F. Ins. Co. v. Oliver, 10 Wall. (U. S.) 566.

**Insurance.**—The business of insurance is not commerce. Liverpool, etc., L. & F. Ins. Co. v. Oliver, 10 Wall. (U. S.) 566.

**Mercantile agencies** are not such legitimate or useful agencies of commerce as to put them exclusively within the regulating power of the federal government over commerce. State v. Morgan (S. Dak. 1891), 48 N. W. Rep. 314.

1. Ficklen v. Shelby County Taxing Dist., 145 U. S. 1; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Singer Mfg. Co. v. Wright, 33 Fed. Rep. 121; Hynes v. Briggs, 41 Fed. Rep. 468; State v. Emert, 103 Mo. 241; 34 Am. & Eng. Corp. Cas. 168; 23 Am. St. Rep. 874; Com. v. Gardner, 133 Pa. St. 284; 19 Am. St. Rep. 645. And see Biddle v. Com., 13 S. & R. (Pa.) 405; Mt. Pleasant v. Clutch, 6 Iowa 546; Sears v. Warren County, 36 Ind. 267; 10 Am. Rep. 62; People v. Coleman, 4 Cal. 46; 60 Am. Dec. 581; State v. Pinckney, 10 Rich. (S. Car.) 474; Seymour v. State, 51 Ala. 52; *In re* Rudolph, 2 Fed. Rep. 65.

If the goods had been previously sent into the state, a license fee required for the privilege of selling them is not a tax upon commerce. State v. Emert, 103 Mo. 241; 34 Am. & Eng. Corp. Cas. 168; 23 Am. St. Rep. 874.

City ordinances imposing a tax upon the business of a telegraph company within the state, which expressly exempts from its operation interstate and governmental business, are valid. Western Union Tel. Co. v. Charleston, 56 Fed. Rep. 419.

2. See Overton v. State, 70 Miss. 558; Richardson v. State (Miss. 1892), 11 So. Rep. 934; Fort Scott v. Pelton, 39 Kan. 764; State v. Agee, 83 Ala. 110; *Ex p.* Murray, 93 Ala. 78; *Ex p.* Resenblatt, 19 Nev. 439; State v. Bracco, 103 N. Car. 349; Martin v. Rosedale Tp., 130 Ind. 109; Hurford v. State, 91 Tenn. 669; Simmons Hardware Co. v.

without inquiry as to their sources.<sup>1</sup> But the rule seems to be well settled by the later authorities that state taxes upon the gross receipts derived from carriage or transportation into, out of, or through the state are within the prohibition of the constitution,<sup>2</sup> and that only such gross receipts can be taxed as are wholly earned within the state.<sup>3</sup> It is not competent for a state to tax receipts of a business engaged in by persons or corporations

McGuire, 39 La. Ann. 848; *Bloomington v. Bourland*, 137 Ill. 534; *Asher v. Texas*, 128 U. S. 129; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60; *U. S. Express Co. v. Allen*, 39 Fed. Rep. 712; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *Ex p. Stockton*, 33 Fed. Rep. 95; *In re White*, 43 Fed. Rep. 913; *In re Nichols*, 48 Fed. Rep. 164; *In re Tyerman*, 48 Fed. Rep. 167; *In re Spain*, 47 Fed. Rep. 208; *In re Rozelle*, 57 Fed. Rep. 155; *In re Kimmel*, 41 Fed. Rep. 775.

But it would be good so far as it applied to business wholly within the state. *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60; *Rothermel v. Meyerle*, 136 Pa. St. 250.

If the person whose business is taxed is merely the representative of the importer, the tax is invalid. *Lyng v. Michigan*, 135 U. S. 161.

A tax upon all drummers, so far as it applies to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state, is a regulation of commerce. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489. And see cases above cited.

1. *Philadelphia, etc., R. Co. v. Pennsylvania (State Tax on Railway Gross Receipts)*, 15 Wall. (U. S.) 284; *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206; *Indiana v. American Express Co.*, 7 Biss. (U. S.) 230; *People v. Wemple*, 52 Hun (N. Y.) 434; *American Union Express Co. v. St. Joseph*, 66 Mo. 675; 27 Am. Rep. 582; *Western Union Tel. Co. v. Com.*, 110 Pa. St. 405; *Columbia Conduit Co. v. Com.*, 90 Pa. St. 307; *Pullman's Palace Car Co. v. Com.*, 107 Pa. St. 156; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361; 24 Am. Rep. 511; *Walcott v. People*, 17 Mich. 68; *Southern Express Co. v. Hood*, 15 Rich. (S. Car.) 66; 94 Am. Dec. 141; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196;

*Western Union Tel. Co. v. State Board*, 80 Ala. 273; 60 Am. Rep. 99; *Kneeland v. Milwaukee*, 15 Wis. 454; *Insurance Co. of N. A. v. Com.*, 87 Pa. St. 173; 30 Am. Rep. 352; *Buffalo, etc., R. Co. v. Com.*, 3 Brew. (Pa.) 387; *Society for Savings v. Coite*, 6 Wall. (U. S.) 594; *Provident Institution v. Massachusetts*, 6 Wall. (U. S.) 611.

**Gross Sales.**—A tax on gross sales is not unconstitutional. *Waring v. Mobile*, 8 Wall. (U. S.) 110.

2. *Fargo v. Stevens*, 121 U. S. 230; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Indiana v. Woodruff Sleeping, etc., Coach Co.*, 1 Interstate Com. Rep. 798; *Western Union Tel. Co. v. Alabama*, 132 U. S. 472; *Western Union Tel. Co. v. Atty. Gen'l*, 125 U. S. 530; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Mobile*, 127 U. S. 640; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *Indiana v. American Express Co.*, 7 Biss. (U. S.) 227; *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155; 33 Am. & Eng. R. Cas. 476; *Delaware, etc., R. Co. v. Com.* (Pa. 1888), 17 Atl. Rep. 175; *State Treasurer v. Auditor Gen'l*, 46 Mich. 324; 13 Am. & Eng. R. Cas. 296.

This is so, even though the franchise of the company engaging in such commerce was derived from the state. *Com. v. Lehigh Valley R. Co.* (Pa. 1888), 17 Atl. Rep. 179.

3. *State v. Baltimore, etc., R. Co.*, 48 Md. 49; *People v. Wabash, etc., R. Co.*, 104 Ill. 476; *People v. Wemple*, 52 Hun (N. Y.) 434; *Delaware, etc., Canal Co. v. Com.* (Pa. 1888), 17 Atl. Rep. 175; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472; *Ratterman v. Western Union Tel. Co.*, 127 U. S.

not within its jurisdiction which are not received nor garnered and ascertained within the state.<sup>1</sup> But when the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the power to tax that which is wholly internal will be upheld.<sup>2</sup> And taxes upon franchises and privileges, measured by gross receipts,<sup>3</sup> or by the amount of capital stock, without regard to its character or the manner in which it is employed,<sup>4</sup> are valid.

411; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60; *Indiana v. American Express Co.*, 7 Biss. (U. S.) 227. And they must be receipts derived under franchises granted by the state taxing them. *State v. Baltimore, etc., R. Co.*, 48 Md. 49.

1. *Indiana v. Pullman Palace Car Co.*, 11 Biss. (U. S.) 561; *Indiana v. American Express Co.*, 7 Biss. (U. S.) 227. And see *Cleveland, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 300; *Northern Cent. R. Co. v. Jackson*, 7 Wall. (U. S.) 262; *Delaware R. Tax Case*, 18 Wall. (U. S.) 229; *People v. Eastman*, 25 Cal. 603; *Forsman v. Byrns*, 68 Ind. 247; *Herron v. Keeran*, 59 Ind. 472; 26 Am. Rep. 87; *Evansville v. Hall*, 14 Ind. 27; *State v. Woodruff, etc., Coach Co.*, 114 Ind. 155; 33 Am. & Eng. R. Cas. 476; *Davenport v. Mississippi, etc., R. Co.*, 12 Iowa 539; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268.

This rule applies to taxation of receipts derived under franchises not granted by the taxing state. *State v. Baltimore, etc., R. Co.*, 48 Md. 49.

2. *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Pacific Express Co. v. Seibert*, 44 Fed. Rep. 310; 142 U. S. 339; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472; *State v. Pullman's Palace Car Co.*, 64 Wis. 89. And see *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39.

3. *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *Philadelphia, etc., Mail Steamship Co. v. Com.*, 104 Pa. St. 109. And see *Western Union Tel. Co. v. State Board of Assessment*, 80 Ala. 273; 60 Am. Rep. 99; *State v. State Board of Assessment* (S. Dak. 1892), 53 N. W. Rep. 192; *Pullman's Palace Car Co. v. Com.*, 107 Pa. St. 148.

There is no constitutional objection in the way of the legislative body prescribing any mode of measurement it

may see fit in order to determine the amount it will charge for the privileges it bestows. *Home Ins. Co. v. New York*, 134 U. S. 594; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *Horn Silver Min. Co. v. New York*, 143 U. S. 305.

A franchise or privilege tax measured by the amount of gross receipts within the state as compared with those without it, is valid. See *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; 48 Am. & Eng. R. Cas. 602; *Atty. Gen'l v. Western Union Tel. Co.*, 23 Fed. Rep. 129; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 46 Am. & Eng. R. Cas. 236; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *State v. Housatonic R. Co.*, 48 Conn. 44; *State v. New York, etc., R. Co.*, 60 Conn. 326; *State v. Pullman's Palace Car Co.*, 64 Wis. 89; *State Treasurer v. Auditor Gen'l*, 46 Mich. 224; 13 Am. & Eng. R. Cas. 296; *Chicago, etc., R. Co. v. Auditor Gen'l*, 53 Mich. 79; *People v. Wemple*, 131 N. Y. 64; *Buffalo, etc., R. Co. v. Com.*, 3 Brew. (Pa.) 386; *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310, 395; *Northern Pac. R. Co. v. Brewer*, 2 N. Dak. 396; *State v. Morgan* (S. Dak. 1891), 48 N. W. Rep. 314. But see *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1; 46 Am. & Eng. R. Cas. 346; *State v. U. S., etc., Express Co.*, 60 N. H. 219.

4. *People v. Campbell*, 70 Hun (N. Y.) 507; (*Supreme Ct.*) 24 N. Y. Supp. 212. And see *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. L. 378. But see *Corson v. Maryland*, 120 U. S. 502.

A tax imposed upon all corporations doing business in the state, proportionate to the total amount of their stock, without regard to the manner of its employment and without reference to the character or amount of business done, is purely a franchise tax, and cannot be considered as a tax upon

(6) DIRECT TAXATION UPON PROPERTY AS SUCH.—The vehicles of commerce may be taxed as property, however, with the rest of the property of a state.<sup>1</sup> The prohibition of the constitution applies only when they are taxed in a manner different from the property of the citizens of the state in general,<sup>2</sup> or as instruments of trade.<sup>3</sup>

A tax on property which has been or may be the subject of commerce, where it is taxed as property, in common with other property within the state, is not a tax on commerce.<sup>4</sup> Neither is a tax upon capital within the jurisdiction of the taxing power

interstate commerce, even as applied to corporations engaged in such commerce. *Horn Silver Min. Co. v. People*, 143 U. S. 305.

The capital stock of a corporation engaged in interstate commerce may be taxed by taking as a basis of the assessment such proportion of the capital stock of the company as the length of its line within the state bears to the length of its line in other states. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 46 Am. & Eng. R. Cas. 236; *Delaware R. Tax Case*, 18 Wall. (U. S.) 206; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 497; *State Railroad Tax Cases*, 92 U. S. 575; *Atty. Gen'l v. Western Union Tel. Co.*, 141 U. S. 40; *State Treasurer v. Auditor Gen'l*, 46 Mich. 224; 13 Am. & Eng. R. Cas. 296. And see *Pullman Palace Car Co. v. Board of Assessors*, 55 Fed. Rep. 206.

The same rule has been applied to taxes on interest upon loans, *Buffalo, etc.*, R. Co. v. Com., 3 Brew. (Pa.) 386; and to taxes upon rolling stock. *Richmond, etc.*, R. Co. v. *Alamance*, 84 N. Car. 509; 7 Am. & Eng. R. Cas. 238.

In *Com. v. Smith*, 92 Ky. 38, an act imposing a license tax upon express companies of \$500 or \$1,000 per annum, according to whether the line over which they operate is less or more than 100 miles in length, was held to be a regulation of interstate commerce because it lays an imposition upon the business of the company rather than upon their property.

1. *Leloup v. Mobile*, 127 U. S. 640; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Western Union Tel. Co. v. Atty. Gen'l*, 125 U. S. 530; *Minot v. Philadelphia, etc.*, R. Co., 18 Wall. (U. S.) 206; *Moran v. New Orleans*, 112 U. S. 69; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Delaware R. Tax Case*, 18 Wall. (U. S.) 206; *Gloucester Ferry*

*Co. v. Pennsylvania*, 114 U. S. 196; *Nathan v. Louisiana*, 8 How. (U. S.) 82; *Morgan v. Parham*, 16 Wall. (U. S.) 475; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *People v. Tax Com'rs*, 48 Barb. (N. Y.) 157; *affirmed*, 58 N. Y. 242; *Irvin v. New Orleans, etc.*, R. Co., 94 Ill. 105; *People v. Tirney*, 57 Hun (N. Y.) 357; *Gunther v. Baltimore*, 55 Md. 459; *Camden v. Haymond*, 9 W. Va. 680; *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587; *Cleveland, etc.*, R. Co. v. *Backus*, 133 Ind. 513; *Indianapolis, etc.*, R. Co. v. *Backus*, 133 Ind. 609; and see *Erie County v. Erie, etc.*, *Transp. Co.*, 87 Pa. St. 434; *Marye v. Baltimore, etc.*, R. Co., 127 U. S. 117; *Atty. Gen'l v. Western Union Tel. Co.*, 33 Fed. Rep. 127.

A railroad bridge within the limits of a city may be taxed by it; and such taxation is not a regulation of interstate commerce or the taxation of an agency of the federal government, even though the bridge is used for the transportation of such commerce. *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679.

2. *Wheeling, etc.*, *Transp. Co. v. Wheeling*, 99 U. S. 284; *Walling v. Michigan*, 116 U. S. 446; *Jackson Min. Co. v. Auditor Gen'l*, 32 Mich. 488; *Johnson v. Drummond*, 20 Gratt. (Va.) 419.

3. *Howell v. State*, 3 Gill. (Md.) 14; *People v. Wemple*, 131 N. Y. 64; *Perry v. Torrence*, 8 Ohio 522; *Cox v. Lott (State Tonnage Tax Cases)*, 12 Wall. (U. S.) 204; *Passenger Cases*, 7 How. (U. S.) 283; *Sinnot v. Davenport*, 22 How. (U. S.) 227. And see *Northern Pac. R. Co. v. Raymond*, 5 Dakota 356.

4. *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *License Cases*, 5 How. (U. S.) 504; *Pervear v. Com.*, 5 Wall. (U. S.) 475; *Waring v. Mobile*, 8 Wall. (U. S.)

invalid because the capital is invested in commerce.<sup>1</sup> A tax on the capital of a corporation engaged in interstate commerce, proportionate to the property of the corporation within the state, is a tax upon the property and is not unconstitutional.<sup>2</sup> Tolls charged for the use of improvements whereby transportation is facilitated, are not taxes upon commerce within the constitutional prohibition.<sup>3</sup>

Where the subject has no taxable *situs* within the state and comes within its jurisdiction only for the purpose of carrying on interstate commerce, it cannot be reached.<sup>4</sup> And the unconstitutionality of a statute imposing a tax upon commerce is not cured by including in its provisions subjects within the jurisdiction of the state,<sup>5</sup> nor by the fact that there is no discrimination between

110; *Hayes v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *Brown v. Houston*, 114 U. S. 622; *Howe Machine Co. v. Gage*, 100 U. S. 676; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Corson River, etc., Co. v. Patterson*, 33 Cal. 334; *In re Wilson*, 19 D. C. 341; *Brown v. Houston*, 33 La. Ann. 843; *Pittsburgh, etc., Coal Co. v. Bates*, 40 La. Ann. 226; 8 Am. St. Rep. 519; *State v. Emert*, 103 Mo. 241; 34 Am. & Eng. Corp. Cas. 168; 23 Am. St. Rep. 874.

1. *People v. Tax Com'rs*, 104 U. S. 466; *License Cases*, 5 How. (U. S.) 504; *Philadelphia, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 284; *Union Tow Boat Co. v. Bordelon*, 7 La. Ann. 195; *Howell v. State*, 3 Gill (Md.) 14; *Jackson v. State*, 15 Ohio 652; *State v. Charleston*, 4 Rich. (S. Car.) 286; *Berney v. Tax Collector*, 2 Bailey (S. Car.) 654. And see *Waring v. Mobile*, 8 Wall. (U. S.) 110; *State v. Pinckney*, 10 Rich. (S. Car.) 474.

2. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Western Union Tel. Co. v. Atty. Gen'l*, 125 U. S. 530; *Delaware R. Tax Case*, 18 Wall. (U. S.) 206.

3. *Benjamin v. Manistee River Imp. Co.*, 42 Mich. 628; *Weimer v. Porter*, 42 Mich. 569; *Harmon v. Chicago*, 140 Ill. 374; *Kellogg v. The Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500; 46 Am. Rep. 332; *Worsley v. Second Municipality*, 9 Rob. (La.) 324; 41 Am. Dec. 333; *McReynolds v. Smallhouse*, 8 Bush. (Ky.) 447; *Wisconsin River Imp. Co. v. Manson*, 43 Wis. 255; 28 Am. Rep. 542; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Keokuk Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union*

*Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Huse v. Glover*, 15 Fed. Rep. 292; *Palmer v. Cuyahoga County*, 3 McLean (U. S.) 226; *Wellamet Iron Bridge Co. v. Hatch*, 19 Fed. Rep. 347.

Thus, a city owning a wharf situated upon a navigable river, may exact charges for its use by vessels. *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Leathers v. Aiken*, 9 Fed. Rep. 679.

4. *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502; *Alabama v. Agee*, 2 Interstate Com. Rep. 21; *Crutcher v. Kentucky*, 171 U. S. 47; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51; *Walling v. Michigan*, 116 U. S. 446; *In re Hennick*, 5 Mackey (D. C.) 489; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Bain v. Richmond, etc., R. Co.*, 105 N. Car. 363; *State v. Pratt*, 59 Vt. 590; and see *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 125; *Appeal Tax Court v. Pullman Palace Car Co.*, 50 Md. 452. But see *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587.

The capital stock of a ferry company incorporated in one state and engaged in the transportation of persons and property between that state and another, is not subject to taxation in the latter state. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

5. *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Crut-*

it and domestic commerce.<sup>1</sup> But these rules do not apply to the taxation of the property engaged in commerce or capital stock representing it, even though owned by a non-resident or a foreign corporation, if it has acquired a *situs* for taxation within the jurisdiction.<sup>2</sup>

(c) **Equal Privileges and Immunities.**—The clauses of the federal constitution which provide that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states,<sup>3</sup> and which prohibit each state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the *United States*,<sup>4</sup> and from denying to any person within its jurisdiction the equal protection of the laws,<sup>5</sup> constitute a limitation upon the powers of the states, and, among others, upon the power to tax.<sup>6</sup>

*cher v. Com.*, 141 U. S. 47; *Walling v. Michigan*, 116 U. S. 446; *Philadelphia, etc., R. Co. v. Pennsylvania* (State Freight Tax Case), 15 Wall. (U. S.) 232. And see *Corson v. Maryland*, 120 U. S. 502.

A law imposing a tax on persons selling goods to be shipped into the state from places outside of it, is an unconstitutional regulation on commerce between the states, and it is not divested of its unconstitutionality by a subsequent enactment imposing a similar tax upon like sales of the products of the state. *Walling v. Michigan*, 116 U. S. 446.

1. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Brimmer v. Rebman*, 138 U. S. 78; *In re Rebman*, 41 Fed. Rep. 867; *Minnesota v. Barber*, 136 U. S. 313. And see *Asher v. State*, 128 U. S. 129; *Ex p. Murray*, 93 Ala. 78.

2. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 46 Am. & Eng. R. Cas. 236; *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117; *Com. v. Gloucester Ferry Co.*, 98 Pa. St. 105; *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 658; *Leloup v. Mobile*, 127 U. S. 640; *Pullman Palace Car Co. v. Hayward*, 141 U. S. 36; *Denver, etc., R. Co. v. Church*, 17 Colo. 1; *People v. Tierney*, 57 Hun (N. Y.) 357. And see *New York, etc., R. Co. v. Com.* (Pa. 1889), 18 Atl. Rep. 412; *Pullman Palace Car Co. v. Board of Assessors*, 55 Fed. Rep. 206. But see *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1.

This is the rule, even though the property consists of cars which pass from state to state. *Denver, etc., R. Co. v. Church*, 17 Colo. 1.

A tax upon tolls paid by one railroad

for the use of another which lies wholly within the state, is not a tax on interstate commerce by reason of the fact that the road paying the tolls is engaged in interstate commerce transportation, and that it is for the use of such transportation that the tolls are paid. *Com. v. New York, etc., R. Co.* (Pa. 1891), 22 Atl. Rep. 212.

**Sleeping Cars** and other rolling stock on railways may be taxed where they are used, although the owner thereof resides in another state. *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18. See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Hayes v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 431; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

Where sleeping cars belonging to a foreign corporation, are run wholly within the state, the business may be taxed as a privilege. *Gibson County v. Pullman Southern Car Co.*, 42 Fed. Rep. 572. And see *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472. Such a tax is an occupation tax and not a tax on property. *Pullman Palace Car Co. v. State*, 64 Tex. 274; 53 Am. Rep. 758.

3. Const. U. S., art. 4, § 2, par. 1. See *CITIZENSHIP*, vol. 3, p. 252; *CONSTITUTIONAL LAW*, vol. 3, p. 677.

4. Const. U. S., 14th Amendment, § 1.

5. Const. U. S., 14th Amendment, § 1.

6. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 17 Am. & Eng. R. Cas. 365; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *San Mateo v. Southern Pac. R. Co.*, 13 Fed. Rep. 722. And see *San Francisco, etc., R. Co. v. Dinwiddie*, 8 Sawy. (U. S.) 312.



All taxes or duties levied either directly or indirectly by a state upon goods imported from a sister state,<sup>1</sup> or which discriminate in favor of the products of the state imposing the tax,<sup>2</sup> or which impose a heavier burden upon citizens of other states than that imposed upon the citizens of the state levying them,<sup>3</sup> are repugnant to these provisions, and are likewise void as constituting a regulation of interstate commerce.<sup>4</sup> And taxes or license charges upon business or privileges imposed upon traders from other states are included within the prohibition, as well as taxes upon property,<sup>5</sup> and the fact that Congress has not seen fit to legislate on the subject is immaterial.<sup>6</sup>

1. *Ward v. Maryland*, 12 Wall. (U. S.) 418; *License Cases*, 5 How. (U. S.) 504; *Guy v. Baltimore*, 100 U. S. 434; *Welton v. Missouri*, 91 U. S. 275; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Robbins v. Shelby County*, 120 U. S. 489; *State v. North*, 27 Mo. 464; *State v. Wiggins*, 54 N. H. 508; *Davis v. Dashiell, Phil. (N. Car.)* 114; *Van Buren v. Downing*, 41 Wis. 122. Compare *People v. Coleman*, 4 Cal. 46.

The exaction by a state of wharfage from foreign vessels other than that exacted from its own, is unconstitutional. *Guy v. Baltimore*, 100 U. S. 434; *The John M. Welsh*, 18 Blatchf. (U. S.) 54.

2. *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Welton v. Missouri*, 91 U. S. 275; *Cook v. Pennsylvania*, 97 U. S. 566; *Williams v. Bruffy*, 96 U. S. 183; *Gibson Co. v. Pullman Southern Car Co.*, 42 Fed. Rep. 572; *Ex p. Stockton*, 33 Fed. Rep. 95; *Webber v. Virginia*, 103 U. S. 344; *Osborn v. Mobile*, 16 Wall. (U. S.) 482; *Ex p. Thornton*, 4 Hughes (U. S.) 220; *Tiernan v. Rinker*, 102 U. S. 123; *Wiley v. Parmer*, 14 Ala. 627; *Vines v. State*, 67 Ala. 73; *State v. McGinnis*, 37 Ark. 362; *State v. North*, 27 Mo. 464; *State v. Browning*, 62 Mo. 591; *Ex p. Rollins*, 80 Va. 314; *Ex p. Thomas*, 71 Cal. 204; *State v. Furbush*, 72 Me. 493; *Lemmon v. People*, 20 N. Y. 608; *Fire Department v. Wright*, 3 E. D. Smith (N. Y.) 474; *Rodgers v. McCoy*, 6 Dakota 230; *Marshalltown v. Blum*, 58 Iowa 184; *Fecheimer v. Louisville*, 84 Ky. 306; *Joyce v. Woods*, 78 Ky. 386; *State v. Browning*, 62 Mo. 591; *Higgins v. Rinker*, 47 Tex. 381. And see *Ex p. Hanson*, 28 Fed. Rep. 129; *Philadelphia, etc., R. Co. v. Pennsylvania*, 15

Wall. (U. S.) 232; *Battle v. Mobile*, 9 Ala. 234; *McGuire v. Parker*, 32 La. Ann. 832; *Merchants v. Memphis*, 9 Baxt. (Tenn.) 76.

**Extent of the Invalidity.**—A statute which discriminates against the products of another state in the imposition of a tax, is invalid and inoperative only so far as it discriminates. *Tiernan v. Rinker*, 102 U. S. 123.

3. *Tiernan v. Rinker*, 102 U. S. 123; *Cook v. Pennsylvania*, 97 U. S. 566; *Guy v. Baltimore*, 100 U. S. 434; *Moran v. New Orleans*, 112 U. S. 69; *Webber v. Virginia*, 103 U. S. 344; *In re Watson*, 15 Fed. Rep. 511; *Pierce v. State*, 13 N. H. 536; *Bliss' Petition*, 63 N. H. 135; *State v. Lancaster*, 63 N. H. 267; *Wiley v. Parmer*, 14 Ala. 627; *Vines v. State*, 67 Ala. 73; *Crandall v. State*, 10 Conn. 339; *McGuire v. Parker*, 32 La. Ann. 832; *Pacific Junction v. Dyer*, 64 Iowa 38; *Marshalltown v. Blum*, 58 Iowa 184; *Chapman v. Miller*, 2 Spears (S. Car.) 769; *State v. Pratt*, 59 Vt. 590; *Fecheimer v. Louisville*, 84 Ky. 306. But see *Davis v. Dashiell, Phil. (N. Car.)* 114.

4. See *supra*, this title, *Regulation of Commerce*.

5. *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Brown v. Maryland*, 12 Wheat. (U. S.) 444; *The J. M. Welsh*, 18 Blatchf. (U. S.) 54; *Ex p. Hanson*, 28 Fed. Rep. 127; *Welton v. Missouri*, 91 U. S. 275; *Fletcher v. Oliver*, 25 Ark. 289; *Vines v. State*, 67 Ala. 73; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *State v. North*, 27 Mo. 464; *State v. Browning*, 62 Mo. 591; *People v. Maring*, 3 Keyes (N. Y.) 374; *Higgins v. Rinker*, 47 Tex. 381. And see *License Cases*, 5 How. (U. S.) 504; *District of Columbia v. Humason*, 2 MacArthur (D. C.) 162; *State v. Wiggins*, 54 N. H. 508; *Marshalltown v. Blum*, 58 Iowa 184.

6. *Welton v. Missouri*, 91 U. S. 275; *Ward v. Maryland*, 12 Wall. (U. S.) 418.

The effect of these provisions upon the taxation of foreign corporations has been dealt with elsewhere.<sup>1</sup> The federal constitution does not exempt the citizens of other states, or of the *United States*, from any condition which the law of the state imposes upon its own citizens.<sup>2</sup> And state taxes upon the property or business of a non-resident within the state,<sup>3</sup> and license impositions for the privilege of carrying on business within the state,<sup>4</sup> may be imposed upon him to the same extent as upon citizens of the state; it is only where a greater burden is imposed that the prohibition applies.<sup>5</sup> Nor is a tax upon a business ex-

1. FOREIGN CORPORATIONS, vol. 8, p. 329; TAXATION (CORPORATE), vol. 25.

2. *Com. v. Milton*, 12 B. Mon. (Ky.) 212; *Jackson v. Bulloch*, 12 Conn. 38; *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 581; *Lemmon v. People*, 20 N. Y. 607; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Woodruff v. Parham*, 8 Wall. (U. S.) 122; *Ex p. Thornton*, 12 Fed. Rep. 538. And see *Cole v. Randolph*, 31 La. Ann. 535; *Sledd v. Com.*, 19 Gratt. (Ga.) 819.

Statutes requiring the taxation of certain property, without allowing for mortgage or other liens thereon, do not conflict with the provisions of the federal constitution forbidding states to pass laws abridging the privileges or immunities of citizens of the *United States*. *Central Pac. R. Co. v. Board of Equalization*, 60 Cal. 35.

3. *Howe Machine Co. v. Gage*, 100 U. S. 676; *Duer v. Small*, 4 Blatchf. (U. S.) 263; *Tiernan v. Rinker*, 102 U. S. 123; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 124; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Delaware Railroad Tax*, 18 Wall. (U. S.) 232; *Nathan v. Louisiana*, 8 How. (U. S.) 73; *Battle v. Mobile*, 9 Ala. 234; *Osborne v. Mobile*, 44 Ala. 493; *Fargo v. Auditor Gen'l*, 57 Mich. 598; 22 Am. & Eng. R. Cas. 217; *Weaver v. State*, 89 Ga. 639; *Ex p. Robinson*, 12 Nev. 263; *Com. v. Milton*, 12 B. Mon. (Ky.) 218; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587; *People v. Brooks*, 4 Den. (N. Y.) 469.

In *Padelford v. Savannah*, 14 Ga. 438, it was held that an ordinance imposing a tax of a certain sum upon every hundred dollars of the amount of sales of all negroes, goods, wares and merchandise, or other commodity, within the corporate limits of the city, is not unconstitutional, even though a

large number of such sales are of goods brought from without the state.

4. *District of Columbia v. Humason*, 2 McArthur (D. C.) 162; *Ex p. Hanson*, 28 Fed. Rep. 127; *In re Rudolph*, 2 Fed. Rep. 65; *Sears v. Warren Co.*, 36 Ind. 267; *McLaughlin v. South Bend*, 126 Ind. 471; *Mt. Pleasant v. Clutch*, 6 Iowa 546; *Sacramento v. California Stage Co.*, 12 Cal. 134; *Standard Underground Cable Co. v. Atty. Gen'l*, 46 N. J. Eq. 270; *Lunt's Case*, 6 Me. 412; *State v. French*, 109 N. Car. 722; *State v. Stevenson*, 109 N. Car. 730; *Corson v. State*, 57 Md. 251; *Brown v. Houston*, 33 La. Ann. 843; *State v. Fosdick*, 21 La. Ann. 434; *Ex p. Burton*, 28 Tex. App. 304; *Hynes v. Briggs*, 41 Fed. Rep. 468; *License Cases*, 5 How. (U. S.) 504; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 124; *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Howe Machine Co. v. Gage*, 100 U. S. 676. And see *Com. v. Maury*, 82 Va. 882; *Cuthbert v. Com.*, 85 Va. 99; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 581; *State v. Long*, 95 N. Car. 582; *Titusville v. Brennan*, 143 Pa. St. 642; *Territory v. Farnsworth*, 5 Mont. 303.

5. See *Howe Machine Co. v. Gage*, 100 U. S. 676; *In re Watson*, 15 Fed. Rep. 511; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Tiernan v. Rinker*, 102 U. S. 123; *Bliss' Petition*, 63 N. H. 135; *State v. Lancaster*, 63 N. H. 267; *Gould v. Atlanta*, 55 Ga. 678; *State v. Furbush*, 72 Me. 493; *State v. North*, 27 Mo. 464; *Crow v. State*, 14 Mo. 237; *State v. Wiggins*, 64 N. H. 508; *Fire Department v. Wright*, 3 E. D. Smith (N. Y.) 478; *Simrall v. Covington* (Ky. 1890), 34 Am. & Eng. Corp. Cas. 190.

tending beyond the state unconstitutional,<sup>1</sup> nor a mere municipal charge for the use of the streets or other accommodations of a city.<sup>2</sup> These restrictions do not prevent the states from exempting property from taxation when it is devoted to public uses in which all the people are alike interested.<sup>3</sup> Nor does the requirement of a different mode of assessment of the property of nonresidents from that required for the assessment of the property of residents, necessarily amount to an unlawful discrimination.<sup>4</sup> The prohibition of the federal constitution was not intended to secure the citizen of a state against discriminations made by his own state in favor of the citizens of other states,<sup>5</sup> nor to secure one class of citizens against discriminations made between them and another class of citizens of the same state.<sup>6</sup>

(d) **Duties of Tonnage.**—The states are prohibited from levying any duty of tonnage without the consent of Congress.<sup>7</sup> Duties of tonnage are taxes or duties charged upon vessels for the privilege of entering, or loading, or lying in a port or harbor,<sup>8</sup> and are usually

1. *Osborn v. Mobile*, 16 Wall. (U. S.) 479; *Home Ins. Co. v. Augusta*, 93 U. S. 116; *Southern Express Co. v. Mobile*, 45 Ala. 404. In *Sears v. Warren County*, 36 Ind. 267, a license required to vend foreign merchandise was held to be valid. See also *People v. Coleman*, 4 Cal. 46; *Seymour v. State*, 51 Ala. 52.

2. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Philadelphia v. Postal Tel. Cable Co.*, 67 Hun (N. Y.) 21. And see *Richmond, etc., R. Co. v. Riedsville*, 101 N. Car. 404. But see *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59.

In *Philadelphia v. Western Union Tel. Co.*, 40 Fed. Rep. 615, it was held that a city cannot tax a telegraph company occupying its streets, without legislative authority, and cannot, even if authorized, tax a company engaged in interstate commerce.

3. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 17 Am. & Eng. R. Cas. 364. And see *State v. French*, 109 N. Car. 722; *State v. Stevenson*, 109 N. Car. 730; *Ex p. Brown*, 48 Fed. Rep. 435; *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310, 395; *Northern Pac. R. Co. v. Brewer*, 2 N. Dak. 396.

4. *Redd v. St. Francis County*, 17 Ark. 416; *McGuire v. Parker*, 32 La. Ann. 832; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Cincinnati, etc., R. Co. v. Kentucky*, 115 U. S. 321; *Pacific Express Co. v. Seibert*, 44 Fed. Rep. 310; *Kentucky R. Tax Cases*, 115 U. S. 321. And see *State Board of Assessors v.*

*Central R. Co.*, 48 N. J. L. 146; *Cincinnati, etc., R. Co. v. Kentucky*, 115 U. S. 321.

If the rate of taxation is the same in both cases, it is sufficient. *Hinson v. Lott*, 8 Wall. (U. S.) 148. See also *infra*, this title, *Equality and Uniformity; The Assessment*.

5. *Com. v. Griffin*, 3 B. Mon. (Ky.) 208; *Bradwell v. State*, 16 Wall. (U. S.) 136; *Slaughter House Cases*, 16 Wall. (U. S.) 36. And see *Downham v. Alexandria*, 10 Wall. (U. S.) 173.

6. *Com. v. Griffin*, 3 B. Mon. (Ky.) 208; *Bradwell v. State*, 16 Wall. (U. S.) 136. The local policy of a state government as to its own citizens is not interfered with. *Kincaid v. Francis, Cooke (Tenn.)* 49.

7. U. S. Const., art. 1, § 10, par. 2; *Cox v. Lott (State Tonnage Tax Cases)*, 12 Wall. (U. S.) 204; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Booth v. Lloyd*, 33 Fed. Rep. 593; *Ex p. Insley*, 33 Fed. Rep. 680; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 131; *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 743; *Johnson v. Drummond*, 20 Gratt. (Va.) 419.

The consent of Congress may be implied from legislation. *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 284.

8. *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Inman Steamship Co. v. Tinker*, 94 U. S. 238; *Southern Steamship Co. v. Port Wards*, 6 Wall. (U. S.) 31; *Cannon v.*

estimated by the entire internal cubic capacity or contents of the vessel, expressed in tons, as estimated and ascertained by rules of admeasurement and computation established by law.<sup>1</sup> But any imposition, whatever its form and whatever it may be called, if really and substantially a duty of tonnage, is equally within the prohibition.<sup>2</sup>

New Orleans, 20 Wall. (U. S.) 577; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80; Northwestern Union Packet Co. v. St. Louis, 4 Dill. (U. S.) 10; Aiken v. Leathers, 9 Fed. Rep. 679; Peete v. Morgan, 19 Wall. (U. S.) 581; Green v. Biddle, 8 Wheat. (U. S.) 1; Virginia v. West Virginia, 11 Wall. (U. S.) 39; Northwestern Union Packet Co. v. St. Paul, 3 Dill. (U. S.) 454; Wheeling, etc., Transp. Co. v. Wheeling, 99 U. S. 280; The North Cape, 6 Biss. (U. S.) 505; Alexander v. Wilmington, etc., R. Co., 3 Strobb. (S. Car.) 594. And see Moran v. New Orleans, 112 U. S. 69; Cole v. Johnson, 10 Daly (N. Y.) 258.

The duty of tonnage which the constitution prohibits the states from levying, is a duty or tax on a ship, as such, without regard to the residence of her owner, whether it be a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty, when a ship, as an instrument of commerce, is required to pay a duty as a condition to her being allowed to enter or depart from a port, or load or unload a cargo, either upon her tonnage, her property, or as a license to her officers or crew. The North Cape, 6 Biss. (U. S.) 505.

1. Cox v. Lott (State Tonnage Tax Cases), 12 Wall. (U. S.) 204; Peete v. Morgan, 19 Wall. (U. S.) 581; Passenger Cases, 7 How. (U. S.) 283; Inman Steamship Co. v. Tinker, 94 U. S. 238; The North Cape, 6 Biss. (U. S.) 505; Sheffield v. Parsons, 3 Stew. & P. (Ala.) 302; Alexander v. Wilmington, etc., R. Co., 3 Strobb. (S. Car.) 598; State v. Charleston, 4 Rich. (S. Car.) 289; Hackley v. Geraghty, 34 N. J. L. 332. And see John Kyle Steamboat Co. v. New Orleans, 23 Int. Rev. Rec. 19.

Duties, the amount of which is determined by comparison with the tonnage, are within the prohibition. Johnson v. Drummond, 20 Gratt. (Va.) 419. So are taxes according to towage. Wheeling, etc., Transp. Co. v. Wheeling, 9 W. Va. 178.

An imposition imposed by harbor commissioners to defray expenses on

vessels entering the port according to the "length over all" in feet, is a tonnage duty within the prohibition of the federal constitution. Harbor Com'rs v. Pashley, 19 S. Car. 315.

2. Johnson v. Drummond, 20 Gratt. (Va.) 419; Alexander v. Wilmington, etc., R. Co., 3 Strobb. (S. Car.) 598; Passenger Cases, 7 How. (U. S.) 447; Cooley v. Port Wardens, 12 How. (U. S.) 299; Northwestern Union Packet Co. v. St. Paul, 3 Dill. (U. S.) 454.

In Southern Steamship Co. v. Port Wardens, 6 Wall. (U. S.) 31, it was held that a statute which entitles the master and wardens of a port to receive certain fees, whether called upon to perform any service or not, for each vessel arriving in the port, is repugnant to the prohibition in the federal constitution against the imposition of duties of tonnage.

Wharfage fees exacted from vessels carrying products of other states, cannot be regarded as compensation for the use of property owned by the city requiring the fees; they are a mere expedient or device to build up the domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states. Guy v. Baltimore, 100 U. S. 434.

A tax upon a vessel in another state than that which contains its home port, which is lawfully engaged in interstate trade over public waters, is an interference with the commerce of the country, which is not permitted to the states. Morgan v. Parham, 16 Wall. (U. S.) 471.

In Hackley v. Geraghty, 34 N. J. L. 332, it was held that a fixed sum required to be paid by each vessel, without regard to its tonnage, is within the constitutional prohibition against duties of tonnage.

See also Wheeling, etc., Transp. Co. v. Wheeling, 99 U. S. 273; Cox v. Lott (State Tonnage Tax Cases), 12 Wall. (U. S.) 204; Booth v. Lloyd, 33 Fed. Rep. 593; Ex p. Insley, 33 Fed. Rep. 680; The North Cape, 6 Biss. (U. S.) 505; Cannon v. New Orleans, 20 Wall. (U. S.) 577; Gibbons v. Ogden,

Duties of tonnage differ from wharfage,<sup>1</sup> and from pilotage.<sup>2</sup> The fact that such impositions are graduated by the size or tonnage of the vessel, does not necessarily make them a duty of tonnage,<sup>3</sup> the mode of making a charge in either case, whether according to the size or capacity of the vessel, or otherwise, having nothing to do with its essential nature,<sup>4</sup> the test question being whether the charge is a reasonable compensation for services rendered or facilities furnished.<sup>5</sup>

9 Wheat. (U. S.) 1; *Inman Steamship Co. v. Tinker*, 94 U. S. 328.

1. *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Cooley v. Port Wardens*, 12 How. (U. S.) 299; *Ouachita, etc., Packet Co. v. Aiken*, 121 U. S. 444; 16 Fed. Rep. 890; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 84; *The Ann Ryan*, 7 Ben. (U. S.) 20; *Pelham v. Woolsey*, 16 Fed. Rep. 418; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *First Municipality v. Pease*, 2 La. Ann. 538; *Sweeney v. Otis*, 37 La. Ann. 520; *Wharf Case*, 3 Bland (Md.) 361; *State v. Charleston*, 4 Rich. (S. Car.) 286; *Sterrett v. Houston*, 14 Tex. 153.

Although wharves are related to commerce and navigation as aids and conveniences, yet, being local in their nature, requiring state regulation for particular purposes, the regulation thereof properly belongs to the state in which they are situated, in the absence of congressional legislation on the subject. *Parkersburg Transp. Co. v. Parkersburg*, 107 U. S. 691; *Ouachita, etc., Packet Co. v. Aiken*, 16 Fed. Rep. 890; *The Ann Ryan*, 7 Ben. (U. S.) 20; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Worsley v. Second Municipality*, 9 Rob. (La.) 324.

2. *Southern Steamship Co. v. Port Wardens*, 6 Wall. (U. S.) 31; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Cooley v. Port Wardens*, 12 How. (U. S.) 299; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *The Charles A. Sparks*, 16 Fed. Rep. 480. And see *State v. Penny*, 19 S. Car. 218.

3. *Parkersburg Transp. Co. v. Parkersburg*, 107 U. S. 691; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Guy v. Baltimore*, 100 U. S. 434; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Keokuk*

*Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Vicksburg v. Tobin*, 100 U. S. 430; *Lott v. Mobile Trade Co.*, 43 Ala. 578; *Lott v. Cox*, 43 Ala. 697. But see *Northwestern Union Packet Co. v. St. Paul*, 3 Dill. (U. S.) 454.

4. *Parkersburg Transp. Co. v. Parkersburg*, 107 U. S. 691; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Cooley v. Port Wardens*, 12 How. (U. S.) 299; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 84; *The Ann Ryan*, 7 Ben. (U. S.) 20; *Wharf Case*, 3 Bland (Md.) 361; *Sterrett v. Houston*, 14 Tex. 153.

Penalties imposed for a refusal to obey rules with reference to places of landing, and orders of wharf masters on the subject, are not taxes on tonnage. *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559.

5. See *Southern Steamship Co. v. Port Wardens*, 6 Wall. (U. S.) 31; *Freeman v. The Undaunted*, 37 Fed. Rep. 662; *Ouachita, etc., Packet Co. v. Aiken*, 121 U. S. 444; 11 Fed. Rep. 862; *Leathers v. Aiken*, 9 Fed. Rep. 679; *Sprague v. Thompson*, 118 U. S. 90; *Webb v. Dunn*, 18 Fla. 721; *Hackley v. Geraghty*, 34 N. J. L. 332. And see *The Ann Ryan*, 7 Ben. (U. S.) 20.

**Question of Law and Fact.**—Whether a charge is wharfage, or a duty on tonnage, is a question, not of intent, but of fact and law; of fact, whether it is imposed for the use of a wharf or for the privilege of entering a port; and of law, whether, according as the fact is, it is wharfage or a duty on tonnage. *Parkersburg Transp. Co. v. Parkersburg*, 107 U. S. 691.

**Burden of Proof.**—In *Ouachita, etc., Packet Co. v. Aiken*, 11 Fed. Rep. 662, it was held that in order to establish that a rate of wharfage is greater than a fair and reasonable compensation for the use of the facilities offered, the evi-

That an imposition is not for revenue purposes, or that its proceeds do not go into the public treasury, does not prevent it from being a duty of tonnage;<sup>1</sup> and a tonnage tax cannot be employed, even for the purpose of carrying into effect regulations which the state has power to make.<sup>2</sup> But the imposition of a reasonable charge in the execution of health and inspection laws is not a duty of tonnage.<sup>3</sup>

The prohibition extends to vessels employed in commercial intercourse between the ports of different states as well as between different ports in the same state,<sup>4</sup> and to vessels employed in the coasting trade<sup>5</sup> as well as to those engaged in internal commerce;<sup>6</sup> and it is immaterial whether the vessel belongs to the citizens of the state which levies the tax or to citizens of another state.<sup>7</sup>

The constitutional prohibition does not affect the right of the state to tax as property, and according to value, vessels owned by its citizens,<sup>8</sup> even though such vessels are registered or

dence submitted must enable the courts to say as a matter of fact, that such greater charge is made against the particular vessels of the complainant. See also *Leathers v. Aiken*, 9 Fed. Rep. 679; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691.

1. *Sheffield v. Parsons*, 3 Stew. & P. (Ala.) 302; *Lott v. Morgan*, 41 Ala. 250; *Alexander v. Wilmington, etc., R. Co.*, 3 Strobb. (S. Car.) 594; *Leathers v. Aiken*, 9 Fed. Rep. 679; *Huse v. Glover*, 119 U. S. 543.

2. *Johnson v. Drummond*, 20 Gratt. (Va.) 419; *People v. Brooks*, 4 Den. (N. Y.) 469; *Peete v. Morgan*, 19 Wall. (U. S.) 581.

3. *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S. 445, *affirming* 36 La. Ann. 666; *Benedict v. Vanderbilt*, 1 Robt. (N. Y.) 200.

4. *Cox v. Lott* (State Tonnage Tax Cases), 12 Wall. (U. S.) 204; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 131; *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 743; *Alexander v. Wilmington, etc., R. Co.*, 3 Strobb. (S. Car.) 598.

In *Lott v. Morgan*, 41 Ala. 250, it was held that vessels engaged exclusively in the towage and lighterage business, carrying passengers and freight from a harbor to vessels far outside, are within the protection of the constitution.

5. *Cox v. Lott* (State Tonnage Tax Cases), 12 Wall. (U. S.) 204; *Lott v. Morgan*, 41 Ala. 246; *Howell v. State*, 3 Gill (Md.) 14.

**Steamboats** are included as well as sailing vessels. *Cox v. Lott* (State Tonnage Tax Cases), 12 Wall. (U. S.) 204. And see *Alexander v. Wilmington, etc., R. Co.*, 3 Strobb. (S. Car.) 598.

6. Congress does not possess the power to regulate purely internal commerce of the states, but it may enroll licensed ships and vessels to sail from one port to another in the same state, and vessels thus enrolled and licensed are entitled to the same privileges as vessels employed in the coasting trade. *Cox v. Lott* (State Tonnage Tax Cases), 12 Wall. (U. S.) 204.

7. *Cox v. Lott* (State Tonnage Tax Cases), 12 Wall. (U. S.) 204; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 202; *Sinnot v. Davenport*, 22 How. (U. S.) 238; *Foster v. Davenport*, 22 How. (U. S.) 245; *Perry v. Torrence*, 8 Ohio 524.

8. *Cox v. Lott* (State Tonnage Tax Case), 12 Wall. (U. S.) 204; *Nathan v. Louisiana*, 8 How. (U. S.) 82; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Passenger Cases*, 7 How. (U. S.) 402; *Lott v. Mobile Trade Co.*, 43 Ala. 578; *Lott v. Cox*, 43 Ala. 697; *Irvin v. New Orleans, etc., R. Co.*, 94 Ill. 105; *People v. Roberts*, 92 Cal. 659; *Howell v. State*, 3 Gill (Md.) 14; *Guenther v. Baltimore*, 55 Md. 459; *Perry v. Torrence*, 8 Ohio 522; *People v. Com'r of Taxes*, 48 Barb. (N. Y.) 157; *affirmed* 58 N. Y. 542. And see *Morgan v. Parham*, 16 Wall. (U. S.) 472; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596.

enrolled by the *United States* under the federal statute requiring such registration and enrollment.<sup>1</sup>

Tolls charged for the improvement of the navigation of a river or of other navigable waters are not taxes upon tonnage;<sup>2</sup> nor are license fees, charged for the privilege of maintaining ferries or towboats, even between different states.<sup>3</sup>

(e) *Impairment of Contract Obligations.*—The prohibition in the federal constitution against the passage by the states of any law impairing the obligation of contracts sometimes operates as a restriction upon the power to tax.<sup>4</sup> When a law is in the nature of a contract, a repeal of the law cannot divest rights which have become vested under it.<sup>5</sup>

This prohibition extends to the obligations of the state as well as to those of an individual, and neither the state nor a municipality can, under the guise of taxation, relieve itself from the performance of its contracts.<sup>6</sup> Concessions to municipal corporations and

Vessels are subject to state taxation like any other property, and as such are liable to seizure for taxes due thereon. *Oteri v. Parker*, 42 La. Ann. 374.

The assessment of a vessel owned in a city, by the city assessor, for city taxes, is not the imposition of a duty of tonnage. *The North Cape*, 6 Biss. (U. S.) 505.

1. *Lott v. Mobile Trade Co.*, 43 Ala. 578; *Lott v. Cox*, 43 Ala. 697; *Irvin v. New Orleans, etc.*, R. Co., 94 Ill. 105; *Howell v. State*, 3 Gill (Md.) 14; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Moran v. New Orleans*, 112 U. S. 69.

2. *Palmer v. Cuyahoga Co.*, 3 McLean (U. S.) 226; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Leathers v. Aiken*, 9 Fed. Rep. 679; *Huse v. Glover*, 15 Fed. Rep. 292; 119 U. S. 543; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288; *Thames Bank v. Lovell*, 18 Conn. 500; *Worsley v. Second Municipality*, 9 Rob. (La.) 324.

3. *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *New Orleans v. Eclipse Towboat Co.*, 33 La. Ann. 647; *Chilvers v. People*, 11 Mich. 43; *People v. Babcock*, 11 Wend. (N. Y.) 586; *Com. v. Gloucester Ferry Co.*, 98 Pa. St. 117; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

4. *Murray v. Charleston*, 96 U. S. 432; *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *Home of the Friendless*

*v. Rouse*, 8 Wall. (U. S.) 430; *Cleveland, etc., R. Co. v. Pennsylvania* (State Tax on Foreign Held Bonds), 15 Wall. (U. S.) 300; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266; *State v. New Orleans*, 29 La. Ann. 863. See generally CONSTITUTIONAL LAW, vol. 3, p. 741.

5. *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *Yazoo, etc., R. Co. v. Levee Com'rs*, 37 Fed. Rep. 24; *McGee v. Mathis*, 4 Wall. (U. S.) 143; *Osborne v. Humphrey*, 7 Conn. 335; *English v. Sacramento*, 19 Cal. 172; *Maguiar v. Henry*, 84 Ky. 1; *State v. Walsh*, 31 Neb. 469; *State v. Butler*, 11 Lea (Tenn.) 493. And see *State v. Com'rs of Railroad Taxation*, 37 N. J. L. 229; *State v. Union*, 44 N. J. L. 259; *Bunch v. Wolerstein*, 62 Miss. 561; *Deere v. Rio Grande County*, 33 Fed. Rep. 823; *Seibert v. U. S.*, 122 U. S. 284; 129 U. S. 192; *Poindexter v. Greenhow*, 114 U. S. 270; *State v. Foley*, 30 Minn. 350; *State v. Young*, 29 Minn. 474.

6. *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Fletcher v. Peck*, 6 Cranch (U. S.) 135; *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430; *O'Donnell v. Bailey*, 24 Miss. 386; *Danolds v. State*, 89 N. Y. 36; *Lord v. Thomas*, 64 N. Y. 107; *State v. Young*, 29 Minn. 474. And see *Louisiana v. St. Martin's Parish*, 111 U. S. 716; *Jacoway v. Denton*, 25 Ark. 625; *Hawkins v. Filkins*, 24 Ark. 286; *McNealy v. Gregory*, 13 Fla. 417; *Chicago v. Rumsey*, 87 Ill. 348; *Edmonds v. Jagers*, 19 Ind. 407; *Mathney v. Golden*, 5 Ohio

other governmental agencies are not contracts, but remain subject to legislative control without limitation within the bounds of constitutional rules.<sup>1</sup> Exemptions from taxation granted upon conditions which are accepted are within the rule,<sup>2</sup> and stipulations with reference to taxation inserted within the charters of private corporations are contracts within the constitutional prohibition.<sup>3</sup> The rule applies to statutes making obligations of the

St. 361; *Hazen v. Bank of Tennessee*, 1 Sneed (Tenn.) 115; *Atlanta, etc., R. Co. v. Wright*, 87 Ga. 487; *Mississippi, etc., R. Co. v. McClure*, 10 Wall. (U. S.) 511; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Groves v. Slaughter*, 15 Pet. (U. S.) 449; *Moultrie County v. Rockingham, etc., Sav. Bank*, 92 U. S. 632; *Marsh v. Burroughs*, 1 Wood (U. S.) 463; *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Osborn v. Nicholson*, 1 Dill. (U. S.) 235; *Louisiana v. Jefferson Police Jury*, 116 U. S. 131; *Murray v. Charleston*, 96 U. S. 432; *De Vignier v. New Orleans*, 16 Fed. Rep. 11.

The state cannot declare that one party to a contract shall not perform until the other presents evidence that he has paid his taxes. *Robertson v. Land Office Com'r*, 44 Mich. 274.

A state may tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest which the debt bears, if the promise is left unchanged. *Murray v. Charleston*, 96 U. S. 432. But it cannot thus tax a foreign creditor. *De Vignier v. New Orleans*, 16 Fed. Rep. 11.

1. *Layton v. New Orleans*, 12 La. Ann. 518; *Tinsman v. Belvidere, etc., R. Co.*, 26 N. J. L. 148; *Jersey City v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 360; *Rader v. Southeasterly Road District*, 36 N. J. L. 273; *Williamson v. State*, 46 N. J. L. 204; 44 N. J. L. 165; *Spring Valley Water Works v. San Francisco*, 61 Cal. 3; 8 Sawy. (U. S.) 555; *Williamson v. New Jersey*, 130 U. S. 189; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 44; *Blessing v. Galveston*, 42 Tex. 641; *Washburn v. Oshkosh*, 60 Wis. 453. This rule includes *quasi* municipalities, such as drainage districts. *Smith v. People*, 140 Ill. 355.

2. *New Jersey v. Watson*, 7 Cranch (U. S.) 164; *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436; *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370; *King v. Madison*, 17 Ind.

48; *Bank of Illinois v. People*, 5 Ill. 303; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *Bank of Cape Fear v. Edwards*, 5 Ired. (N. Car.) 516. And see *Western, etc., R. Co. v. State*, 54 Ga. 428.

Taxing the franchise and rolling stock of a railway company, violates a charter exemption, as well as taxation of the property itself. *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264. And see *Raleigh, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 269.

Where the grant or lease under which property is held, itself contemplates the payment of taxes by the grantee, it is subject to taxation at the will of the legislature without reference to charter privileges of the grantee. *Hart v. Cornwall*, 14 Conn. 228.

3. *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *Humphrey v. Peques*, 16 Wall. (U. S.) 247; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Washington University v. Rouse*, 8 Wall. (U. S.) 439; *Wales v. Stetson*, 2 Mass. 143; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *State v. Newark*, 50 N. J. L. 66; *O'Donnell v. Bailey*, 24 Miss. 386; *First Division R. Co. v. Parcher*, 14 Minn. 297; *Worth v. Wilmington, etc., R. Co.*, 89 N. Car. 291; 13 Am. & Eng. R. Cas. 286; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 17 Am. & Eng. R. Cas. 364; *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43; *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 479; *Mechanics' Bank v. Kansas City*, 73 Mo. 555; *Western, etc., R. Co. v. State*, 54 Ga. 428; *Washington County v. Franklin R. Co.*, 34 Md. 159; *State v. Baltimore, etc., R. Co.*, 48 Md. 50; *State v. Union, etc., Bank (Tenn. 1892)*, 35 Cent. L. J. 169; *Union Bank v. State*, 9 Yerg (Tenn.) 490; *Mobile, etc., R. Co. v.*



state or a municipality receivable for taxes; <sup>1</sup> as well as to all valuable privileges extended by charter or statute which have been accepted and acted upon; <sup>2</sup> including acts taking away the remedy for a breach of contract as well as to an impairment of the contract itself.<sup>3</sup> The grant must have been made upon a valid and sufficient consideration, however, in order to constitute an irrevoc-

Kennedy, 74 Ala. 566. And see *Yazoo, etc., R. Co. v. Levee Commissioners*, 37 Fed. Rep. 24; *Ohio L. Ins., etc., Co. v. Hamilton County*, 16 How. (U. S.) 416; *Thomas v. Scotland County*, 3 Dill. (U. S.) 12; *Harshman v. Bates County*, 3 Dill. (U. S.) 150; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Delaware Railroad Tax Case*, 18 Wall. (U. S.) 205; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 498.

In *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133, it was held that the charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it which the legislature accepted. But the corporate property is separable from the franchise and is taxable, unless there is an agreement to the contrary. But see *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288.

Where the charter of a bank limits the right of a state to tax it a certain per cent. on each share of stock, and confines the right to tax to state purposes only, the legislature has no power to delegate the power to tax the bank to a municipal corporation. *O'Donnell v. Bailey*, 24 Miss. 386.

The acceptance of a new charter, or of the provisions of a statute omitting the right of exemption from taxation, is a waiver of the right conferred by the old charter. *Stevens County v. St. Paul, etc., R. Co.*, 36 Minn. 467; *Seaboard, etc., R. Co. v. Norfolk County*, 83 Va. 195.

1. *Antoni v. Wright*, 22 Gratt. (Va.) 83; *McGahey v. State*, 135 U. S. 662; *Willis v. Miller*, 29 Fed. Rep. 238; *Keith v. Clark*, 97 U. S. 454; *Antoni v. Greenhow*, 107 U. S. 769; *Poindexter v. Greenhow*, 114 U. S. 270; *White v. Greenhow*, 114 U. S. 327; *Chaffin v. Taylor*, 114 U. S. 309; 116 U. S. 567; *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311. See also *McGahey v. Com.*, 85 Va. 519; *Laube v. Com.*, 85 Va. 530; *Amy v. Shelby County*, 114 U. S. 387; *Ex p. Ayres*, 123 U. S. 433; *McGee v. Mathis*, 4 Wall. (U. S.) 143; *Moore v. Greenhow*, 114 U. S. 338.

Where coupons cut from state bonds are made receivable for taxes, an act

providing that expert evidence shall not be received as to the genuineness of such coupons, violates the obligations of the contract; and where coupons are receivable for taxes, and judgment has been recovered against a taxpayer for his taxes and costs, the taxpayer is entitled to pay the whole judgment with such coupons. *McGahey v. State*, 135 U. S. 662, *overruling Com. v. Weller*, 82 Va. 721; *Com. v. Booker*, 82 Va. 964.

A statute providing for the refunding of the indebtedness of an existing municipality in the bonds of another taxing district, and the collection and application of back taxes, does not violate the obligation of any contract when the new bonds exchanged for the old indebtedness would have been received if no exchange had been made. *Amy v. Shelby County*, 114 U. S. 387.

**Refusal of Tender.**—There is no violation of contract until taxes legally due are tendered and refused. *Hagood v. Williams*, 117 U. S. 52.

**Not Applicable to Licenses.**—Where state coupons are made receivable for taxes, debts, dues and demands due to the state, the obligation of the contract is not impaired by requiring payment for licenses to sell intoxicating liquors in lawful money of the *United States*. *McGahey v. State*, 135 U. S. 662. But see *Harvey v. Virginia*, 20 Fed. Rep. 411.

2. *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518. And see *McGahey v. State*, 135 U. S. 662; *Atwater v. Woodbridge*, 6 Conn. 223.

3. See *Van Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Antoni v. Greenhow*, 107 U. S. 769; *Poindexter v. Greenhow*, 114 U. S. 270; *White v. Greenhow*, 114 U. S. 307; *Chaffin v. Taylor*, 114 U. S. 309; 116 U. S. 567; *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311; *Rahway v. State*, 44 N. J. L. 395; *Morten v. Comptroller Gen'l*, 4 S. Car. 430. See also *Tracey v. Reed*, 38 Fed. Rep. 69; *Collins v. Collins*, 79 Ky. 88.

cable contract;<sup>1</sup> or conditions must have been imposed by the legislative enactment which were accepted and acted upon;<sup>2</sup> though when the conditions of the contract are accepted and acted upon, it will be presumed to have been made upon a sufficient consideration.<sup>3</sup>

A reasonable limitation upon the enforcement of a right is not an impairment of the contract out of which it springs;<sup>4</sup> nor is a contract impaired by a mere change in the method of taxation;<sup>5</sup> and if, in any fair construction of the legislation, there is a reasonable doubt whether the contract is made out, this doubt must be

A mere change of remedies does not impair the obligation of the contract. *Antoni v. Greenhow*, 107 U. S. 769. And see *Cape Girardeau County Ct. v. Hill*, 118 U. S. 68; *Moore v. Greenhow*, 114 U. S. 338; *Rosseau v. New Orleans*, 35 La. Ann. 557.

But the obligation of the contract is impaired if a legal equivalent of the remedy formerly existing is not furnished. *Seibert v. Lewis*, 122 U. S. 284. And see *Moore v. Greenhow*, 114 U. S. 338.

Where the holders of bonds issued by a municipality, are entitled to payment by taxes collected in the same manner as ordinary taxes, a statute permitting the tax collector to give bond for the collection of ordinary taxes without requiring him to give bond for the collection of special taxes, impairs the obligation of the contract incorporated in the bonds. *Edwards v. Williamson*, 70 Ala. 145.

**Who May Complain.**—Complaint of an impairing of the obligation of a contract must be made by one of the parties thereto, or by persons claiming under him, and not by a third party. *Hagar v. Reclamation District*, 111 U. S. 701.

1. See *Tucker v. Ferguson*, 22 Wall. (U. S.) 575; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595; *Home Ins. Co. v. Augusta*, 93 U. S. 116; *St. Vincent College v. Schaefer*, 104 Mo. 262. And see *infra*, this title, *Waiver or Relinquishment of the Power*.

It must have been a grant as distinguished from a mere license. *Derby Turnpike Co. v. Parks*, 10 Conn. 522.

2. *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Armstrong v. Athens County*, 16 Pet. (U. S.) 281; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Washington University v. Rouse*, 8 Wall. (U. S.) 439;

*Gordon v. Appeal Tax Court*, 3 How. (U. S.) 143; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Parker v. Redfield*, 10 Conn. 495; *Osborne v. Humphrey*, 7 Conn. 339; *Western, etc., R. Co. v. State*, 54 Ga. 428; *King v. Madison*, 17 Ind. 48; *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370; *Detroit v. Detroit, etc., Plank Road Co.*, 43 Mich. 140. And see *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595; *Home Ins. Co. v. Augusta*, 93 U. S. 116.

Some of the cases have drawn a distinction between immunities granted by general laws and those granted by special charter; holding that an immunity granted by general law is a mere gratuity which may be revoked at the pleasure of the legislature, but that one granted by special charter, which has been accepted and acted upon, constitutes an irrevocable contract. See *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. (U. S.) 373; *Welch v. Cook*, 97 U. S. 541.

3. *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Mechanics', etc., Bank v. Thomas*, 18 How. (U. S.) 384; *Mechanics', etc., Bank v. Debolt*, 18 How. (U. S.) 360; *McGee v. Mathis*, 4 Wall. (U. S.) 143.

4. *Wheeler v. Jackson*, 137 U. S. 245; *McFarland v. Jackson*, 137 U. S. 258; *Barnett v. Holmes*, 102 U. S. 651. And see *Com. v. Plunkett*, 84 Va. 519; *Com. v. Maury*, 82 Va. 883. But an unreasonable limitation is void. See *Priestly v. Watkins*, 62 Miss. 798.

5. See *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *U. S. v. Knox County*, 51 Fed. Rep. 880; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79; *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

solved in favor of the state.<sup>1</sup> The payment of a bonus for a charter of incorporation does not protect the grantee of the franchise from all taxation except such as the state has reserved the right to impose.<sup>2</sup> And the tax upon a new subject or an increased tax upon the old one, is not an impairment of the obligation of the contract.<sup>3</sup> Nor is a contract between individuals impaired by being taxed,<sup>4</sup> when the tax can be regarded as a tax upon income derived from contracts,<sup>5</sup> or an excise tax,<sup>6</sup> and not

1. *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Piqua Bank v. Knoop*, 16 How. (U. S.) 369; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Detroit v. Detroit, etc., Plank Road Co.*, 43 Mich. 140; *Detroit City Street R. Co. v. Guthard*, 51 Mich. 180; *Buchanan v. Talbot County*, 47 Md. 286; *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 22; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. (Va.) 83; *Holly Springs Sav., etc., Co. v. Marshall County*, 52 Miss. 281. And see *State v. St. Martin's Parish*, 32 La. Ann. 884; *Los Angeles v. Southern Pac. R. Co.* (Cal. 1885), 7 West Coast Rep. 416; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 19 Mich. 259; *Weeks v. Gilmanton*, 60 N. H. 500; *Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155; *Alexandria Canal, etc., Co. v. District of Columbia*, 1 Mackey (D. C.) 217.

In *State v. Wright*, 41 N. J. L. 478, it was held that where a tax, declared illegal in violation of a contract, is again levied and paid for a long time without objection, the right of the taxpayer is lost.

In order to constitute a contract, the covenant or enactment must distinctly express that there shall be no other or further taxation. *Memphis Gas Light Co. v. Shelby County Taxing Dist.*, 109 U. S. 398. And see *Herrick v. Randolph*, 13 Vt. 531; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514. See also *State v. Clark*, 53 N. J. L. 332.

2. *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; *Memphis Gas Light Co. v. Shelby Co.*, 109 U. S. 398; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *New Orleans, etc., R. Co. v. New Orleans*, 143 U. S. 193; *San Jose v. San Jose, etc., R. Co.*, 53 Cal. 475; *Little v. Bowers*, 46 N. J. L. 300; *State v. Clark*, 53 N. J. L. 332; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43; *New Orleans v. New Orleans City, etc., R. Co.*, 40 La.

Ann. 587; *State v. Petway*, 2 Jones Eq. (N. Car.) 396; *Frankfort, etc., Pass. R. Co. v. Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Com. v. New York, etc., R. Co.*, 145 Pa. St. 38; *New York, etc., R. Co. v. Com.* (Pa. 1889), 18 Atl. Rep. 42; *Erie R. Co. v. Com.*, 66 Pa. St. 84. And see *Detroit v. Detroit City R. Co.*, 76 Mich. 421; *Detroit St. R. Co. v. Guthard*, 51 Mich. 180. But the rule is different if the acceptance of the bonus is accompanied by an agreement not to tax. *Gorden v. Appeal Tax Court*, 3 How. (U. S.) 133; *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370; *State v. Morris, etc., R. Co.*, 49 N. J. L. 193.

**Foreign Corporations.**—A grant by one state to a corporation of another state, of a right to exercise a part of its franchise within its limits, and laying a tax upon it at the time of the grant, does not preclude the right of further taxation by the same state. *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Home Ins. Co. v. Augusta*, 93 U. S. 116.

3. *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Dundee Mtg., etc., Co. v. School District*, 19 Fed. Rep. 369. And see *Wabash Eastern R. Co. v. Com'rs of Drainage Dist.*, 134 Ill. 384.

4. *Cook v. Smith*, 30 N. J. L. 387; *Catlin v. Hull*, 21 Vt. 152; *Kirtland v. Hotchkiss*, 100 U. S. 491.

**Taxing mortgages** against the mortgagees and making the mortgagor liable for the tax, does not violate the provisions of the contract, because the whole value of the mortgaged property might have been assessed to the mortgagor. *Detroit v. Board of Assessors*, 91 Mich. 78. And see *Hay v. Hill*, 65 Cal. 383.

5. *Murray v. Charleston*, 96 U. S. 432; *Haight v. Pittsburg, etc., R. Co.*, 6 Wall. (U. S.) 15; *Robertson v. Land Office Com'rs*, 44 Mich. 274; *Kirtland v. Hotchkiss*, 100 U. S. 491.

6. *Michigan Cent. R. Co. v. Slack*, 100 U. S. 595; *U. S. v. Erie R. Co.*,

a tax upon the creditor. And exemptions from taxation made through motives of public policy, for which no consideration is given, are not contracts.<sup>1</sup> The right to amend or repeal a statute in the nature of a contract may be reserved either by provision of the act itself or by general constitutional or statutory provision, and in such case the reservation also is a part of the contract<sup>2</sup> and authorizes a repeal of an exemption or the imposition of a different tax from that stipulated for in the charter,<sup>3</sup> at the will of

106 U. S. 327; 13 Am. & Eng. R. Cas. 319. And see *Com. v. Maury*, 82 Va. 883.

**Negotiable Instruments.**—In *McGahey v. State*, 135 U. S. 662, it was held that a high license required for the business of selling, and otherwise dealing in negotiable contracts and bonds, placed an undue restraint upon their negotiability, and was unconstitutional.

1. *Robertson v. Land Office Com'rs*, 44 Mich. 274; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259; *Calhoun v. Woodstock Iron Co.*, 82 Ala. 151; *Lord v. Litchfield*, 36 Conn. 116; 4 Am. Rep. 41; *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 286; *Shiner v. Jacobs*, 62 Iowa 392; *Com. v. Bird*, 12 Mass 443; *Ex p. Thompson*, 20 Fla. 887; *People v. Roper*, 35 N. Y. 629; *New Orleans v. St. Anna's Asylum*, 31 La. Ann. 292; *Grand Lodge v. New Orleans*, 44 La. Ann. 659; *Livingston County v. Hannibal*, etc., R. Co., 60 Mo. 516; *St. Joseph v. Hannibal*, etc., R. Co., 39 Mo. 476; *Bellinger v. White*, 5 Neb. 401; *Alexandria Canal*, etc., Co. v. District of Columbia, 1 Mackey (D. C.) 217; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. (U. S.) 373; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Williamson v. New Jersey*, 130 U. S. 189; *Memphis*, etc., R. Co. v. *Gaines*, 97 U. S. 697; *Christ Church v. Philadelphia County*, 24 How. (U. S.) 330; *Hewitt v. New York*, etc., R. Co., 12 Blatchf. (U. S.) 452; *Chesapeake*, etc., R. Co. v. *Miller*, 114 U. S. 176; *Morgan v. Louisiana*, 93 U. S. 217; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595. The same rule applies to neglect to tax. *Alexandria*, etc., Canal Co. v. District of Columbia, 1 Mackey (D. C.) 217.

A law authorizing a bounty for every bushel of salt manufactured in the state, and exempting from taxation the property used for the purpose, is not a contract in such a sense that it cannot be repealed. *East Saginaw Salt Mfg.*

*Co. v. East Saginaw*, 13 Wall. (U. S.) 373.

2. *State v. Northern Cent. R. Co.*, 44 Md. 131; *Appeal Tax Court v. Rice*, 50 Md. 302; *Appeal Tax Court v. Baltimore Academy*, 50 Md. 437; *State v. Com'rs of Railroad Taxation*, 37 N. J. L. 229; *English v. New Haven*, etc., Co., 32 Conn. 243; *Com. v. Fayette County R. Co.*, 55 Pa. St. 452; *Detroit v. Detroit*, etc., Plank Road Co., 43 Mich. 140; *New Orleans v. St. Anna's Asylum*, 31 La. Ann. 292; *State v. New Orleans*, 37 La. Ann. 436; *Wilson v. Gaines*, 3 Tenn. Ch. 597; *Nashville*, etc., R. Co. v. *Hodges*, 7 Lea (Tenn.) 665; *Delaware Railroad Tax*, 18 Wall. (U. S.) 225; *Tucker v. Ferguson*, 22 Wall. (U. S.) 575; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 498; *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Memphis*, etc., R. Co. v. *Loftin*, 105 U. S. 261; *Hoge v. Richmond*, etc., R. Co., 99 U. S. 349; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595; *Pennsylvania College Cases*, 13 Wall. (U. S.) 190; *Tomlinson v. Jessup*, 15 Wall. (U. S.) 459; *Louisville*, etc., R. Co. v. *Gaines*, 2 Flap. (U. S.) 621; *Holyoke County v. Lyman*, 15 Wall. (U. S.) 522; *Shields v. Ohio*, 95 U. S. 319; *Louisville Water Co. v. Clark*, 143 U. S. 1.

When the power is reserved by a general law applicable to all acts of incorporation, it may be revised with reference to any charter subsequently granted. *Miller v. New York*, 15 Wall. (U. S.) 478. But a state legislature may grant an irrevocable contract for exemption from taxes, notwithstanding a former legislature had declared that all charters should be subject to amendment. *New Jersey v. Yard*, 95 U. S. 104.

3. *Iron City Bank v. Pittsburg*, 37 Pa. St. 340; *Com. v. Fayette Co. R. Co.*, 55 Pa. St. 452; *Union Improvement Co. v. Com.*, 69 Pa. St. 140; *State v. Northern Cent. R. Co.*, 44 Md. 131; *Central R.*, etc., Co. v. *State*, 54 Ga.

the legislature, its action not being subject to judicial review;<sup>1</sup> though such a reservation will not authorize the addition of requirements which are inconsistent with constitutional principles.<sup>2</sup>

An exemption from taxation is not affected by a subsequent general law declaring all lands liable to taxation and repealing all inconsistent acts.<sup>3</sup> Nor will a change in the character or objects of the corporation preclude it from proclaiming the benefits of an exemption;<sup>4</sup> but if by a change in its character a corporation has disqualified itself to comply with the conditions upon the performance of which the limitation was granted, it must be considered as having waived the exemption.<sup>5</sup>

411; *Atlanta, etc., R. Co. v. State*, 55 Ga. 312; *New Orleans v. Metropolitan Loan, etc., Bank*, 27 La. Ann. 648; *Guillotte v. New Orleans*, 12 La. Ann. 434; *Palfrey v. Paulding*, 7 La. Ann. 363; *State v. Jersey City*, 31 N. J. L. 575; *State v. Miller*, 31 N. J. L. 521; *State Board v. Patterson, etc., R. Co.*, 50 N. J. L. 446; 33 Am. & Eng. R. Cas. 468; *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 476; *State v. Nashville, etc., R. Co.*, 12 Lea (Tenn.) 583; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595; *Hewitt v. New York, etc., R. Co.*, 12 Blatchf. (U. S.) 452; *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454; *Miller v. New York*, 15 Wall. (U. S.) 478; *Louisville Water Co. v. Clark*, 143 U. S. 1; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176. When the power to change is received, the grant is a *quasi* contract in the nature of a license. *Wagner Fire Institute v. Philadelphia*, 132 Pa. St. 612.

1. *New Orleans v. St. Anna's Asylum*, 31 La. Ann. 296; *Lothrop v. Stedman*, 42 Conn. 583; *Bangor, etc., R. Co. v. Smith*, 47 Me. 34; *In re Lee & Co.'s Bank*, 21 N. Y. 9; *Suydam v. Moore*, 8 Barb. (N. Y.) 362; *Hyatt v. Whiffle*, 37 Barb. (N. Y.) 595; *Com. v. Fayette Co. R. Co.*, 55 Pa. St. 452; *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 257; *Memphis, etc., R. Co. v. Gaines*, 97 U. S. 697.

The reservation of a right of alteration and repeal in the charter of a corporation takes effect on the legislative grant itself to prevent its becoming what it otherwise might become, a contract with the state, and it has none of the characteristics of a mere power which, when once exercised, is exhausted. *State v. Com'r of Railroad Taxation*, 37 N. J. L. 229.

2. *Detroit v. Detroit Plank Road Co.*, 43 Mich. 140; *Shields v. Ohio*, 95 U. S. 324.

Under a reserved power to amend, alter or repeal laws under which private corporations are formed, the state cannot exercise a control over the property of the corporation, except such as may be exercised through its right to control its franchise, and such as it may exercise over like property of natural persons engaged in a similar business. *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. Rep. 722; *Shields v. Ohio*, 95 U. S. 324.

3. *State v. Minton*, 23 N. J. L. 529; *Nichols v. New Haven, etc., Co.*, 42 Conn. 103. And see *State v. Hannibal, etc., R. Co.* (Mo. 1889), 11 S. W. Rep. 746; *New Orleans v. St. Anna's Asylum*, 31 La. Ann. 292.

**Subsequent Contract.**—In *New Jersey v. Yard*, 95 U. S. 104, it was held that a provision in the supplement to the charter of a company that the supplement and the charter may be altered or amended by the legislature, does not apply to a contract made with the company in a supplement passed a long time afterwards.

4. See *Nichols v. New Haven, etc., Co.*, 42 Conn. 103; *State v. Society, etc.*, 43 N. J. Eq. 410; *Charew, etc., R. Co. v. Anson*, 88 N. Car. 519; *State v. Hannibal, etc., R. Co.* (Mo. 1889), 11 S. W. Rep. 746. Where the capital stock of a corporation, which is exempted by a charter provision, is increased, the whole capital does not thereby become taxable. *Nichols v. New Haven, etc., Co.*, 42 Conn. 103.

An exemption from taxation in the charter of a railroad company protects it after a sale of its road, even before the terms of the sale are complied with and the title is transferred. *Stevens v. St. Paul, etc., R. Co.*, 36 Minn. 467.

5. *Maine Cent. R. Co. v. Maine*, 96 U. S. 499; *Chicago, etc., R. Co. v. Missouri*, 122 U. S. 561. And see *State v. Minnesota Cent. R. Co.*, 36 Minn. 246.

(f) **Due Process of Law**—(See also DUE PROCESS OF LAW, vol. 6, p. 43).—The requirement of due process of law in the federal and many state constitutions<sup>1</sup> has its application to taxation.<sup>2</sup> The taxpayer is entitled to an opportunity to be heard.<sup>3</sup>

A statute which assumes to make void assessments valid, without making provision for a reassessment or notice and opportu-

But see *International, etc., R. Co. v. State*, 72 Tex. 356.

1. See CONSTITUTIONAL LAW, vol. 3, p. 670; DUE PROCESS OF LAW, vol. 6, p. 43.

2. See, for the application of the rule, various subdivisions of this title, as, for example, *The Tax Sale, Local Assessments*, etc.

In *Dundee Mortgage, etc., Co. v. Multnomah County*, 19 Fed. Rep. 359, it was held that the enforcement of a tax levied under a void law is a deprivation of property without due process of law.

**Notice.**—A provision for the assessment of taxes, without notice or opportunity to be heard, is a deprivation of property without due process of law. *San Mateo County v. Southern Pac. R. Co.*, 8 Sawy. (U.S.) 238; *Stewart v. Palmer*, 74 N. Y. 183; *Remsen v. Wheeler*, 105 N. Y. 573. And see *Tyrell v. Wheeler*, 123 N. Y. 76; *State v. Buchanan County*, 108 Mo. 235; *South Platt Land Co. v. Buffalo County*, 7 Neb. 253.

A failure to require notice, in a statute authorizing a municipality to impose a tax, does not render the statute unconstitutional, but notice must nevertheless be given. *Gilmore v. Hentig*, 33 Kan. 156; *Paulsen v. Portland*, 149 U. S. 30. And see *Gatch v. Des Moines*, 63 Iowa 718; *Williams v. Detroit*, 2 Mich. 560; *Cleveland v. Tripp*, 13 R. I. 50; *Baltimore, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 17 W. Va. 812; *Patten v. Green*, 13 Cal. 325; *Baltimore v. Grand Masonic Lodge*, 60 Md. 280; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *Rich Hill Min. Co. v. Neptune*, 19 Mo. App. 438; *Avant v. Flynn* (S. Dak. 1891), 49 N. W. Rep. 15.

A provision for notice by publication may be sufficient to satisfy the requirement of due process of law. *Lent v. Tillson*, 140 U. S. 316; *McEneny v. Sullivan Tp.*, 125 Ind. 407; *Meggett v. Eau Claire*, 81 Wis. 326. Personal notice is not necessary. *Davies v. Los Angeles*, 86 Cal. 37; *Happy v. Mosher*, 48 N. Y. 313.

A mere general notice to the world is not sufficient. *Boorman v. Santa Barbara*, 65 Cal. 313.

In *Maryland*, the rule was adopted that in the exercise of the taxing power, notice and opportunity to be heard is necessary. See *Alberger v. Baltimore*, 64 Md. 1; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Baltimore v. Scharf*, 56 Md. 50; *Baltimore v. Scharf*, 54 Md. 499; *Moale v. Baltimore*, 61 Md. 225. But these decisions were overruled in this point by *Ulman v. Baltimore*, 72 Md. 609.

3. See *Hagar v. Reclamation Dist.*, 111 U. S. 701; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Stewart v. Palmer*, 74 N. Y. 183; *Matter of Union College*, 129 N. Y. 308; *Matter of Flower*, 129 N. Y. 693; *Remsen v. Wheeler*, 105 N. Y. 573; *Williams v. Albany County*, 21 Fed. Rep. 995; *McFadden v. Longham*, 58 Tex. 579; *Plumer v. Marathon County*, 46 Wis. 163.

Even the legislature cannot arbitrarily fix the amount of an assessment and refuse a hearing to the person assessed. *Matter of Union College*, 129 N. Y. 308; *Matter of Flower*, 129 N. Y. 643.

In *Spencer v. Merchant*, 100 N. Y. 585, it was held that if the owners of land received notice of the time and place for the apportionment of their assessment, it was immaterial that they were not granted a hearing as to the aggregate amount to be collected.

If one is illegally deprived of an opportunity to be heard, the defect is jurisdictional and cannot be cured by a subsequent statute. *Marsh v. Chesnut*, 14 Ill. 223; *Billings v. Detten*, 15 Ill. 218. But it may be remedied by a subsequent law giving such opportunity. *Williams v. Albany County*, 21 Fed. Rep. 99.

**Error in Administering the Law.**—Where proper provision for notice and opportunity to be heard is made, the court will not hold that the taxpayer is deprived of due process of law because of errors in the administration

nity to be heard, is within the constitutional prohibition.<sup>1</sup> If the opportunity to object is afforded to the taxpayer in an action for the collection of the tax, he is not deprived of his property without due process of law.<sup>2</sup>

The right to be heard does not embrace the right to a trial by jury,<sup>3</sup> or by a judicial tribunal.<sup>4</sup>

(3) *Restrictions in State Constitutions*—(a) **Equality and Uniformity.**—Constitutional provisions requiring equality and uniformity of taxation exist in many states.<sup>5</sup> And the provisions of the federal constitution forbidding any state to deny to any person within its jurisdiction the equal protection of the law forbid

of the law. *Lent v. Tillson*, 140 U. S. 316.

1. *Albany City Nat. Bank v. Maber*, 20 Blatchf. (U. S.) 141; *Spencer v. Merchant*, 125 U. S. 345; *Slaughter v. Louisville* (Ky. 1888), 8 S. W. Rep. 917. And see *Matter of Flower*, 129 N. Y. 643; *Matter of Union College*, 129 N. Y. 308; *Williams v. Albany County*, 21 Fed. Rep. 99. But acts providing for reassessment with notice are valid. *Spencer v. Merchant*, 125 U. S. 345.

2. *Murdock v. Cincinnati*, 44 Fed. Rep. 726; *Cincinnati, etc., R. Co. v. Kentucky*, 115 U. S. 321; *Garvin v. Daussman*, 114 Ind. 429; *Redwood County v. Winona, etc., Land Co.*, 40 Minn. 512. And see *Young v. Wempe*, 46 Fed. Rep. 354.

3. *Cowles v. Brittain*, 2 Hawks (N. Car.) 204; *McCarroll v. Weeks*, 5 Hayw. (Tenn.) 246; *Hagar v. Yolo County*, 47 Cal. 233; *Mille Lacs County v. Morrison*, 22 Minn. 178; *In re McMahon*, 22 N. Y. Daily Reg. 881; *People v. Police Com'rs*, 93 N. Y. 102; *Davis v. Clinton*, 55 Iowa 549; *New Town Cut v. Seabrook*, 2 Strobh. (S. Car.) 560; *Wurts v. Hoagland*, 114 U. S. 606; *Pullan v. Kinsinger*, 2 Abb. (U. S.) 94; *Matter of Meador*, 1 Abb. (U. S.) 317.

4. *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 108; *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *Kelly v. Pittsburgh*, 104 U. S. 78; *Pullan v. Kinsinger*, 2 Abb. (U. S.) 94; *Greene v. Briggs*, 1 Curt. (U. S.) 311; *North German Lloyd Steamship Co. v. Hedden*, 43 Fed. Rep. 17; *Cincinnati, etc., R. Co. v. Kentucky*, 115 U. S. 321; *Taylor v. Porter*, 4 Hill (N. Y.) 146; *Hoke v. Henderson*, 4 Dev. (N. Car.) 15; *Vanzant v. Waddel*, 2 Yerg. (Tenn.) 260; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; *State Bank v. Cooper*, 2 Yerg. (Tenn.) 599. And see *Harris v.*

*Wood*, 6 T. B. Mon. (Ky.) 642; *Weimer v. Bunbury*, 30 Mich. 201.

In *Pullan v. Kinsinger*, 2 Abb. (U. S.) 94, a statute providing that no suit to restrain the assessment or collection of any authorized tax shall be maintained in any court, was held to apply to all cases where the officer has power to determine whether the thing assessed by him is liable to taxation, however erroneous his decision may be.

All that is required under any system of taxation is that the substantial and fundamental rights of the taxpayer shall be protected. *State v. Central Pac. R. Co.*, 21 Nev. 260.

It is within the power of the legislature to provide for the collection of the tax, by requiring the taxpayers to pay in advance the sum assessed against them, but affording them an opportunity afterward to be heard and have restitution of any excess. *Williams v. Albany County*, 21 Fed. Rep. 99. And see *Palmer v. McMahon*, 133 U. S. 660.

A statute giving the taxpayer a right to enjoin collection of a tax, and having its validity decided by a court of justice, furnishes due process of law, even though it requires the party to give security in advance, as in other injunction cases. *McMillen v. Anderson*, 95 U. S. 37.

**Provision for Appeal.**—Where provision is made for an appeal, due process of law is given: *Yeomans v. Riddle*, 84 Iowa 147.

5. See *Primm v. Belleville*, 59 Ill. 142; *People v. Bradley*, 39 Ill. 130; *Bright v. McCullough*, 27 Ind. 223; *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196; *Wintz v. Girardey*, 31 La. Ann. 381; *Sanborn v. Rice County*, 9 Minn. 273; *Youngblood v. Sexton*, 32 Mich. 406; *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1; *East Portland v. Multnomah County*, 6 Oregon 62; *Roup's Case*, 81\* Pa. St. 211; *Pleuler*

unequal exactions of any kind, and among them that of unequal taxation.<sup>1</sup> Such provisions are not restrictions on the absolute power of taxation; they affect only the mode of its exercise.<sup>2</sup> They prohibit discriminations in favor of or against persons and classes, either of persons or of property, in the imposition of a tax.<sup>3</sup> Their object is to regulate the power by such limitations and restrictions as will protect the taxpayer against unjust or arbitrary action,<sup>4</sup> and conformity to their requirements is an

*v. State*, 11 Neb. 547; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Ex p. Robinson*, 12 Neb. 263; *Gatlin v. Tarboro*, 78 N. Car. 119; *Douglass v. Harrisville*, 9 W. Va. 162; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Louisiana v. Pilsbury*, 105 U. S. 278; *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

The *Illinois* provision is held to be merely declaratory of what the law was before its adoption. See *Bureau County v. Chicago*, etc., R. Co., 44 Ill. 229; *Primm v. Belleville*, 59 Ill. 142; *Chicago, etc., R. Co. v. Boone County*, 44 Ill. 240.

In *Pennsylvania*, the former constitution did not enjoin equality. *Kirby v. Shaw*, 19 Pa. St. 258. But the requirement has since been made a part of the fundamental law of the state. See *Roup's Case*, 81\* Pa. St. 211.

1. *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. Rep. 722; *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681; *Kelly v. Pittsburgh*, 104 U. S. 78.

This provision of the federal constitution was not intended to compel the states to adopt an iron rule of equality, or to prevent the classification of property for taxation at different rates. It is enough that there is no discrimination in favor of one as against another of the same class. *Giozza v. Tiernan*, 148 U. S. 657. And see *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Home Ins. Co. v. New York*, 134 U. S. 594; *Pacific Express Co. v. Seibert*, 142 U. S. 339.

In *People v. San Francisco*, etc., R. Co., 35 Cal. 606, it was held that the charges upon commerce, such as wharf and dockage charges, are to be considered as a tax, and as such are subject to constitutional provisions requiring equality and uniformity.

2. *Beals v. Amador County*, 35 Cal. 624; *People v. Coleman*, 4 Cal. 46; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521.

Where the constitution of a state does not require a uniform method of valuation, the legislature is vested with discretion as to the method, and, unless the one adopted is clearly inadequate to secure a proper result, the courts will not interfere. *Louisville, etc., R. Co. v. State*, 25 Ind. 177.

3. *Lehigh Iron Co. v. Lower Muncie Tp.*, 81 Pa. St. 482; *Durach's Appeal*, 62 Pa. St. 494; *Fletcher v. Oliver*, 25 Ark. 289; *O'Kane v. Treat*, 25 Ill. 557; *Primm v. Belleville*, 59 Ill. 142; *Mason v. Lancaster*, 4 Bush (Ky.) 408; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Youngblood v. Sexton*, 32 Mich. 406; *People v. Weaver*, 100 U. S. 539; *German Nat. Bank v. Kimball*, 103 U. S. 732; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153.

**Corporations** fall within the purview of such provisions, as well as private individuals and all other subjects of taxation. See *Clark v. Mobile*, 67 Ala. 217; *Mobile v. Dargan*, 45 Ala. 310; *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *Ottawa Gas Light, etc., Co. v. Downey*, 127 Ill. 201; *Coal Run Co. v. Finlen*, 124 Ill. 666; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633.

4. *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 533; *Zanesville v. Richards*, 5 Ohio St. 589; *Hamilton County v. Ohio L. Ins., etc., Co.*, 1 Ohio St. 563; *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *Clark v. Mobile*, 67 Ala. 217; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Northampton v. Hampshire County*, 145 Mass. 108; *Lumsden v. Cross*, 10 Wis. 282; *Knowlton v. Rock County*, 9 Wis. 410; *State v. Winnebago Lake, etc., R. Co.*, 11 Wis. 34; *Weeks v. Milwaukee*, 10 Wis. 242; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666.

The object of provisions requiring equality and uniformity is to secure



indispensable prerequisite to the validity of a tax imposed in a state where such a provision is in force.<sup>1</sup>

Taxes are equal and uniform when all within the limits of the district share equal benefits therefrom, or where they are imposed uniformly upon all property or things of the same description,<sup>2</sup> and where they reach and bear with a like burden upon all the subjects selected for taxation within the jurisdiction of the taxing power.<sup>3</sup> Absolute equality, however, is unobtainable; the approximation is all that is required.<sup>4</sup> A law, the evident intent and legitimate result of which is to equalize the burden so far as

the same equality between different kinds of taxable property, as that secured by the federal constitution between the states. *State v. Winnebago Lake, etc., Co.*, 11 Wis. 35. And see *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1.

1. *Sleight v. People*, 74 Ill. 47; *People v. Henderson*, 12 Colo. 369; *Northampton v. Hampshire County*, 145 Mass. 108; *State v. Cumberland, etc.*, R. Co., 40 Md. 22; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Philleo v. Hiles*, 42 Wis. 527; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Knowlton v. Rock County*, 9 Wis. 410.

In *Douglass v. Harrisville*, 9 W. Va. 162, it was held that the adoption of a constitutional provision requiring taxation to be equal and uniform throughout the state, and that all property both real and personal shall be taxed in proportion to its value, does not operate to repeal a law imposing a tax in force at the time of its adoption.

In *Muscatine v. Mississippi, etc.*, R. Co., 1 Dill. (U. S.) 536, it was held that the omission to levy a proportional tax does not render void a tax upon other property liable to taxation, and that the owner of such other property cannot have a collection of taxes upon it enjoined for that reason.

**Rule Applicable to Levy Only.**—In *Holton v. Mechenburg County*, 93 N. Car. 430, it was held that the constitutional requirement that taxes shall be uniform, applies to the levy, but not to the distribution after they are raised; and that a statute providing for a road tax is not unconstitutional because in one district it permits the tax to be paid in labor, while in another it requires it to be paid in money.

2. *Smith v. Aberdeen*, 25 Miss. 458; *Daily v. Swope*, 47 Miss. 367; *Palmer v. Stumph*, 29 Ind. 329; *East Portland v. Multnomah County*, 6 Oregon 63;

*Norris v. Waco*, 57 Tex. 635. Part of the real estate of a town cannot be taxed and the rest exempted. *Dyar v. Farmington*, 70 Me. 515. And see *McCormack v. Patchin*, 53 Mo. 33.

3. *People v. Whyler*, 41 Cal. 351; *Bright v. McCullough*, 27 Ind. 223; *Portland Bank v. Althorp*, 12 Mass. 252; *Smith v. Aberdeen*, 25 Miss. 458; *State v. U. S., etc., Express Co.*, 60 N. H. 219; *Norris v. Waco*, 57 Tex. 635. And see *Comer v. Folsom*, 13 Minn. 219.

The true rule as to equity and uniformity is that the tax must be uniform as to all persons or corporations engaged in the same business. *State Railroad Tax Cases*, 92 U. S. 575.

A tax is uniform where it operates with the same effect in all places where the subject is to be found, whether it is equally distributed throughout the country or not. *Edye v. Robertson*, 112 U. S. 580.

The requirement that taxes for gas, water and ferry purposes shall be assessed in equal proportions on all lots, is not answered by an assessment for gas and lamps upon all town lots by their number as they appear on the map, each for an equal sum without regard to value. *State v. Reimenschneider*, 39 N. J. L. 625.

4. *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Cheshire v. Berkshire County*, 118 Mass. 386; *Richmond v. Scott*, 48 Ind. 568; *Howell v. Bristol*, 8 Bush (Ky.) 493; *Dubuque v. Chicago, etc.*, R. Co., 47 Iowa 196; *Waring v. Savannah*, 60 Ga. 97; *Athens v. Long*, 54 Ga. 330; *People v. Worthington*, 21 Ill. 170; *Sawyer v. Alton*, 4 Ill. 127; *People v. Salem Tp.*, 20 Mich. 452; *Turner v. Althaus*, 6 Neb. 54; *Finley v. Philadelphia*, 32 Pa. St. 381; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433; *Weber v. Reinhard*, 73 Pa. St. 373; *Kirby v. Shaw*, 19 Pa. St. 258. And see *Carrington v. Farmington*, 21 Conn. 72; *Savings Bank v. New Lon-*

practicable, is not to be held a violation of the constitution merely because the desired end may not be reached.<sup>1</sup> It is only where statutes impose taxes on false and unjust principles, or which operate to produce gross inequality, that courts can declare them void;<sup>2</sup> and the want of uniformity must be the direct result of the law itself and not of the maladministration of a proper law.<sup>3</sup>

The requirement of equality and uniformity of taxation extends to cities, towns, and counties, as well as to the state;<sup>4</sup> but does not require that the rate shall be uniform and equal for all pur-

don, 20 Conn. 117; *Cook v. Burlington*, 59 Iowa 251; *McGregor v. Vanpel*, 24 Iowa 436; *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *State Railroad Tax Cases*, 92 U. S. 575; *People v. Coleman*, 4 Cal. 46; *People v. Whyler*, 41 Cal. 351; *Comer v. Folsom*, 13 Minn. 219; *Ould v. Richmond*, 23 Gratt. (Va.) 464.

It is no objection to a law authorizing the imposition of a tax that it works injustice in particular cases. *People v. New York, etc., Dock Co.*, 63 How. Pr. (N. Y. Supreme Ct.) 451; *Bank of Commerce v. New York*, 2 Black (U. S.) 620; *Williams v. Cammack*, 27 Miss. 209; *People v. Whyler*, 41 Cal. 351.

1. *Howell v. Bristol*, 8 Bush (Ky.) 493; *People v. Coleman*, 4 Cal. 46; *People v. Worthington*, 21 Ill. 170; *Cheshire v. Berkshire County*, 118 Mass. 386; *People v. New York, etc., Dock Co.*, 63 How. Pr. (N. Y.) 451; *Warren v. Henly*, 31 Iowa, 31; *Comer v. Folsom*, 13 Minn. 219; *Turner v. Althaus*, 6 Neb. 54. And see *Zimmerman v. Perkiomen, etc., Turnpike Co.*, 81 Pa. St. 96.

Where the collection of a tax has been defeated for defects in the levy, or other proceedings not going to the right to levy the same, and some of the taxes have been voluntarily paid, a law providing for giving credits to parties paying, is not in violation of constitutional provisions requiring uniformity. *Fairfield v. People*, 94 Ill. 244.

Where a deficiency in the revenues of a county is afterward supplied, it will be presumed, in the absence of proof to the contrary, that it was done in such a mode that the entire property of the county contributed its just share. *Logan County v. Lincoln*, 81 Ill. 156.

2. *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Warren v. Henly*, 31 Iowa, 31; *Howell v. Bristol*, 8 Bush (Ky.) 493; *Turner v. Althaus*, 6 Neb. 54. And see *State v. Cumberland, etc., R. Co.*, 40 Md. 22;

*Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372.

The infraction of a constitutional requirement of uniformity and equality must be palpable before the courts will declare a law unconstitutional; a substantial compliance with the requirement by the legislature is all that can be required. *Sanborn v. Rice County*, 9 Minn. 273.

In the absence of express legislation, an intention to tax all classes of property equally will be imputed to the legislature. *Rice County v. Citizens' Nat. Bank*, 23 Minn. 280.

3. *Dundee Mortgage, etc., Co. v. School District*, 21 Fed. Rep. 151; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153. And see *State v. Maxwell*, 27 La. Ann. 723.

The violation of a constitutional rule by local assessors who fail to assess property at its actual cash value, does not impair the law under which they act. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153.

In *Bureau County v. Chicago, etc., R. Co.*, 44 Ill. 229, it was held that principles of equality and uniformity of taxation require that where the practice is to assess the property of individuals at less than the actual value, the property of a railroad company cannot be assessed at a greater per cent. of its value. See also *Chicago, etc., R. Co. v. Boone County*, 44 Ill. 240.

4. *State v. Hannibal, etc., R. Co.*, 75 Mo. 208; *Palmer v. Way*, 6 Colo. 106; *Brewer Brick Co. v. Brewer*, 62 Me. 62; *Daily v. Swope*, 47 Miss. 367; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 484; *Knowlton v. Rock County*, 9 Wis. 410; *Hale v. Kenosha*, 29 Wis. 599; *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, 10 Wis. 282; *State v. Winnebago Lake, etc., R. Co.*, 11 Wis. 42; *Donnelly v. Decker*, 58 Wis. 461; *Johnson v. Milwaukee*, 40 Wis. 315; *Milwau-*

poses throughout the state;<sup>1</sup> but only that a uniform rate shall be established throughout the locality in which the particular tax is levied.<sup>2</sup> Nor does the requirement prohibit the creation of more than one revenue district in a single county or other political division, and the imposition of a tax in that district different from the taxes imposed throughout the rest of the state.<sup>3</sup>

kee Fire Dept. *v.* Helfenstein, 16 Wis. 137; Chicago *v.* Larned, 34 Ill. 203; Ottawa *v.* Spencer, 40 Ill. 211; Updike *v.* Wright, 81 Ill. 49; Lee *v.* Ruggles, 62 Ill. 427; Zanesville *v.* Richards, 5 Ohio St. 589; Exchange Bank of Columbus *v.* Hines, 3 Ohio St. 1; Bright *v.* McCullough, 27 Ind. 223; State *v.* Reimenschneider, 39 N. J. L. 629; Gilman *v.* Sheboygan, 2 Black (U. S.) 510; Pine Grove Tp. *v.* Talcott, 19 Wall. (U. S.) 666. But see Selby *v.* Levee Com'rs, 14 La. Ann. 437; Wallace, *v.* Shelton, 14 La. Ann. 503; Bishop *v.* Marks, 15 La. Ann. 147; Surgi *v.* Snetchman, 11 La. Ann. 387; Second Municipality *v.* Duncan, 2 La. Ann. 182; Lafayette *v.* Cummins, 3 La. Ann. 673; Yeatman *v.* Crandall, 11 La. Ann. 220; Gilkeson *v.* Frederick, 13 Gratt. (Va.) 577; Douglass *v.* Harrisville, 9 W. Va. 162; Louisiana *v.* Pillsbury, 105 U. S. 278; Washington *v.* State, 13 Ark. 752; McGehee *v.* Mathis, 21 Ark. 40; laying down the rule that the requirement applies to state taxation only.

Constitutional provisions requiring a uniform rule of taxation are applicable to municipal corporations, notwithstanding another constitutional provision requiring the legislature in establishing them to restrict their powers of taxation, the latter provision being designed to furnish a further protection. Weeks *v.* Milwaukee, 10 Wis. 242.

Under the present *Virginia* constitution, the rule of uniformity and equality applies to counties as well as to the state. *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 484.

1. *Richmond v. Scott*, 48 Ind. 568; *Loftin v. Citizens' Nat. Bank*, 85 Ind. 341; *State Bank v. New Albany*, 11 Ind. 139; *Bright v. McCullough*, 27 Ind. 223; *People v. Central Pac. R. Co.*, 43 Cal. 398; *Columbus, etc., R. Co. v. Wright*, 89 Ga. 574; *Haney v. Bartow County* (Ga. 1893), 18 S. E. Rep. 28; *Ottawa County v. Nelson*, 19 Kan. 234; *Stratton v. Collins*, 43 N. J. L. 562; *East Portland v. Multnomah County*, 6 Oregon 62; *Merrick v. Amherst*, 12 Allen (Mass.) 500; *Public*

*School Com'rs v. Alleghany County*, 20 Md. 449; *Daly v. Morgan*, 69 Md. 460; *Com. v. Macferron*, 152 Pa. St. 244.

The requirement does not prevent different rates in different municipalities; the needs of different local bodies can hardly be uniform. *Daily v. Swope*, 47 Miss. 367; *Covington v. East St. Louis*, 78 Ill. 545; *Binkert v. Jansen*, 94 Ill. 283. Nor does it prevent a different rate in a municipality from that adopted by a state. *Daily v. Swope*, 47 Miss. 367. Neither do constitutional provisions that taxation shall be equal and uniform throughout the state apply as between cities, towns and villages. *Douglass v. Harrisville*, 9 W. Va. 162.

A *pro rata* tax on the length of a railroad in each township, imposed upon each respectively, does not violate constitutional provisions requiring a uniform and equal rate of assessment and a just valuation for taxation of real and personal property. *Gilson v. Rush County*, 128 Ind. 65.

2. *Loftin v. Citizens' Nat. Bank*, 85 Ind. 341; *Bright v. McCullough*, 27 Ind. 223; *State Bank v. New Albany*, 11 Ind. 139; *Cornwell v. O'Brien*, 11 Ind. 419; *People v. Whyler*, 41 Cal. 355; *Haney v. Bartow County* (Ga. 1893), 18 S. E. Rep. 28; *State v. Collins*, 43 N. J. L. 562; *Daly v. Morgan*, 69 Md. 460; *East Portland v. Multnomah County*, 6 Oregon 62; *Adams v. Lindell*, 5 Mo. App. 197; *Covington Draw Bridge Co. v. Warren County*, 14 Ind. 331; *Adamson v. Warren County*, 9 Ind. 174; *Douglass v. Harrisville*, 9 W. Va. 162; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666. And see *Kenaga v. Kerr* (Ill. 1888), 14 N. E. Rep. 671.

The rule requiring equality and uniformity of taxation does not require taxes to be imposed in different territorial sub-divisions at the same time. *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666.

3. *People v. Central Pac. R. Co.*, 43 Cal. 398; *Furlock Irrigation Dist. v. Williams*, 76 Cal. 360; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675;

If the tax is imposed for state purposes, it must rest alike upon all parts of the state; if for county purposes, upon the entire county; if for township or city purposes, on the whole township or city; and if for local purposes, upon the locality benefited and upon which it is imposed.<sup>1</sup> In order to be uniform and equal, however, local taxes must be imposed upon subjects of taxation within the jurisdiction of the taxing power;<sup>2</sup> the uniformity must be co-extensive with the territory to which it applies,<sup>3</sup> and must

Merrick v. Amherst, 12 Allen (Mass.) 500; Public School Com'rs v. Alleghany County, 20 Md. 449; Greene County v. Lenoir County, 92 N. Car. 180; East Portland v. Multnomah County, 6 Oregon 62; Cook v. Portland, 20 Oregon 580; Fahey v. State, 27 Tex. App. 146. And see State v. Sauk County, 70 Wis. 485; Maltby v. Tautges (Minn. 1892), 52 N. W. Rep. 858.

Constitutional provisions requiring equality and uniformity do not take away the power to make local assessments for local improvements, proportioned according to the benefits received. Yeatman v. Crandall, 11 La. Ann. 220; Denver v. Knowles, 17 Colo. 204. And see *infra*, this title, *Local Assessments*.

1. Loftin v. Citizens' Nat. Bank, 85 Ind. 341; Bright v. McCullough, 27 Ind. 223; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185; Mobile v. Dargan, 45 Ala. 310; State v. Collins, 43 N. J. L. 562; Murray v. Lehman, 61 Miss. 283; Taylor v. Chandler, 9 Heisk. (Tenn.) 349; Gilman v. Sheboygan, 2 Black (U. S.) 510; Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666; Hutchinson v. Ozark Land Co. (Ark. 1893), 22 S. W. Rep. 173; Hanscom v. Omaha, 11 Neb. 37; Danville v. Shelton, 76 Va. 325; Davis v. Gaines, 48 Ark. 370; Daily v. Swope, 47 Miss. 367; Chrisman v. Brookhaven (Miss. 1893), 12 So. Rep. 458; Turner v. Althaus, 6 Neb. 54; Denver v. Knowles, 17 Colo. 204.

All the land in a "no fence" district should be taxed uniformly, notwithstanding the fact that the district is made up of lands from two different counties, and those in one require a greater amount of fence than those in the other. Greene County v. Lenoir County, 92 N. Car. 180.

In Hundley v. Lincoln Park, 67 Ill. 559, it was held that an assessment cannot be sustained, which was made by the authorities of two towns acting together, where, after the assessment was

made, they added a large sum upon the property of one of the towns, merely on the basis of density of population and superiority of improvements.

A tax imposed upon several towns, to raise money to meet an obligation which they have voted to assume, is uniform in its operation. Gilson v. Rush County, 128 Ind. 65.

2. Wells v. Weston, 22 Mo. 384; People v. Placerville, etc., R. Co., 34 Cal. 656; People v. Townsend, 56 Cal. 633; Barton v. Kalloch, 56 Cal. 95; Covington v. Southgate, 15 B. Mon. (Ky.) 491; Morford v. Unger, 8 Iowa 82. And see Knowlton v. Rock County, 9 Wis. 410; Gilman v. Sheboygan, 2 Black (U. S.) 510.

In People v. Townsend, 56 Cal. 633, it was held that it is essential that each taxing district should confine itself to the objects of taxation within its limits, in order to render taxation uniform within the qualification that the *situs* of personal property may be the domicile of the owner.

3. Exchange Bank of Columbus v. Hines, 3 Ohio St. 1; Mobile v. Dargan, 45 Ala. 310; *Ex p.* Marshall, 64 Ala. 266; Bright v. McCullough, 27 Ind. 223; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185; Madison County v. People, 58 Ill. 456; Primm v. Belleville, 59 Ill. 142; Sleight v. People, 74 Ill. 47; Knowlton v. Rock County, 9 Wis. 410; Wisconsin Cent. R. Co. v. Taylor County, 52 Wis. 37; Gilman v. Sheboygan, 2 Black (U. S.) 510; Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666; Turner v. Althaus, 6 Neb. 54; Hanscom v. Omaha, 11 Neb. 37. And see Allhands v. People, 82 Ill. 234; Harward v. St. Clair, etc., Levee, etc., Co., 51 Ill. 130; Trustees of Schools v. People, 63 Ill. 300.

Taxes imposed upon property must be proportional, and must be laid upon an assessment or valuation of all the property in the state, it being required that each individual shall be assessed according to his proportion of that

extend to all property subject to taxation;<sup>1</sup> and the purpose of the tax must be a local one pertaining to the district taxed.<sup>2</sup> The property or business of a nonresident must not be taxed at a higher or different rate than that of a resident.<sup>3</sup>

The requirement of equality and uniformity does not preclude exemption from taxation,<sup>4</sup> nor the division of things taxable

property. *Provident Institution v. Massachusetts*, 6 Wall. (U. S.) 611.

The support of the poor of a municipality is a matter of common concern, and the expense thereof must be borne by the whole corporation; and a provision requiring a part thereof to pay more than another part, is unconstitutional and void. *Knowlton v. Rock County*, 9 Wis. 410.

1. *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1; *Mobile v. Dargan*, 45 Ala. 310; *Goldsmith v. Rome R. Co.*, 62 Ga. 473; *Harward v. St. Clair, etc., Levee, etc., Co.*, 51 Ill. 130; *Primm v. Belleville*, 59 Ill. 142; *Sherlock v. Winnetka*, 68 Ill. 530; *Chicago, etc., R. Co. v. Boone County*, 44 Ill. 240; *Dunham v. Chicago*, 55 Ill. 357; *Trustees of Schools v. People*, 63 Ill. 301; *State v. Winnebago Lake, etc., Co.*, 11 Wis. 34; *Hale v. Kenosha*, 29 Wis. 399; *Gilman v. Sheboygan*, 2 Black (U. S.) 1; *Louisiana v. Pilsbury*, 105 U. S. 278; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *Provident Institution v. Massachusetts*, 6 Wall. (U. S.) 611. And see *People v. Bradley*, 39 Ill. 130; *Sleight v. People*, 74 Ill. 47; *Allhands v. People*, 82 Ill. 234; *Dundee Mortgage, etc., Co. v. Multnomah County*, 19 Fed. Rep. 359.

The corporate authorities of a county have no power to except a railroad from the constitutional rule of uniformity of taxation, by causing its property to be assessed at a greater per cent. of its value than that of individuals. *Bureau County v. Chicago, etc., R. Co.*, 44 Ill. 229.

All kinds of property must be taxed uniformly, or be entirely exempt. *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666; *Knowlton v. Rock County*, 9 Wis. 410.

2. *People v. Salem Tp.*, 20 Mich. 452; *Manistee Lumber Co. v. Springfield Tp.*, 92 Mich. 277; *Sanborn v. Rice County*, 9 Minn. 273; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349. See also *infra*, this title, *Purposes of Taxation*.

**Apportionment of County Taxes.**—In *Sangamon County v. Springfield*, 63

Ill. 66, it was held that a constitutional provision requiring taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same, is not contravened by statute, requiring an apportionment of county taxes upon a certain basis between the county and city.

3. *Holloway v. Police Jury*, 16 La. Ann. 203; *Marshalltown v. Blum*, 58 Iowa 184; *Simrall v. Covington (Ky.)*, 1890, 34 Am. & Eng. Corp. Cas. 190; *Farris v. Henderson (Okl.)*, 1893, 33 Pac. Rep. 380; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554; *Duer v. Small*, 4 Blatchf. (U. S.) 263. But see *Jones v. Columbus*, 25 Ga. 610. Such discriminations are beyond the authority of either state or municipal legislation. *Nashville v. Althrop*, 5 Coldw. (Tenn.) 544.

Taxing property of a resident at one time, and similar property of a nonresident at another time, is not unconstitutional for want of uniformity. *Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54.

4. *State v. Winnebago Lake, etc., Co.*, 11 Wis. 42; *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587; *Athens v. Long*, 59 Ga. 330; *Waring v. Savannah*, 60 Ga. 93; *People v. Auditor Gen'l*, 7 Mich. 84; *People v. Coleman*, 4 Cal. 46; *High v. Shoemaker*, 22 Cal. 363; *State Bank v. New Albany*, 11 Ind. 139; *Connorsville v. State Bank*, 16 Ind. 105; *King v. Machsin*, 17 Ind. 48; *State v. Collins*, 43 N. J. L. 562; *Williams v. Cammack*, 27 Miss. 209; *Mississippi Mills v. Cook*, 56 Miss. 40; *New Orleans v. Davidson*, 30 La. Ann. 555; *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86; *New Orleans v. Fourchy*, 30 La. Ann. 910; *New Orleans v. Klein*, 26 La. Ann. 493; *Reynolds v. Police Jury*, 44 La. Ann. 863; *State v. Poydras*, 9 La. Ann. 165; *New Orleans v. Kennard*, 34 La. Ann. 851; *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440; *Leicht v. Burlington*, 73 Iowa 29; *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *State v. Winnebago*

into classes, and the imposition of taxes which, while bearing equally upon the different members of each class, bear unequally upon the classes in the aggregate.<sup>1</sup> A legislative division of this sort cannot be interfered with by the courts.<sup>2</sup> Such classification is usually based upon inherent differences in the character of the different subjects;<sup>3</sup> thus, corporations may constitute a class by themselves for the purpose of taxation;<sup>4</sup>

Lake, etc., R. Co., 11 Wis. 34; Northern Pac. R. Co. v. Barnes (N. Dak. 1892), 51 N. W. Rep. 386, 786; Northern Pac. R. Co. v. Brewer (N. Dak. 1892), 31 N. W. Rep. 787; Louisiana v. Pilsbury, 105 U. S. 278; Williams v. Rees, 9 Biss. (U. S.) 405; Wells v. Central Vermont R. Co., 14 Blatchf. (U. S.) 426; Danville v. Shelton, 76 Va. 325. And see Ferns v. Vannier, 6 Dakota 186; State v. Hennepin County, 33 Minn. 235; Columbia, etc., R. Co. v. Chilberg (Wash. 1893), 34 Pac. Rep. 163.

To be uniform, taxation need not be universal. Louisiana v. Pilsbury, 105 U. S. 278.

See generally, as to exemptions, *infra*, this title, *Exemptions*.

1. New Orleans v. Kaufman, 29 La. Ann. 283; State v. Rolle, 30 La. Ann. 991; New Orleans v. People's Bank, 32 La. Ann. 84; State v. Lathrop, 10 La. Ann. 398; State v. Ogden, 10 La. Ann. 402; Dubuque v. Illinois Cent. R. Co., 39 Iowa 56; People v. Henderson, 12 Colo. 369; Coal Run Coal Co. v. Finlen, 124 Ill. 666; Hunsaker v. Wright, 30 Ill. 146; Sterling Gas Co. v. Higby, 134 Ill. 557; Levy v. Smith, 4 Fla. 154; Fletcher v. Oliver, 25 Ark. 289; American Union Express Co. v. St. Joseph, 66 Mo. 675; St. Louis v. Freivogel, 95 Mo. 533; Roup's Case, 81\* Pa. St. 211; Com. v. Lehigh Valley R. Co., 129 Pa. St. 429; Banger's Appeal, 109 Pa. St. 79; Com. v. Germania Brewing Co., 145 Pa. St. 83; Hammett v. Philadelphia, 65 Pa. St. 146; Weber v. Reinhard, 73 Pa. St. 370; Kneeland v. Milwaukee, 15 Wis. 454; Dean v. Gleason, 16 Wis. 1; Wisconsin Cent. R. Co. v. Taylor County, 52 Wis. 37; State v. Mann, 76 Wis. 469; London v. Wilmington, 78 N. Car. 109; Stratton v. Collins, 43 N. J. L. 562; State v. Parker, 32 N. J. L. 435; State v. Underground Cable Co. (N. J. 1889), 18 Atl. Rep. 581; State v. Richards, 52 N. J. L. 156; State Board v. Central R. Co., 48 N. J. L. 146; State Railroad Tax Cases, 92 U. S. 575; Singer Mfg. Co. v. Wright, 33 Fed. Rep.

121; Kentucky Railroad Tax Cases, 115 U. S. 322; Gibbons v. District of Columbia, 116 U. S. 404; Davenport Nat. Bank v. Board of Equalization, 123 U. S. 83. And see Louisiana Cotton Mfg. Co. v. New Orleans, 31 La. Ann. 442; New Orleans v. Davidson, 30 La. Ann. 554; New Orleans v. Fourchy, 30 La. Ann. 910; Frontier Land, etc., Co. v. Baldwin, 3 Wyoming 764; State v. Western Union Tel. Co., 73 Me. 518; Pacific Express Co. v. Seibert, 44 Fed. Rep. 310; 142 U. S. 339.

If taxation is upon all of the class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered throughout the state. Durach's Appeal, 62 Pa. St. 494.

2. Roup's Case, 81\* Pa. St. 211; Zimmerman v. Perkiomen, etc., Turnpike Co., 81\* Pa. St. 96; People v. McCreery, 34 Cal. 432; People v. Henderson, 12 Colo. 369; Lexington v. McQuillan, 9 Dana (Ky.) 513; Vasser v. George, 47 Miss. 718; Mississippi Mills v. Cook, 56 Miss. 40; Singer Mfg. Co. v. Wright, 33 Fed. Rep. 121. And see *infra*, this title, *The Levy*.

The legislature cannot designate a class of persons as special subjects of taxation because of their race or nationality. Lin Sing v. Washburn, 20 Cal. 534; *In re Quong Woo*, 13 Fed. Rep. 229.

**Non-resident persons**, however, cannot be made a class by themselves and taxed as such at a higher rate than residents. Halloway v. Police Jury, 16 La. Ann. 203.

3. See Cincinnati, etc., R. Co. v. Kentucky, 115 U. S. 321.

4. Ottawa Gas Light, etc., Co. v. Downey, 127 Ill. 201; Com. v. Brush Electric Light Co., 145 Pa. St. 147. And see Lehigh Valley R. Co. v. Com. (Pa. 1889), 18 Atl. Rep. 470.

A statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals. State Railroad Tax Cases, 92 U. S. 575; Cincinnati,

and different kinds of corporations, or corporations engaged in different kinds of business may be placed in different classes;<sup>1</sup> and even corporate debts may be made a distinct class and taxed as such;<sup>2</sup> but, under constitutional requirements that the property of corporations shall be taxed the same as that of individuals, the legislature may not distinguish or discriminate in favor of or against corporate property.<sup>3</sup>

The requirement of equality and uniformity is satisfied by such regulations as will secure an equal rate and a just valuation with-

etc., *R. Co. v. Kentucky*, 115 U. S. 321. And see *State Board of Assessors v. State*, 48 N. J. L. 146; 24 Am. & Eng. R. Cas. 546.

A statutory provision requiring all the railroad companies in the state to contribute to the salary and expenses of a state railroad commissioner, is not in contravention of the constitutional provision requiring that all taxation shall be uniform. *Charlotte, etc., R. Co. v. Gibbs* (S. Car. 1887), 31 Am. & Eng. R. Cas. 464. But see *Atchison, etc., R. Co. v. Howe*, 32 Kan. 737.

A tax upon the gross receipts of some railroad companies and upon the capital stock of others is not equal and uniform. *Worth v. Wilmington, etc., R. Co.*, 89 N. Car. 291; 13 Am. & Eng. R. Cas. 286; 45 Am. Rep. 679; *Gatlin v. Tarboro*, 78 N. Car. 119. But see *Com. v. Brush Electric Light Co.*, 145 Pa. St. 147.

1. *Hughes v. Cairo*, 92 Ill. 339; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *Weaver v. State*, 89 Ga. 639; *Com. v. Germania Brewing Co.*, 145 Pa. St. 83; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *Pacific Express Co. v. Seibert*, 142 U. S. 339. And see *State v. Liverpool, etc., Ins. Co.*, 40 La. Ann. 463.

Constitutional provisions conferring power upon the legislature to tax corporations by a general law uniform as to the class upon which it operates, do not prohibit the legislature from classifying corporations for taxation. *La Salle, etc., R. Co. v. Donoghue*, 127 Ill. 27; *Ottawa Gas Light, etc., Co. v. Downey*, 127 Ill. 201; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666. And see *Ducat v. Chicago*, 48 Ill. 173.

Foreign corporations may be made a class by themselves and taxed at a higher rate than domestic corporations. *Insurance Co. v. New Orleans*, 1 Woods (U. S.) 85; *State v. Lathrop*, 10 La. Ann. 398; *Milwaukee Fire Dept. v. Helfenstein*, 16 Wis. 136. But see

*State Treasurer v. Auditor Gen'l*, 46 Mich. 224; 13 Am. & Eng. R. Cas. 296.

2. *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *Com. v. Bellefonte, etc., R. Co.* (Pa. 1889), 16 Atl. Rep. 593; *Com. v. Bell's Gap R. Co.* (Pa. 1889), 16 Atl. Rep. 593; *Lehigh Valley R. Co. v. Com.* (Pa. 1889), 18 Atl. Rep. 410; *Com. v. North Pa. R. Co.*, 129 Pa. St. 460; *Com. v. Lehigh Avenue R. Co.*, 129 Pa. St. 405.

A tax may be imposed upon the indebtedness within the state of a foreign corporation permitted to do business in the state. *Com. v. New York, etc., R. Co.*, 145 Pa. St. 38.

3. See *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *Perry County v. Selma, etc., R. Co.*, 65 Ala. 391; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Mobile, etc., R. Co. v. Kennerly*, 74 Ala. 566; *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 208; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Bureau County v. Chicago, etc., R. Co.*, 44 Ill. 229; *Chicago, etc., R. Co. v. Boone County*, 44 Ill. 290; *Columbus, etc., R. Co. v. Wright*, 89 Ga. 574; *State v. Missouri Pac. R. Co.*, 92 Mo. 137; *State v. Board of Revenue*, 73 Ala. 65; *Boston, etc., R. Co. v. State*, 60 N. H. 87.

Under a constitutional provision declaring that property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, the legislature may exempt property of a particular class, whether the owners be corporations or natural persons. But the property of corporations for pecuniary profit cannot be placed beyond the reach of the taxing power; it may not be taxed, but it must ever be taxable; it need not be subjected, but it must be subject to taxation, the same as that of individuals. *Mississippi Mills v. Cook*, 56 Miss. 40. See generally TAXATION (CORPORATE).

out reference to the mode of valuation;<sup>1</sup> and, in order to be uniform, a tax need not be imposed and assessed upon all property by the same agency or officer.<sup>2</sup>

The principles here dealt with appertain to general taxation, and not to local assessments<sup>3</sup> or occupation taxes.<sup>4</sup> The effect of constitutional requirements of equality and uniformity on exemptions, and the power to exempt is dealt with elsewhere.<sup>5</sup>

1. Louisville, etc., R. Co. v. State, 25 Ind. 177; Sterling Gas Co. v. Higby, 134 Ill. 557; Coal Run Coal Co. v. Finlen, 124 Ill. 666; Dubuque v. Chicago, etc., R. Co., 47 Iowa 196; People v. Henderson, 12 Colo. 369; Missouri River, etc., R. Co. v. Morris, 7 Kan. 210; Ottawa County v. Nelson, 19 Kan. 234; Francis v. Atchison, etc., R. Co., 19 Kan. 307; Shotwell v. Moore, 45 Ohio St. 632; State v. Severance, 55 Mo. 378; Louisville, etc., R. Co. v. State, 8 Heisk. (Tenn.) 663; People v. New York, etc., Dock Co., 11 Abb. N. Cas. (N. Y.) 40; Virginia v. Chollar Potosi, etc., Co., 2 Nev. 86; Wagoner v. Loomis, 37 Ohio St. 671; Wisconsin Cent. R. Co. v. Lincoln County, 57 Wis. 137; Cincinnati, etc., R. Co. v. Kentucky, 115 U. S. 321; Apperson v. Memphis, 2 Flip. (U. S.) 363; Cincinnati, etc., R. Co. v. Kentucky, 115 U. S. 321; Exchange Nat. Bank v. Miller, 19 Fed. Rep. 372; Nelson Lumber Co. v. Loraine, 22 Fed. Rep. 59. But this doctrine does not apply to an international discrimination. Exchange Nat. Bank v. Miller, 19 Fed. Rep. 372.

In determining how this end shall be secured, the legislature must exercise a discretion, and unless the method adopted is clearly inadequate to secure the result, the courts cannot interfere. Louisville, etc., R. Co. v. State, 25 Ind. 177.

Provisions authorizing boards of equalization to change assessments, do not contravene constitutional provisions requiring a just and uniform rule of valuation. Smith v. Kelly (Oregon, 1893), 33 Pac. Rep. 642.

An *ad valorem* tax imposed upon the property of a railroad, at the same rate as that imposed upon other property in the county, and a tax in addition thereupon its rolling stock and other floating or unlocated property, corresponding to the ratio between its property located in a given county and the aggregate of its located property in all the counties through which the road runs, does not violate constitutional

provisions requiring all taxation to be uniform upon the same class of subjects and *ad valorem* on all property taxed. Columbus, etc., R. Co. v. Wright, 89 Ga. 574; Georgia, etc., R. Co. v. State, 89 Ga. 597. And see Chicago, etc., R. Co. v. Siders, 88 Ill. 320.

2. Dubuque v. Chicago, etc., R. Co., 47 Iowa 196; Missouri Valley, etc., R. Co. v. Harrison County, 74 Iowa 283; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625; Indianapolis, etc., R. Co. v. Backus, 133 Ind. 609; Cincinnati, etc., R. Co. v. Com., 81 Ky. 492; Missouri River, etc., R. Co. v. Morris, 7 Kan. 210; Columbus, etc., R. Co. v. Wright, 89 Ga. 574; Georgia, etc., R. Co. v. State, 89 Ga. 597; Sawyer v. Dooley (Nev. 1893), 32 Pac. Rep. 437; San Francisco, etc., R. Co. v. State Board, 60 Cal. 12; Central Pac. R. Co. v. State Board, 60 Cal. 35; Com. v. Delaware Div. Canal Co., 123 Pa. St. 594; Coal Ridge Imp., etc., Co. v. Jennings, 127 Pa. St. 397; Shenandoah Valley R. Co. v. Clark County, 78 Va. 269; Coal Run Coal Co. v. Finlen, 124 Ill. 666; Sterling Gas Co. v. Higby, 134 Ill. 557; Ottawa Gas Light, etc., Co. v. People, 138 Ill. 336.

In Central Iowa R. Co. v. Wright County, 67 Iowa 199, it was held that a provision for the assessment of a railroad company every year, while other property is assessed every alternate year, is not unconstitutional.

In Dunham v. Cox, 44 N. J. Eq. 273, it was held that an act providing for the assessment of mortgages made to the chancellor in his official capacity, when there is no provision for the taxation of mortgages made to other officers of the court, is in violation of a constitutional provision requiring property to be assessed under general laws and by uniform rules.

See *infra*, this title, *The Assessment*.

3. See *infra*, this title, *Local Assessments*.

4. See *infra*, this title, *Occupation, Business, and Privilege Taxes*.

5. See *infra*, this title, *Exemptions*.



(b) **Taxation by Value.**—It is required usually that property be taxed according to its value; this to secure equality and uniformity.<sup>1</sup> Constitutions sometimes require this in express terms,<sup>2</sup> and, where such constitutional provisions exist, statutes laying taxes on any other basis than that of the value of the property taxed, are void.<sup>3</sup>

Arbitrary or artificial values may not be attached to property, nor may arbitrary or artificial rules for the estimation of values be adopted.<sup>4</sup>

The listing and valuation of different classes of property, in different modes and by different agencies, does not necessarily

1. See *Savings, etc., Soc. v. Austin*, 46 Cal. 415; *State v. County Court*, 19 Ark. 360; *Augusta v. National Bank*, 47 Ga. 562; *New Orleans v. Fourchy*, 30 La. Ann. 910; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361; *St. Louis v. Green*, 7 Mo. 562; *State v. North*, 27 Mo. 464; *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 5; *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1.

2. See *St. Louis v. Green*, 7 Mo. App. 468; *State v. North*, 27 Mo. 464; *Mobile v. Royal, etc., R. Co.*, 45 Ala. 322; *Clark v. Mobile*, 67 Ala. 217; *Mobile v. Dargan*, 45 Ala. 310; *McGehee v. Mathis*, 21 Ark. 40; *Hyatt v. Allen*, 54 Cal. 353; *O'Kane v. Treat*, 25 Ill. 557; *People v. Bradley*, 39 Ill. 130; *Johnston v. Macon*, 62 Ga. 645; *State v. South Carolina R. Co.*, 4 S. Car. 376; *Mississippi Mills v. Cook*, 56 Miss. 40; *Adams v. Somerville*, 2 Head (Tenn.) 363; *Pleuler v. State*, 11 Neb. 547; *Douglass v. Harrisville*, 9 W. Va. 162; *Creamer v. Allen*, 3 Mo. App. 545; *St. Louis v. Green*, 7 Mo. App. 468.

**Provision Self-Executing.**—In *Hyatt v. Allen*, 54 Cal. 353, it was held that the constitutional provision that all the property in the state, not exempt under the laws of the *United States*, shall be taxed in proportion to its value to be ascertained as provided by law, does not require subsequent legislation to enforce it, but is self-executing.

3. *Livingston v. Albany*, 41 Ga. 21; *Augusta v. National Bank*, 47 Ga. 562; *Peay v. Little Rock*, 32 Ark. 31; *Doster v. Sterling*, 33 Kan. 381; *St. Louis v. Green*, 7 Mo. App. 468; *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 5; *State v. North*, 27 Mo. 464; *Life Association v. St. Louis County*, 49 Mo. 512; *Pittsburgh, etc., R. Co. v. State*, 49 Ohio St. 189; *State v. South Carolina R. Co.*, 4

S. Car. 376; *Danville v. Shelton*, 76 Va. 325.

In *Life Association v. St. Louis County*, 49 Mo. 512, it was held that the provision of the new *Missouri* constitution that all property subject to taxation ought to be taxed in proportion to its value, is a prohibition against taxation in any other mode, the word "ought" not being directory, but mandatory.

In *Taggart v. Sanilac County*, 71 Mich. 16, it was held that a provision requiring mortgages to be reported for assessment, does not violate a constitutional provision that all assessments shall be on property at its cash value, the assessing officer being required to determine the cash value of a mortgage as well as any other personality.

In *Livingston v. Albany*, 41 Ga. 21, it was held that a tax upon the sale of horses or mules, or upon horses or mules sold, was a tax on the property, and must be imposed in proportion to the value of the property taxed.

4. *Assessment Board v. Alabama Cent. R. Co.*, 59 Ala. 551; *Cheshire v. Berkshire County*, 118 Mass. 386; *Gillespie v. Pittsburgh*, 138 Pa. St. 401. And see *Williams v. Bettle*, 51 N. J. L. 512; *In re House Bill*, 9 Colo. 635; *Mississippi Mills v. Cook*, 56 Miss. 40; *Taggart v. Sanilac County*, 71 Mich. 16.

The assessors must ascertain the value in the manner provided by law. *Hyatt v. Allen*, 54 Cal. 353.

An arbitrary requirement as to valuation is also in conflict with provisions requiring equality and uniformity of taxation. *In re Pittsburgh*, 138 Pa. St. 401.

In *Atlantic, etc., R. Co. v. Carteret County*, 75 N. Car. 474, it was held that a statute providing that railroad beds listed for taxation should not be valued at less than \$8,000 per mile,

conflict with the requirement ;<sup>1</sup> nor need all the property in the state be taxed, but only every species of property selected for taxation in proportion to its value.<sup>2</sup>

Such a constitutional provision does not prohibit the raising of revenue from other sources than that of property taxation,<sup>3</sup> as, for example, on occupations or privileges, or from licenses,<sup>4</sup> or incomes.<sup>5</sup> So assessments for local improvements are outside the rule.<sup>6</sup>

(c) **Double Taxation.**—In the absence of constitutional restrictions, double taxation is within the power of the state.<sup>7</sup> Some consti-

without regard to their real value, was unconstitutional.

1. *German Nat. Bank v. Kimball*, 103 U. S. 732; *Weaver v. State*, 89 Ga. 639; *Louisville, etc., R. Co. v. State*, 25 Ind. 178; *Wagoner v. Loomis*, 37 Ohio St. 571; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

A constitutional provision that property shall be taxed in proportion to its value to be ascertained as directed by law, does not require the value to be found after the rate of taxation is fixed, and the tax may be levied either before or after the value of the property is ascertained. *People v. Latham*, 52 Cal. 598.

2. *State v. North*, 27 Mo. 464; *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 5; *Johnston v. Macon*, 62 Ga. 645; *Verdery v. Summerville*, 82 Ga. 138; *Savannah v. Weed*, 84 Ga. 683; *Mississippi Mills v. Cook*, 56 Miss. 40; *Stratton v. Collins*, 43 N. J. L. 562; *Williamson v. Massey*, 33 Gratt. (Va.) 241. But see *Crow v. State*, 14 Mo. 180; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681.

A requirement that all property shall be taxed at its value in money does not prohibit or render void a transfer of an immunity from taxation attaching to property by the owner to another. *State v. Winona, etc., R. Co.*, 21 Minn. 315.

3. *American Union Express Co. v. St. Joseph*, 66 Mo. 675; *Glasgow v. Rowse*, 43 Mo. 479; *Washington v. State*, 13 Ark. 752; *Macon v. Macon Sav. Bank*, 60 Ga. 133; *Johnston v. Macon*, 62 Ga. 645; *Davis v. Macon*, 64 Ga. 128; *State v. Lancaster County*, 4 Neb. 537; *Charlotte, etc., R. Co. v. Gibbs* (S. Car. 1887), 31 Am. & Eng. R. Cas. 464.

In *St. Louis v. Green*, 7 Mo. App. 468, it was said that there is perhaps

no state which does not levy other taxes than those imposed upon property.

4. *St. Louis v. Green*, 7 Mo. App. 468; *People v. Thurber*, 13 Ill. 554; *Cole v. Hall*, 103 Ill. 30.

See *infra*, this title, *Occupation, Business, and Privilege Taxes*.

5. *Waring v. Savannah*, 60 Ga. 99; *Charlotte, etc., R. Co. v. Gibbs* (S. Car. 1887), 31 Am. & Eng. R. Cas. 464.

6. See *infra*, this title, *Local Assessments*.

7. *West Chester Gas Co. v. Chester County*, 30 Pa. St. 232; *Pittsburg, etc., R. Co. v. Com.*, 66 Pa. St. 77; *Erie R. Co. v. Com.*, 66 Pa. St. 84; *School Directors v. Carlisle Bank*, 8 Watts (Pa.) 291; *Ryan v. Leavenworth County*, 30 Kan. 185; *State v. Newark*, 25 N. J. L. 315; *U. S. v. Benzons*, 2 Cliff. (U. S.) 512; *Reclamation District v. Hagar*, 6 Sawy. (U. S.) 567; *Davidson v. New Orleans*, 96 U. S. 97. See also *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *St. Louis Mut. L. Ins. Co. v. St. Louis County*, 56 Mo. 503; *Holton v. Bangor*, 23 Me. 264; *Augusta Bank v. Augusta*, 36 Me. 255; *Com. v. New England, etc., Co.*, 13 Allen (Mass.) 393; *State v. Chambersburg*, 37 N. J. L. 258; *State v. Newark*, 25 N. J. L. 315; *Ebervale Coal Co. v. Com.*, 91 Pa. St. 47; *Pittsburg, etc., R. Co. v. Com.*, 66 Pa. St. 73; *New Orleans v. Houston*, 119 U. S. 265; *Tennessee v. Whitworth*, 117 U. S. 129; *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *Kirby v. Shaw*, 19 Pa. St. 258.

In *Alabama*, the owner of property, both real and personal, is required to return for assessment what he owns, on the first day of January in each year, which is the date at which the tax year begins; and the tax on salaries, incomes, gains, etc., is required to be given in, assessed, and paid, the year after they accrue, thus apparently, though not actually, making double

tutions, however, prohibit it.<sup>1</sup> Whether double taxation is prohibited or not, if the language of the statute imposing the tax is indefinite, the courts will construe it in such a manner as to avoid that result, a construction which will subject property to double taxation not being permissible unless required by the express words of the statute or by necessary implication.<sup>2</sup>

Prohibitions against double taxation apply to property taxes based upon value;<sup>3</sup> not to taxes on franchises,<sup>4</sup> or in-

taxes on the same property in the same year. *Board of Revenue v. Montgomery Gas Light Co.*, 64 Ala. 269.

The legislature has the power to impose double taxation, provided it is done in such manner as to secure the uniformity which the constitution requires; but an attempt to impose double taxation will not be presumed. *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488.

1. *Frederick County v. Farmers', etc.*, Nat. Bank, 48 Md. 116; *State v. Cumberland, etc.*, R. Co., 40 Md. 22; *State v. Central Sav. Bank*, 67 Md. 290; *Alexandria Canal, etc.*, Bridge Co. v. District of Columbia, 1 Mackey (D. C.) 217; *State v. Jersey City*, 46 N. J. L. 194; *People v. Badlam*, 57 Cal. 594; *San Francisco v. Mackey*, 21 Fed. Rep. 539; 22 Fed. Rep. 602.

2. *Toll-Bridge Co. v. Osborn*, 35 Conn. 7; *Savings Bank v. New London*, 20 Conn. 111; *Osborn v. New York, etc.*, R. Co., 40 Conn. 491; *Board of Revenue v. Montgomery Gas Light Co.*, 64 Ala. 269; *People v. Tax Com'rs*, 95 N. Y. 554; *Tallman v. Butler*, 12 Iowa 531; *Cook v. Burlington*, 59 Iowa 251; *U. S. Express Co. v. Ellyson*, 28 Iowa 378; *State v. Hannibal, etc.*, R. Co., 37 Mo. 265; *State v. Ross*, 23 N. J. Eq. 517; *State v. Thomas*, 26 N. J. L. 181; *Salem Iron, etc., Co. v. Danvers*, 10 Mass. 514; *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 202; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Worcester County Sav. Inst. v. Worcester*, 10 Cush. (Mass.) 128; *Conwell v. Connorsville*, 15 Ind. 150; *State v. Chambersburg*, 37 N. J. L. 258; *State v. Branin*, 23 N. J. L. 484; *Gardner, etc., Factory Co. v. Gardner*, 5 Me. 133; *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488; *Bank of Georgia v. Savannah*, 1 Dudley (Ga.) 130; *Rome R. Co. v. Rome*, 14 Ga. 275; *Rice County v. Citizens' Nat. Bank*, 23 Minn. 280; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *American Bank v. Mumford*, 4 R. I. 482; *Providence Sav. Inst. v. Gardiner*, 4 R.

I. 484; *Tennessee v. Whitworth*, 117 U. S. 129. And see *Amesbury, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461; *Chicago, etc., R. Co. v. Miller*, 72 Ill. 144; *New Orleans v. Houston*, 119 U. S. 265; *Coatesville Gas Co. v. Chester County*, 97 Pa. St. 476.

A depot company is not liable for taxes on its gross earnings when the railway companies, which own all the stock and use the terminal facilities of the depot company, have paid such taxes on their gross earnings, their payment constituting payment on all the property of the depot company. *State v. St. Paul Union Depot Co.*, 42 Minn. 142.

Where property which is realty, at common law is assessed as personalty, it will be presumed that it was not included in the valuation of the realty to which it is attached. *Johnson v. Roberts*, 102 Ill. 655.

3. *Society for Savings v. Coite*, 6 Wall. (U. S.) 594; *Johnston v. Macon*, 62 Ga. 645; *Livingston v. Paducah*, 80 Ky. 656.

4. See *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Carbon Iron Co. v. Carbon County*, 39 Pa. St. 251; *Lackawanna Iron, etc., Co. v. Luzerne County*, 42 Pa. St. 424; *Bridgeport v. Bishop*, 33 Conn. 187; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Wilmington, etc., R. Co. v. Reid*, 64 N. Car. 226; *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509; 40 Am. Rep. 99; *Com. v. New England Slate, etc., Co.*, 13 Allen (Mass.) 391; *Tremont Bank v. Boston*, 1 Cush. (Mass.) 142; *Com. v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75; *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 298; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *Bank of Commerce v. New York*, 2 Black (U. S.) 620; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Monroe Sav. Bank v. Rochester*, 37 N. Y. 365. See also *State v. Central Sav. Bank*, 67 Md. 290.

In *Louisville City R. Co. v. Louis-*

comes,<sup>1</sup> or successions,<sup>2</sup> or privileges.<sup>3</sup> So taxing credits or incumbrances when the property upon which they are secured is also taxed;<sup>4</sup> or goods or property for which the owner is indebted, while the indebtedness is taxed to the creditor;<sup>5</sup> or deposits to the depositor, while the moneys deposited are also taxed to the bank,<sup>6</sup> are not usually deemed to be objectionable, as double taxation. It has been held that the aggregate tax upon the different interests in the same piece of property should not exceed that which might have been imposed upon an owner in whom all the interests are united.<sup>7</sup> Taxing property to the trustee, however, and also to the *cestui que trust*,<sup>8</sup> or to the bailee and also to the bailor,<sup>9</sup> constitute double taxation.

It is not double taxation within constitutional prohibitions to tax the same thing in two jurisdictions, where each has the right

ville, 4 Bush (Ky.) 478, it was held that the payment by a railroad company to the city of a certain sum annually, on each car used within it, which secures to the company certain franchises, is not a tax, and does not exonerate the company from the payment of an *ad valorem* tax upon its property which was assessable by statute for municipal purpose. See TAXATION (CORPORATE)—*Double Taxation*.

1. Lott v. Hubbard, 44 Ala. 593; Board of Revenue v. Montgomery Gas Light Co., 64 Ala. 269; Wilcox v. Middlesex County, 103 Mass. 544; Memphis v. Ensley, 6 Baxt. (Tenn.) 553; Union Bank v. State, 9 Yerg. (Tenn.) 490.

2. Eyre v. Jacob, 14 Gratt. (Va.) 422. See SUCCESSION TAXES, vol. 24, p. 431.

3. See *infra*, this title, *Occupation, Business, and Privilege Taxes*.

4. See Detroit v. Board of Assessors, 91 Mich. 78; Toll-Bridge Co. v. Osborn, 35 Conn. 7; Taggart v. Sanilac County, 71 Mich. 16; People v. Rhodes, 15 Ill. 304; Nashua Sav. Bank v. Nashua, 46 N. H. 389; State v. Carson City Sav. Bank, 17 Nev. 146; Augusta Bank v. Augusta, 36 Me. 255; Philadelphia Sav. Fund Soc. v. Yard, 9 Pa. St. 359. But see to the contrary, Savings, etc., Soc. v. Austin, 46 Cal. 415.

In Lick v. Austin, 43 Cal. 590, it was held that where land subject to a mortgage is taxed, and the debt thereby secured is also taxed, and the tax on the debt is paid by the mortgagee, the mortgagor cannot complain of double taxation; nor can the assessor in assessing land deduct from its value the amount due on mortgages, by which it is incumbered, and call the remainder its assessed value.

In Sivwright v. Pierce, 108 Ill. 133, it was held that when one has been taxed in one town for his personal property, including his credits, an assessment against him in another town for his credits will be enjoined.

5. Augusta Bank v. Augusta, 36 Me. 255. And see People v. Worthington, 21 Ill. 171.

6. See Yuba County v. Adams, 7 Cal. 35; Savings Bank v. New London, 20 Conn. 111; New Orleans v. New Orleans Canal, etc., Co., 29 La. Ann. 851; 32 La. Ann. 157. But see State v. Central Sav. Bank, 67 Md. 290.

Taxes upon deposits have been held to be taxes upon a franchise, and not upon property. See Society for Savings v. Coite, 6 Wall. (U. S.) 594; Provident Institution v. Massachusetts, 6 Wall. (U. S.) 611.

7. Logan v. Washington County, 29 Pa. St. 373. And see Taggart v. Sanilac County, 71 Mich. 16; Daugherty v. Thompson, 71 Tex. 192; State v. Taylor, 72 Tex. 297.

When a lessee has an estate which amounts to an interest in the realty, he should be assessed on the comparative value of his estate, having reference to the character of the lease and to the value of the whole as assessed for taxation. Cincinnati College v. Yeatman, 30 Ohio St. 276.

8. People v. Badlam, 57 Cal. 594; Savings, etc., Soc. v. Austin, 46 Cal. 415; Berry v. Windham, 59 N. H. 288; Robinson v. Dover, 59 N. H. 521; Augusta Sav. Bank v. Augusta, 36 Me. 176. And see State v. Central Sav. Bank, 67 Md. 290.

9. Waltham Bank v. Waltham, 10 Met. (Mass.) 334; Tremont Bank v. Boston, 1 Cush. (Mass.) 142.

to tax it;<sup>1</sup> nor is a tax for general purposes and another for a special purpose necessarily objectionable;<sup>2</sup> nor does the imposition of a burden which is not a tax, as, for example, an inspection fee or a toll, in addition to the general tax, constitute double taxation.<sup>3</sup>

(d) **Rate of Taxation.**<sup>4</sup>—Constitutional limitations of the rate of taxation are self-executing,<sup>5</sup> a tax in excess of the prescribed limit being void.<sup>6</sup> But constitutional provisions permitting or requiring

1. See *Coe v. Errol*, 116 U. S. 517; *Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Hilgenberg v. Wilson*, 55 Ind. 210; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *People v. Davenport*, 25 Hun (N.Y.) 630; *People v. Tax Com'rs*, 26 Hun (N.Y.) 446; *St. Joseph v. Hannibal, etc.*, R. Co., 39 Mo. 476; *Dyer v. Osborne*, 11 R. I. 321.

In *Hilgenberg v. Wilson*, 55 Ind. 210, it was held that an owner of personal property who is assessed thereon for state and county purposes may be afterwards assessed upon the same property for city purposes upon his removing into the city before the time at which the city taxes are imposed. See also *Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54.

Provisions of law requiring railroads to be taxed in different counties in such proportion as the main tract used in each county bears to the whole length of the road, do not import into the state, valuations belonging to property in another state, so as to constitute double taxation. *Cleveland, etc.*, R. Co. v. *Backus*, 133 Ind. 513; *Indianapolis, etc.*, R. Co. v. *Backus*, 133 Ind. 609.

2. See *Drysdale v. Pradat*, 45 Miss. 445.

This rule is repeatedly acted upon in the imposition of local assessments and special taxation upon property taxed for general purposes. See *infra*, this title, *Local Assessments; Municipal Taxation*.

**Change of Form of Property.**—The fact that lands on which logs are grown are assessed for taxation in May, and the logs cut thereon are assessed for taxation in the following April, does not render the tax on the logs a second tax. *Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54.

3. *Vanmeter v. Spurrier* (Ky. 1893), 21 S. W. Rep. 337. And see *State v. Charleston*, 4 Rich. (S. Car.) 286.

4. See also as to the rate of taxation, and as to restrictions upon the amount

imposed, *infra*, this title, *The Levy; Municipal Taxation*.

5. *St. Joseph Board, etc. v. Patten*, 62 Mo. 444; *Laycock v. Baton Rouge*, 36 La. Ann. 328; *Ketchum v. Pacific R. Co.*, 22 Int. Rev. Rec. 383.

Such provisions are self-executing, even though they contain a proviso allowing the rate to be increased by legislative action on certain conditions. *St. Joseph Board, etc. v. Patten*, 62 Mo. 444. But when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters shall vote therefor, it requires legislation to enforce it, and without such legislation it is nugatory. *State v. St. Louis, etc.*, R. Co., 74 Mo. 163.

6. See *Trull v. Madison County*, 72 N. Car. 388; *Elyton Land Co. v. Birmingham*, 89 Ala. 477; *People v. Scott*, 9 Colo. 422; *Cleveland v. Heisley*, 41 Ohio St. 670; *State v. Carri-tuck Co.*, 107 N. Car. 110; *Ex p. Schmidt*, 2 Tex. App. 196.

A tax in excess of the limit prescribed by the constitution is not validated pursuant to an order of court. *Black v. McGonigle*, 103 Mo. 192.

An injunction is the proper remedy to prevent the collection of a tax levied in excess of the legal limit, but the court will require the complainant to pay such part of the tax as is confessedly due before granting it. *Overall v. Ruenzi*, 67 Mo. 203.

In *Clifton v. Wynne*, 80 N. Car. 145, it was held, under a constitutional provision limiting county taxes to double the state tax, that a county tax more than double that of the state is not *prima facie* invalid on that account, since there are exceptional cases in which such tax would be authorized; and that the courts will presume, in the absence of rebutting evidence, that such a case has arisen, under the maxim *omnia præsumuntur rite esse acta*.

ing the legislature to restrict the power to tax are not self-executing,<sup>1</sup> and a failure on the part of the legislature to obey such a requirement lays no foundation for judicial correction.<sup>2</sup>

As a general rule, the restrictions thus imposed apply only to taxes levied to meet the ordinary expenses of government,<sup>3</sup> and provisions which merely restrict the manner or mode of taxation do not affect the rate or valuation.<sup>4</sup>

Provisions limiting the amount of indebtedness which may be contracted by a state or a municipal division are also restrictions upon the power to tax,<sup>5</sup> the restriction entering into and forming

1. See *Hill v. Higden*, 5 Ohio St. 248; *St. Joseph Board, etc. v. Patten*, 62 Mo. 444; *People v. Mahaney*, 13 Mich. 481; *Bank of Rome v. Rome*, 18 N. Y. 38.

Such provisions are designed to give further protection in addition to that furnished by the rule requiring uniformity and equality. *Weeks v. Milwaukee*, 10 Wis. 242.

Such provisions do not prevent an enactment prohibiting the courts from vacating or reducing assessments for local improvements, except to reduce them to the extent beyond which they are increased by fraud or irregularity, and prohibiting in any event the disturbance of that portion of an assessment which is equivalent to the fair value of the improvement. *Matter of Mead*, 74 N. Y. 216.

In *Hines v. Leavenworth*, 3 Kan. 186, it was held that a statute requiring the cost of paving streets to be assessed upon the adjacent property to the middle of the block, was a compliance with a constitutional requirement that every law upon the subject of taxation should contain a restriction.

In *Townsend v. New York*, 16 Hun (N. Y.) 363, it was held that a statutory provision constituting the mayor and comptroller, president of the board of aldermen, and president of the department of taxes of New York City, a board of estimates and apportionment, to certify to the county supervisors the amount necessary to raise by tax in the city for county purposes, was a sufficient compliance with a constitutional requirement that the power to tax by municipal corporations should be restricted.

2. *Hill v. Higden*, 5 Ohio St. 248; *Maloy v. Marietta*, 11 Ohio St. 636; *Northern Indiana, etc., R. Co. v. Connelly*, 10 Ohio St. 159; *St. Joseph Board, etc. v. Patten*, 62 Mo. 444; *Peo-*

*ple v. Mahaney*, 13 Mich. 481; *Bank of Rome v. Rome*, 18 N. Y. 38.

3. *Clifton v. Wynne*, 80 N. Car. 115; *Powder River Cattle Co. v. Johnson County*, 3 Wyoming 597; *U. S. v. Muscatine*, 8 Wall. (U. S.) 575. And see *Bond Debt Cases* 12 S. Car. 200.

Under a constitutional provision limiting the whole tax levy for the purposes of state and county governments, the right of the state to tax is paramount, and counties can levy taxes only to the extent that the power to tax has not been exhausted by the levy of the state. *State v. Currituck County*, 107 N. Car. 110. See also *Young v. Henderson*, 76 N. Car. 420.

The *Louisiana* constitutional limitation upon the rate of taxation applies not only to the ordinary expenses or purposes of municipal government, but to all taxes levied by municipalities for any purpose whatever. *State v. New Orleans*, 32 La. Ann. 709.

The *North Carolina* constitution, establishing an equation of taxation, does not restrict the power of state taxation to meet the interest of the public debt, nor does it restrict the power of county taxation to meet the interest of the debt of the county, and such taxation does not require the special approval of the general assembly. *University R. Co. v. Holden*, 63 N. Car. 410; *Pegram v. Cleveland County*, 64 N. Car. 557.

The *Colorado* provision includes taxes for the support of state institutions. *People v. Scott*, 9 Colo. 422.

4. *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Binkert v. Jansen*, 94 Ill. 283.

5. See *Nongues v. Douglass*, 7 Cal. 65; *Graham v. Parham*, 32 Ark. 676; *Holland v. State*, 15 Fla. 455; *Kimball v. Com'rs*, 21 Fed. Rep. 145.

Neither the legislature of the state,

a part of the contract under which the indebtedness is incurred;<sup>1</sup> and a tax imposed for the payment of an indebtedness in excess of the limit is void.<sup>2</sup> But taxes for the payment of debts contracted prior to the adoption of the restriction,<sup>3</sup> may be laid without regard to the constitutional limitation.

(e) *Form of the Enactment.*—(See STATUTES, vol. 23, pp. 140, 258.)

**3. Restriction by Treaty.**—(See also TREATIES).—State laws imposing taxation, which are repugnant to treaty stipulations made pursuant to the federal constitution under authority of the *United States*, are inoperative and void,<sup>4</sup> but congressional legislation is not restrained by treaty provisions.<sup>5</sup>

**4. Legislative Exercise of Power.**—*a. THE LEGISLATIVE FUNCTION.*—The power to tax is a legislative power.<sup>6</sup> If its exercise is intrusted to a judicial body, the action of such body is *quasi*

nor the federal courts can direct or force a county to make a valid levy in excess of the limit. *Graham v. Parham*, 32 Ark. 676.

1. *State v. Shortridge*, 56 Mo. 176; *Klein v. Kinkead*, 16 Nev. 194. And see *Louisiana v. Jefferson Police Jury*, 116 U. S. 135.

2. See *People v. Kings County*, 52 N. Y. 565; *Trull v. Madison County*, 72 N. Car. 388; *Mauney v. Montgomery County*, 71 N. Car. 486.

A resident and taxpayer of a municipality has such an interest in its affairs, as to entitle him to enjoin it from incurring indebtedness in excess of the amount limited by law. *Springfield v. Edwards*, 84 Ill. 626.

3. *Trull v. Madison County*, 72 N. Car. 388; *French v. New Hanover County*, 74 N. Car. 692; *Street v. Craven County*, 70 N. Car. 644; *Mauney v. Montgomery County*, 71 N. Car. 486; *Clifton v. Wynne*, 80 N. Car. 145; *Haughton v. Jones County*, 70 N. Car. 466; *Brothens v. Currituck County*, 70 N. Car. 726; *Pegram v. Cleveland County*, 64 N. Car. 557; *Vance v. Little Rock*, 30 Ark. 435; *State v. New Orleans*, 29 La. Ann. 863; *Saloy v. New Orleans*, 33 La. Ann. 79; *Chiniquy v. People*, 78 Ill. 570; *Pope County v. Sloan*, 92 Ill. 177.

In *State v. Hannibal*, etc., R. Co., 101 Mo. 120, it was held that the *Missouri* constitutional limitation as to the rate of levy for taxes applies only to years subsequent to its adoption, and does not affect levies made after its adoption for years prior thereto.

4. See *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Cherokee Tobacco v. U. S.*, 11 Wall. (U. S.) 616; *Pollard v. Kibby*,

14 Pet. (U. S.) 353; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 667; *Crane v. Reeder*, 25 Mich. 303; *Fellows v. Denniston*, 23 N. Y. 420; *Gordon v. Kerr*, 1 Wash. (U. S.) 322.

5. See *Ropes v. Clinch*, 8 Blatchf. (U. S.) 304; *Cherokee Tobacco v. U. S.*, 11 Wall. (U. S.) 616; *Talbot v. Seaman*, 1 Cranch (U. S.) 1; *Ware v. Hylton*, 3 Dall. (U. S.) 199; *U. S. v. Tobacco Factory*, 1 Dill. (U. S.) 264; *Foster v. Wilson*, 2 Pet. (U. S.) 314; *Taylor v. Merton*, 2 Curt. (U. S.) 454; *The Clinton Bridge*, 1 Woolw. (U. S.) 155; *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 344; *Chinese Exclusion Case*, 130 U. S. 581; *Head Money Cases*, 112 U. S. 580; *Whitney v. Robinson*, 124 U. S. 190; *Edye v. Robertson*, 112 U. S. 580. And see generally TREATIES.

6. *Sharpless v. Philadelphia*, 21 Pa. St. 147; *Kirby v. Shaw*, 19 Pa. St. 258; *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; *Houghton v. Austen*, 47 Cal. 646; *People v. Seymour*, 16 Cal. 332; *People v. Coleman*, 4 Cal. 46; *San José v. San José*, etc., R. Co., 53 Cal. 475; *McVeagh v. Chicago*, 49 Ill. 318; *People v. Morgan*, 90 Ill. 558; *Porter v. Rockford*, etc., R. Co., 76 Ill. 561; *Eurigh v. People*, 79 Ill. 214; *Sawyer v. Alton*, 4 Ill. 130; *People v. Worthington*, 21 Ill. 174; *People v. Salomon*, 51 Ill. 37; *Stewart v. Polk County*, 30 Iowa 9; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Auditor v. Atchison*, etc., R. Co., 6 Kan. 500; *Baltimore v. State*, 15 Md. 376; *American Union Express Co. v. St. Joseph*, 66 Mo. 675; *St. Louis v. Laughlin*, 49 Mo. 559; *Glasgow v. Rowse*, 43 Mo. 479; *Gibson v. Mason*, 5 Nev. 283; *Youngblood v.*

legislative.<sup>1</sup> This general rule embraces time, occasion, and extent,<sup>2</sup> as well as the subjects upon which the power is brought

Sexton, 32 Mich. 406; Warren v. Grand Haven, 30 Mich. 24; Turner v. Althaus, 6 Neb. 54; State v. Rahway, 43 N. J. L. 338; People v. Brooklyn, 4 N. Y. 419; People v. Flagg, 46 N. Y. 401; Gorden v. Cornes, 47 N. Y. 608; State v. Central Pac. R. Co., 21 Nev. 260; Lima v. McBride, 34 Ohio St. 338; Board of Education v. McLandsborough, 36 Ohio St. 227; State v. Franklin County, 35 Ohio St. 458; Scovill v. Cleveland, 1 Ohio St. 126; State v. Haggood, 13 S. Car. 46; Morton v. Comptroller General, 4 S. Car. 430; Taylor v. Chandler, 9 Heisk. (Tenn.) 349; Hope v. Deaderick, 8 Humph. (Tenn.) 1; Waterhouse v. Cleveland Public Schools, 9 Baxt. (Tenn.) 398; Luehrman v. Taxing District, 2 Lea (Tenn.) 443; Wells v. Board of Education, 20 W. Va. 157; Meriwether v. Garrett, 102 U. S. 472; State Railroad Tax Cases, 92 U. S. 615; McCulloch v. Maryland, 4 Wheat. (U. S.) 419; Heine v. Levee Com'rs, 19 Wall. (U. S.) 655; U. S. v. New Orleans, 98 U. S. 381; New Orleans Waterworks Co. v. Louisiana Sugar, etc., Co., 125 U. S. 18; U. S. v. New Orleans, 103 U. S. 358; U. S. v. New Orleans, 2 Woods (U. S.) 230; Society for Savings v. Coite, 6 Wall. (U. S.) 606.

In *Yellowstone County v. Northern Pac. R. Co.* (Mont. 1891), 25 Pac. Rep. 1058, it was held that the addition of a strip of land to a county for judicial purposes does not confer upon the county the right to tax it, as the power to tax is an executive and not a judicial power.

1. Cooley on Taxation (2d ed.) 46. And see *St. Louis, etc., R. Co. v. State*, 47 Ark. 323; *Housman v. Montgomery*, 58 Mich. 364; *State v. Paterson*, 49 N. J. L. 380; *Philadelphia Assoc., etc. v. Wood*, 39 Pa. St. 73; *Baldwin v. Shine*, 84 Ky. 502; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *State Railroad Tax Cases*, 92 U. S. 575; *Delaware Railroad Tax Cases*, 18 Wall. (U. S.) 206.

In *Baldwin v. Shine*, 84 Ky. 502, it was held that the county judge, in assessing property under the *Kentucky* statute, acts ministerially and not judicially.

2. See *Ex p. Newman*, 9 Cal. 502; *Blanding v. Burr*, 13 Cal. 343; *People v. Seymour*, 16 Cal. 332; *Lyon v. Morris*, 15 Ga. 480; *Loughbridge v. Har-*

*ris*, 42 Ga. 500; *Linton v. Athens*, 53 Ga. 588; *Shaw v. Dennis*, 10 Ill. 418; *Bank of the Republic v. Hamilton County*, 21 Ill. 53; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 576; *Wright v. Defress*, 8 Ind. 298; *Bankhead v. Brown*, 25 Iowa 540; *Anderson v. Mayfield* (Ky. 1892), 19 S. W. Rep. 598; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *State v. Maxwell*, 27 La. Ann. 722; *Coburn v. Richardson*, 16 Mass. 213; *Com. v. People's, etc., Sav. Bank*, 5 Allen (Mass.) 428; *Lowell v. Oliver*, 8 Allen (Mass.) 247; *Cushing v. Newburyport*, 10 Met. (Mass.) 508; *Sears v. Cottrell*, 5 Mich. 251; *Baltimore v. State*, 15 Md. 376; *Robertson v. State Land Com'rs*, 44 Mich. 274; *Sheley v. Detroit*, 45 Mich. 431; *Hamilton v. St. Louis County Ct.*, 15 Mo. 5; *State v. St. Louis County Ct.*, 34 Mo. 546; *Glasgow v. Rowse*, 43 Mo. 489; *State v. Hays*, 49 Mo. 604; *Hannibal v. Marion County*, 69 Mo. 571; *Bradshaw v. Omaha*, 1 Neb. 16; *Gibson v. Mason*, 5 Nev. 283; *Turner v. Althaus*, 6 Neb. 54; *Ex p. Spinney*, 10 Nev. 323; *Concord R. Co. v. Greely*, 17 N. H. 47; *Guilford v. Chenango County*, 13 N. Y. 143; *People v. Draper*, 15 N. Y. 545; *Matter of Townsend*, 39 N. Y. 174; *Genet v. Brooklyn*, 99 N. Y. 296; *Matter of McPherson*, 104 N. Y. 306; *De Camp v. Eveland*, 19 Barb. (N. Y.) 81; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Astor v. New York*, 37 N. Y. Super. Ct. 560; *State v. Central Pac. R. Co.*, 21 Nev. 260; *Cowles v. Brittain*, 2 Hawks (N. Car.) 204; *Hill v. Higdon*, 5 Ohio St. 248; *North Indiana R. Co. v. Conneley*, 10 Ohio St. 165; *King v. Portland*, 2 Oregon 154; *McGregor v. Montgomery*, 4 Pa. St. 237; *Kirby v. Shaw*, 19 Pa. St. 261; *Philadelphia v. Field*, 58 Pa. St. 320; *Durach's Appeal*, 62 Pa. St. 491; *Henry v. Horstick*, 9 Watts (Pa.) 412; *State v. Allen*, 2 McCord (S. Car.) 55; *Goddin v. Crump*, 8 Leigh (Va.) 154; *In re Powers*, 25 Vt. 265; *Lusher v. Scites*, 4 W. Va. 11; *Plumer v. Marathon County*, 46 Wis. 164; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Martin v. Hunter*, 1 Wheat. (U. S.) 326; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Ex p. McCardle*, 7 Wall. (U. S.) 514; *Philadelphia, etc.,*



to bear<sup>1</sup> and the mode in which it is carried into effect.<sup>2</sup> The only security against the abuse of the power is found in constitutional limitations and in the responsibility of the members of the legislature to their constituents.<sup>3</sup>

Executive and ministerial officers may enforce tax laws, but

*R. Co. v. Pennsylvania* (Foreign Held Bond Cases), 15 Wall. (U. S.) 300; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 296; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492.

The reasonableness, justice, and expediency of an act are questions for legislative determination. *Ex p. Spinnery*, 10 Nev. 323.

1. *North Missouri, etc., R. Co. v. Maguire*, 20 Wall. (U. S.) 60; *Kirtland v. Hotchkiss*, 100 U. S. 491; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 429; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Waring v. Savannah*, 60 Ga. 97; *Athens v. Long*, 54 Ga. 330; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Bank of Pennsylvania v. Com.*, 19 Pa. St. 144; *In re Hancock St.*, 18 Pa. St. 30; *Woodbridge v. Detroit*, 8 Mich. 274; *Pullen v. Wake County*, 66 N. Car. 361; *Turner v. Althaus*, 6 Neb. 54; *De Camp v. Eveland*, 19 Barb. (N. Y.) 81; *Catlin v. Hull*, 21 Vt. 161; *Tallman v. Butler County*, 12 Iowa 531; *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Beals v. Amador County*, 35 Cal. 624.

The legislature has the power to prescribe not only what property shall be taxed, but also the rule by which it must be taxed, and what property shall not be taxed. *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

2. See *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 429; *Bank of Commerce v. New York*, 2 Black (U. S.) 620; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Philadelphia, etc., R. Co. v. Pennsylvania* (Foreign Held Bond Cases), 15 Wall. (U. S.) 300; *Williams v. Albany County*, 122 U. S. 154; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *People v. Eddy*, 43 Cal. 331; *Frost v. Flick*, 1 Dakota 131; *Waring v. Savannah*, 60 Ga. 97; *Athens v. Long*, 54 Ga. 330; *Euright v. People*, 79 Ill. 214; *Porter v. Rock-*

*ford, etc., R. Co.*, 76 Ill. 561; *Tallman v. Butler County*, 12 Iowa 531; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43; *Slack v. Ray*, 26 La. Ann. 675; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Robertson v. State Land Com'rs*, 44 Mich. 274; *Williams v. Cammack*, 27 Miss. 209; *Wheeler v. Plattsmouth*, 7 Neb. 270; *State v. Central Pac. R. Co.*, 21 Nev. 260; *State v. Consolidated, etc., Co.*, 16 Nev. 432; *People v. Brooklyn*, 4 N. Y. 419; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *People v. New York, etc., Dock Co.*, 63 How. Pr. (N. Y.) 451; *Cowles v. Brittain*, 2 Hawks (N. Car.) 204; *King v. Portland*, 2 Oregon 154; *Lipscomb v. Dean*, 1 Lea (Tenn.) 550; *Luehrman v. Taxing District*, 2 Lea (Tenn.) 444; *Warden v. Fond du Lac County*, 14 Wis. 618.

A revenue law is not to be held void merely because it is unjust in its operation. *Porter v. Rockford, etc., R. Co.*, 76 Ill. 563. And see *People v. Whyler*, 41 Cal. 351.

3. *Nathan v. Louisiana*, 8 How. (U. S.) 82; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 419; *Providence Bank v. Billings*, 4 Pet. (U. S.) 561; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738; *Railroad Tax Cases*, 13 Fed. Rep. 726; *Johnston v. Macon*, 62 Ga. 652; *Ex p. Robinson*, 12 Nev. 263; *People v. Brooklyn*, 4 N. Y. 419; *Astor v. New York*, 37 N. Y. Super. Ct. 537; *People v. Flagg*, 46 N. Y. 401; *King v. Portland*, 2 Oregon 147; *Sharpless v. Philadelphia*, 21 Pa. St. 147; *Felty v. Uhler*, 10 Phila. (Pa.) 512; *Wharton v. School Directors*, 42 Pa. St. 358; *Philadelphia v. Field*, 58 Pa. St. 320. And see *State v. Rainey*, 74 Mo. 236; *Shaw v. Dennis*, 10 Ill. 418; *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 201; *Tallman v. Butler County*, 12 Iowa 531; *Meriwether v. Garrett*, 102 U. S. 472.

The power will not be presumed to have been abused. *Kneidler v. Lane*, 45 Pa. St. 238; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Cowles v. Brittain*, 2 Hawks (N. Car.) 204.

they cannot exercise the taxing power or add to or vary any tax lawfully levied.<sup>1</sup>

Courts cannot interfere with the legislature in the exercise of the taxing power, unless constitutional limitations are contravened;<sup>2</sup> even a total failure to exercise the power laying no foundation for judicial correction,<sup>3</sup> unless its exercise is a duty enforceable at law.<sup>4</sup>

It is within the province of the courts, however, to determine, in particular cases, whether the extreme boundary of legislative power has been reached and passed.<sup>5</sup> But courts cannot declare

1. *State v. Bentley*, 23 N. J. L. 532; *State v. Flavell*, 29 N. J. L. 370.

In *Bragg v. Tufts*, 49 Ark. 554, it was held that a convention called for the purpose of taking into consideration the condition of political affairs, consisting of but a single body, and brought together for a special purpose, has no power to raise revenue under a constitutional provision confining the legislative power of the state to a general assembly consisting of a Senate and House of Representatives.

2. *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 145; *Wharton v. School Directors*, 42 Pa. St. 358; *Durach's Appeal*, 62 Pa. St. 491; *Beals v. Amador County*, 35 Cal. 624; *Stewart v. Polk County*, 30 Iowa 9; *Athens v. Long*, 54 Ga. 330; *Burke v. Speer*, 59 Ga. 353; *Wright v. Southwestern R. Co.*, 64 Ga. 790; *White v. State*, 51 Ga. 254; *Decker v. McGowan*, 59 Ga. 806; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Turner v. Althaus*, 6 Neb. 54; *Pleuler v. State*, 11 Neb. 547; *State v. Lancaster County*, 4 Neb. 537; *Sears v. Cottrell*, 5 Mich. 251; *State v. McCann*, 21 Ohio St. 210; *Maloy v. Marietta*, 11 Ohio St. 639; *Mills v. Charleton*, 29 Wis. 400; *Plumer v. Marathon County*, 46 Wis. 175; *Philleo v. Hiles*, 42 Wis. 527; *Schettler v. Fort Howard*, 43 Wis. 48; *Goff v. Outagamie County*, 43 Wis. 55; *Delaware Railroad Tax Case*, 18 Wall. (U. S.) 206; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 296; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Cooper v. Telfair*, 4 Dall. (U. S.) 14. And see *Price v. Kramer*, 4 Colo. 546; *People v. Lothrop*, 3 Colo. 465; *King v. Portland*, 2 Oregon 147; *Exchange Bank Tax Cases*, 21 Fed. Rep. 99.

Courts will abstain from questioning the validity of legislation until it becomes absolutely necessary in a decision of a pending controversy. *Upton v. Kennedy*, 36 Mich. 215.

If the legislature keeps within its proper sphere of action and does not impose burdens under the name of taxation, which are not taxation in fact, its decisions as to what is proper, just, and politic, both in respect to the subjects of taxation and the kind and amount of taxes, must be final and conclusive. *Turner v. Althaus*, 6 Neb. 54; *Providence Bank v. Billings*, 4 Pet. (U. S.) 561; *Shaw v. Dennis*, 10 Ill. 418; *Wynehamer v. People*, 13 N. Y. 404. In *Norris v. Boston*, 4 Met. (Mass.)

282, it was held that an act of the legislature is void so far only as its provisions are repugnant to constitutional enactments; and that, therefore, the same act may be valid in part and void in part.

The burden of proof is upon him who assails the action of the legislature, and to warrant judicial interference he must make out a clear case of violation of constitutional provisions. *Brown v. Denver*, 3 Colo. 169.

3. *Hill v. Higdon*, 5 Ohio St. 248; *Maloy v. Marietta*, 11 Ohio St. 636; *State v. Board of Revenue*, 73 Ala. 65. And see *Cannon v. Hoodenpyle*, 7 Humph. (Tenn.) 147; *State v. Rahway*, 43 N. J. L. 338; *State Railroad Tax Cases*, 92 U. S. 575.

Courts cannot classify property into that taxable and that exempt;—this is a legislative duty. *Turner v. Althaus*, 6 Neb. 54.

In *McLean County v. Deposit Bank*, 81 Ky. 254, it was held that the failure of the proper authorities to appoint a collector does not authorize the court to appoint one.

4. See *infra*, this title, *The Levy*. See also *MANDAMUS*, vol. 14, p. 88.

5. *Weismer v. Douglas*, 64 N. Y. 91; *People v. Brooklyn*, 4 N. Y. 419; *Pullen v. Wake County*, 66 N. Car. 361; *Sharpless v. Philadelphia*, 21 Pa. St. 147; *Maltby v. Reading, etc., R. Co.*,

an act void merely because it is opposed to the spirit of the constitution;<sup>1</sup> the incompatibility with the constitution must be clear.<sup>2</sup>

*b. MODE OF EXERCISE.*—Within constitutional limitations the legislature has power to regulate the mode of the exercise of the power to tax,<sup>3</sup> and may change the mode of imposing or of collecting taxes at any time before their payment.<sup>4</sup> In the absence of constitutional prohibitions, even retrospective legislation may be valid,<sup>5</sup> so long as it does not divest rights or interfere unduly

52 Pa. St. 140; *Wharton v. School Directors*, 42 Pa. St. 358; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Kansas Pac. R. Co. v. Ellis County*, 19 Kan. 584; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *Ketcham v. Pacific R. Co.*, 4 Dill. (U. S.) 41. And see *Gault's Appeal*, 33 Pa. St. 94; *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242; *Bank of Pennsylvania v. Com.*, 19 Pa. St. 144; *Weber v. Reinhard*, 73 Pa. St. 370; *People v. Eddy*, 43 Cal. 331; *Waters v. State*, 1 Gill (Md.) 302; *Perkins v. Milford*, 59 Me. 315; *Com. v. Peoples', etc.*, Sav. Bank, 5 Allen (Mass.) 428; *Lowell v. Oliver*, 8 Allen (Mass.) 247; *Howell v. Bristol*, 8 Bush (Ky.) 493; *Bloomfield, etc., Gas Light Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Ould v. Richmond*, 23 Gratt. (Va.) 473; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153.

Whether the power to tax does or does not exist is a proper subject of judicial inquiry, but whether the exercise of a conceded power in any particular case is proper or not proper is a question for the body which imposed the tax. *Brodnax v. Groom*, 64 N. Car. 244. And see *Hammett v. Philadelphia*, 65 Pa. St. 146.

1. *Luehrman v. Taxing District*, 2 Lea (Tenn.) 440; *State v. Traders' Bank*, 41 La. Ann. 329; *Weber v. Reinhard*, 73 Pa. St. 370; *In re Powers*, 25 Vt. 265. But see *People v. Gallagher*, 4 Mich. 244.

2. *Livingston County v. Darlington*, 101 U. S. 407; *Fletcher v. Peck*, 6 Cranch (U. S.) 128; *Adams v. Howe*, 14 Mass. 340; *Fisher v. McGirr*, 1 Gray (Mass.) 1; *Pleuler v. State*, 11 Neb. 547; *Turner v. Althaus*, 6 Neb. 54; *Roup's Case*, 81\* Pa. St. 211; *Wharton v. School Directors*, 42 Pa. St. 358; *Felty v. Uhler*, 10 Phila. (Pa.) 513; *Zimmerman v. Perkiomen, etc.*, *Turnpike Co.*, 81\* Pa. St. 96; *Durach's Appeal*, 62 Pa. St. 491; *Tyler v. People*, 8 Mich. 333; *Sears v. Cottrell*, 5 Mich. 251; *Lex-*

*ington v. McQuillan*, 9 Dana (Ky.) 513; *Cooper v. Telfair*, 4 Dall. (U. S.) 14; *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *Richards v. Raymond*, 92 Ill. 612; *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268; *Lane v. Dorman*, 4 Ill. 238; *People v. Marshall*, 6 Ill. 672; *Baltimore v. State*, 15 Md. 376.

In case of doubt every presumption not clearly inconsistent with the language used and the subject-matter is to be made in favor of constitutionality. *Sears v. Cottrell*, 5 Mich. 251. And see *Plumer v. Marathon County*, 46 Wis. 164.

3. *Vaughan v. Swayzie*, 56 Miss. 705; *State v. Union*, 33 N. J. L. 351; *King v. Portland*, 2 Oregon 147. The machinery by which taxes are to be levied is left to legislative discretion. *Public Schools v. Trenton*, 30 N. J. Eq. 667; *State v. Consolidated Va. Min. Co.*, 16 Nev. 432; *Slack v. Ray*, 26 La. Ann. 675; *Morrison v. Larkin*, 26 La. Ann. 701.

4. *Hosmer v. People*, 96 Ill. 58; *Bank of the Republic v. Hamilton County*, 21 Ill. 53; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43; *Detroit v. Detroit, etc., Plank Road Co.*, 43 Mich. 140; *Weister v. Hale*, 52 Pa. St. 479; *Bellows v. Weeks*, 41 Vt. 590; *Mills v. Charleston*, 29 Wis. 400.

5. See *New Orleans v. Rhenish Westphalian Lloyds*, 31 La. Ann. 781; *New Orleans v. Day*, 29 La. Ann. 416; *Fairfield v. People*, 94 Ill. 244; *Cowgill v. Long*, 15 Ill. 202; *Hosmer v. People*, 96 Ill. 58; *Hyde Park v. Ingalls*, 87 Ill. 11; *San Luis Obispo v. Pettit*, 87 Cal. 499; *People v. Seymour*, 16 Cal. 332; *State v. Graham*, 16 Neb. 74; 8 Am. & Eng. Corp. Cas. 500; *State v. Bell*, 1 Phil. (N. Car.) 76; *People v. Schoharie County*, 2 N. Y. Supp. 142; *People v. Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383; *Weister v. Hale*, 52 Pa. St. 474; *Gault's Appeal*, 33 Pa. St. 94; *State v. Memphis, etc., R. Co.*, 14 Lea (Tenn.) 56; *Bagnall v. State*, 25

with contract obligations;<sup>1</sup> but, speaking generally, it may be said that tax laws should be prospective,<sup>2</sup> and they will be so construed if possible.<sup>3</sup>

The methods prescribed by law for the imposition of taxes must be strictly pursued,<sup>4</sup> and so must the laws imposing

Wis. 112, *Exchange Bank Tax Cases*, 21 Fed. Rep. 99; *Locke v. New Orleans*, 4 Wall. (U. S.) 172.

In *North Carolina*, retroactive taxes by towns are forbidden by constitutional provision. *Young v. Henderson*, 76 N. Car. 420.

1. See *Grimm v. Weissenberg School Dist.*, 54 Pa. St. 435; *Weister v. Hale*, 52 Pa. St. 474; *Gault's Appeal*, 33 Pa. St. 94; *People v. Moore*, 1 Idaho 662; *Hosmer v. People*, 96 Ill. 58; *Conway v. Cable*, 37 Ill. 82.

2. See *Price v. Mott*, 52 Pa. St. 315; *Com. v. Pennsylvania Ins. Co.*, 13 Pa. St. 165; *People v. Monroe County*, 36 Mich. 70; *Clark v. Hall*, 19 Mich. 356; *Smith v. Humphrey*, 20 Mich. 398. As to retrospective legislation in general, see STATUTES, vol. 23, p. 140.

In *Com. v. Pennsylvania Ins. Co.*, 13 Pa. St. 165, it was said that new burdens ought to be prospective, not merely from the date of the tax act, but from the time of the assessment.

In *Sturges v. Carter*, 114 U. S. 511, it was held that a law providing for the collection of taxes for a preceding period which, but for concealment by taxpayers, should have been paid during such preceding years, was not a retroactive law within a constitutional prohibition. Nor is a tax retrospective because the business of a past year is considered in fixing its amount. *People v. Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383.

In *Locke v. New Orleans*, 4 Wall. (U. S.) 172, it was held that a statute which simply authorized the imposition of a tax accrued on a previous assessment was not a retrospective tax.

3. *Price v. Mott*, 52 Pa. St. 315; *Drexel v. Com.*, 46 Pa. St. 31; *Philadelphia v. Philadelphia, etc.*, R. Co., 52 Pa. St. 177; *New England Mortgage, etc., Co. v. Board of Revenue*, 81 Ala. 110; *Barnes v. Mobile*, 19 Ala. 707; *Boyce v. Holmes*, 2 Ala. 54; *Oakland v. Whipple*, 44 Cal. 303; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Hosmer v. People*, 96 Ill. 58; *People v. Peacock*, 98 Ill. 172; *Conway v. Cable*, 37 Ill. 32; *Marsh v. Chesnut*, 14 Ill. 223; *People v. Thatcher*, 95 Ill. 109; *Fuller v. Grand Rapids*, 40 Mich. 396; *Clark v.*

*Hall*, 19 Mich. 356; *Smith v. Humphrey*, 20 Mich. 398; *People v. Monroe County*, 36 Mich. 70; *Finn v. Haynes*, 37 Mich. 63; *Warren R. Co. v. Belvidere*, 35 N. J. L. 584; *State v. Newark*, 40 N. J. L. 92; *Citizens' Gas Light Co. v. Alden*, 44 N. J. L. 648; *Peters v. Auditor*, 33 Gratt. (Va.) 368; *People v. Albany Ins. Co.*, 92 N. Y. 458. And see *Shelby County v. Mississippi, etc.*, R. Co., 16 Lea (Tenn.) 401; *Gerry v. Stoneham*, 1. Allen (Mass.) 319; *Andrews v. Worcester County Mut. F. Ins. Co.*, 5 Allen (Mass.) 65; *Caruthers v. McLaran*, 56 Miss. 341; *Vaughan v. Swayzie*, 56 Miss. 704; *Selden v. Coffee*, 55 Miss. 41; *McPhaill v. Burris*, 42 Tex. 142; *Richey v. Shute*, 43 N. J. L. 414.

In *New England Mortgage, etc., Co. v. Board of Revenue*, 81 Ala. 110, it was held that a statute levying a tax on the gross receipts of persons, companies, associations, and corporations engaged in lending money on property in the state, takes effect from its enactment, and only applies to receipts derived from business transacted in the state and engaged in after the passage of the act.

**Constitutional provisions** are subject to the same rule. *New Orleans v. Vergnole*, 33 La. Ann. 35; *New Orleans v. Meister*, 33 La. Ann. 646; *New Orleans v. Eclipse Tow Boat Co.*, 33 La. Ann. 647. And see *New Orleans v. L'Hote*, 35 La. Ann. 1177.

**Penal Statutes.**—Statutes which are highly penal in their nature should not be held to apply to back taxes. *People v. Peacock*, 98 Ill. 172; *Weister v. Hale*, 52 Pa. St. 474.

4. *State Auditor v. Jackson County*, 65 Ala. 151; *Lyon v. Hunt*, 11 Ala. 295; *Milner v. Clarke*, 61 Ala. 258; *Parker v. Burgen*, 20 Ala. 251; *Silsbee v. Stockle*, 44 Mich. 567; *Chicago, etc., R. Co. v. Davenport*, 51 Iowa 454. And see *Scales v. Alvis*, 12 Ala. 617; *Elliot v. Eddins*, 24 Ala. 508.

This is especially the case when the provisions of the statutes are intended for the benefit or protection of the property owner. *Lyon v. Hunt*, 11 Ala. 295.

The provisions of an act must be

them,<sup>1</sup> particularly when they are in derogation of property rights;<sup>2</sup> though when a law is capable of more than one construction it will be construed in such a manner as most reasonably to accomplish the legislative purpose.<sup>3</sup>

Measures intended for the security of the citizen, to secure equality of taxation, and to enable the taxpayer to know for what he and others are taxed, may be said to be conditions pre-

followed, unless it admits of a variation or relaxation by its own terms. *Hoffman v. Bell*, 61 Pa. St. 444.

1. *Moseley v. Tift*, 4 Fla. 403; *Barnes v. Doe*, 4 Ind. 133; *Williams v. State*, 6 Blackf. (Ind.) 36; *Sewell v. Jones*, 9 Pick. (Mass.) 412; *Cahoon v. Coe*, 57 N. H. 557; *U. S. v. Watts*, 1 Bond (U. S.) 583; *U. S. v. Wigglesworth*, 2 Story (U. S.) 369; *Williamsburg v. Lord*, 51 Me. 599; *Williams v. Cammack*, 27 Miss. 209; *Boyd v. Hood*, 57 Pa. St. 98. And see *Alton v. Etna Ins. Co.*, 82 Ill. 45; *Bowling Green, etc., R. Co. v. Warren County*, 10 Bush (Ky.) 711; *Mankato v. Fowler*, 32 Minn. 364.

Every charge upon person or property must be imposed by clear and unambiguous words. *Smith v. Waters*, 25 Ind. 397; *Culver v. Hayden*, 1 Vt. 359. And see *Gomer v. Chaffee*, 6 Colo. 314.

In *State v. Brewer*, 64 Ala. 287, the rule of strict construction was applied against a county in favor of the state.

Tax laws have been held not to be penal, however, in a sense which will require them to be strictly construed like penal statutes. *U. S. v. Barrels of Spirits*, 2 Abb. (U. S.) 305; *U. S. v. Olney*, 1 Abb. (U. S.) 275; *U. S. v. Cases of Cloth*, 1 Crabbe (U. S.) 356; *U. S. v. Hodson*, 10 Wall. (U. S.) 395; *Cornwall v. Todd*, 38 Conn. 443.

2. *People v. Lothrop*, 3 Colo. 467; *Powers v. Barney*, 5 Blatchf. (U. S.) 202. And see *Savannah v. Hartridge*, 8 Ga. 23.

In *State v. Hodges*, 14 Rich. (S. Car.) 256, it was held that cotton belonging to a non-resident of a state, in the possession of an agent within the state, on the first day of May, but which was removed therefrom before October 1st, was not liable for a tax imposed on all cotton sold between May 1st and October 1st, and all cotton on hand on October 1st.

3. *Green v. State*, 59 Md. 123; *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; *Cornwall v. Todd*, 38 Conn. 443; *Hubbard v. Brainard*, 35 Conn. 563; *Bleight v. Auditor*, 2 T. B. Mon. (Ky.) 25; *New*

*Orleans v. Salamander Ins. Co.*, 25 La. Ann. 650; *State v. Western Union Tel. Co.*, 73 Me. 518; *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 302; *Hawkins v. Carroll County*, 50 Miss. 732; *Matter of Metropolitan Gas Light Co.*, 23 Hun (N. Y.) 327; *Lima v. McBride*, 34 Ohio St. 338; *Higgins v. Rinker*, 47 Tex. 393; *U. S. v. Olney*, 1 Abb. (U. S.) 275; *Twenty-eight Cases*, 2 Ben. (U. S.) 63; *U. S. v. Hodson*, 10 Wall. (U. S.) 395; *Kelley v. Herrall*, 20 Fed. Rep. 364. And see *State v. Brewer*, 64 Ala. 287; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 102 Pa. St. 190; *Burger v. State*, 1 McMull. (S. Car.) 410; *Davis v. Brace*, 82 Ill. 542.

Revenue laws should be construed with reasonable fairness to the citizen. *U. S. v. Distilled Spirits*, 10 Blatchf. (U. S.) 428.

A tax to be imposed as long as needed to pay a particular debt means an imposition of the tax until the debt is satisfied. *Louisville v. Murphy*, 86 Ky. 53.

The history of the legislation of a state, in reference to a particular subject-matter of taxation, may be referred to as tending to aid in the construction to be given to the statute. *Savannah v. Hartridge*, 8 Ga. 23.

In *Hubbard v. Brainard*, 35 Conn. 563, it was said that a tax law is not to be construed strictly because it takes money or property *invitum*, nor liberally like laws intended to effect directly some great public object, but fairly for the government and justly for the citizens, so as to carry out the intention of the legislature gathered from the language used, read in connection with the general purpose of the law, and the nature of the property on which the tax is imposed, and the legal relation of the taxpayer to it.

Unless it is impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a particular subject is invalid. *Field v. Clark*, 143 U. S. 649. The whole statute should not be held to be void unless the valid and invalid parts are insepa-

cedent to the validity of the tax;<sup>1</sup> but regulations designed for the information of assessors and officers, and for the promotion of method, system, and uniformity in the modes of proceeding, the compliance with which does not affect the rights of the taxpayer, are directory only;<sup>2</sup> though, in either event, where the

able. *Treasurer v. Bank*, 47 Ohio St. 503. And see *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1.

1. *Torrey v. Millsbury*, 21 Pick. (Mass.) 64; *Westhampton v. Searle*, 127 Mass. 502; *Marsh v. Clark County*, 42 Wis. 502; *Hamilton v. Fond du Lac*, 25 Wis. 490; *Hayden v. Dunlap*, 3 Bibb (Ky.) 216; *Walker v. Chapman*, 22 Ala. 116; *State Auditor v. Jackson County*, 65 Ala. 142; *State v. Jersey City*, 35 N. J. L. 381; *Wiley v. Flournoy*, 30 Ark. 609; *O'Neil v. Virginia, etc., Bridge Co.*, 18 Md. 1; *Willard v. Pike*, 59 Vt. 202; *Spear v. Ditty*, 8 Vt. 419; *Mason v. Ricker*, 63 Me. 381; *Greene v. Lunt*, 58 Me. 518; *French v. Edwards*, 13 Wall. (U. S.) 506; *Lyon v. Alley*, 130 U. S. 177; *Mayhew v. Davis*, 4 McLean (U. S.) 213. And see *Shawnee County v. Carter*, 2 Kan. 115; *Bird v. Perkins*, 33 Mich. 28; *Flint, etc., R. Co. v. Auditor Gen'l*, 41 Mich. 635; *Houghton v. Auditor Gen'l*, 41 Mich. 31; *Clark v. Crane*, 5 Mich. 151; *Hoyt v. East Saginaw*, 19 Mich. 39; *Green v. Craft*, 28 Miss. 70; *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30; *Wheeler v. Chicago*, 24 Ill. 105; *People v. Schermerhorn*, 19 Barb. (N. Y.) 558; *Cruger v. Dougherty*, 43 N. Y. 107; *Easton v. Calendar*, 11 Wend. (N. Y.) 94; *Kelsey v. Abbott*, 13 Cal. 609; *People v. Hollister*, 47 Cal. 408; *Rubey v. Huntsman*, 32 Mo. 501; *McNair v. Jensen*, 33 Mo. 312; *Life Assoc. v. St. Louis County*, 49 Mo. 512; *State v. Rollins*, 29 Mo. 267; *Den v. Craig*, 5 Ired. (N. Car.) 129; *Magee v. Com.*, 46 Pa. St. 358.

Requirements as to separate assessment of different kinds of property are for the benefit of the taxpayer and therefore mandatory. *Rayner v. Lee*, 20 Mich. 384; *Young v. Joslin*, 13 R. I. 675; *Capwell v. Hopkins*, 10 R. I. 378.

Conditions precedent are always mandatory. *Morrill v. Taylor*, 6 Neb. 236; *Hurford v. Omaha*, 4 Neb. 336; *Hewes v. Reis*, 40 Cal. 255; *Washington v. Pratt*, 8 Wheat. (U. S.) 681.

2. *Torrey v. Millsbury*, 21 Pick. (Mass.) 64; *Westhampton v. Searle*, 127 Mass. 502; *Currie v. Van Horn*, 40 N. J. L. 143; *Paulison v. Taylor*, 35 N. J.

L. 184; *O'Neal v. Virginia Bridge, etc., Co.*, 18 Md. 1; *State v. Jersey City*, 35 N. J. L. 381; *State Auditor v. Jackson County*, 65 Ala. 142; *Avant v. Flynn* (S. Dak. 1891), 49 N. W. Rep. 15; *Bellows Falls Canal Co. v. Rockingham*, 37 Vt. 622; *Willard v. Pike*, 59 Vt. 202; *Marsh v. Clark County*, 42 Wis. 502; *French v. Edwards*, 13 Wall. (U. S.) 506; *Craig v. Radford*, 3 Wheat. (U. S.) 594. And see *Alvord v. Collin*, 20 Pick. (Mass.) 418.

Requirements as to mere matters of form are directory. *Mussey v. White*, 3 Me. 290. So are those with reference to clerical and ministerial duties, which do not affect the taxpayer. *State Auditor v. Jackson County*, 65 Ala. 142. And provisions with reference to the time of performance of an act are usually directory only. *Stickney v. Hugbings*, 10 Ala. 106; *Limestone County v. Rather*, 48 Ala. 433; *Hart v. Plum*, 14 Cal. 148; *Pond v. Negus*, 3 Mass. 230; *People v. Allen*, 6 Wend. (N. Y.) 486; *Ex p. Heath*, 3 Hill (N. Y.) 43; *Gale v. Mead*, 2 Den. (N. Y.) 160; *Perrin v. Benson*, 49 Iowa 325; *Easton v. Savery*, 44 Iowa 656; *Hill v. Wolfe*, 28 Iowa 577; *Goodwin v. Perkins*, 39 Vt. 598; *Fry v. Booth*, 19 Ohio St. 25; *French v. Edwards*, 13 Wall. (U. S.) 506.

A statute cannot be regarded as directory, nor can any of its provisions be dispensed with, when the act required, or the omission of it, can by any possibility work damage or injury, however slight, to any one affected by it. *Wiley v. Flournoy*, 30 Ark. 609; *Mayhew v. Davis*, 4 McLean (U. S.) 213; *Clark v. Crane*, 5 Mich. 151; *People v. Schermerhorn*, 19 Barb. (N. Y.) 558.

Under the *Louisiana* statutes, a failure by the assessor to visit or examine the property assessed, an irregular authentication of a roll, and an assessment of property not belonging exclusively to the person to whom it was assessed, are not radical defects, but simply irregularities in matters of form which must be judicially invoked before the first of November of the year in which the assessment is made. *Oteri v. Parker*, 42 La. Ann. 374.

The question what requirements are

requirements of the statute are plainly imperative, they will be treated as mandatory.<sup>1</sup>

5. **Delegation of the Power.**—The power to tax cannot be delegated to the judicial department,<sup>2</sup> to ministerial or administrative officers,<sup>3</sup> nor to individuals or private corporations.<sup>4</sup> But the legislature need not prescribe the details nor perform the administrative functions involving the exercise of the power to tax;<sup>5</sup> it is sufficient if it originates the proceedings and prescribes the rule of action, leaving the details to administrative officers;<sup>6</sup> and it may delegate the power to determine some fact or state of things

mandatory and what directory only is discussed, *infra*, under the particular heads *The Levy; The Assessment; Collection*.

1. *Morrill v. Taylor*, 6 Neb. 236; *Niagara County v. People*, 7 Hill (N. Y.) 511; *French v. Edwards*, 13 Wall. (U. S.) 506. And see *People v. Hollister*, 47 Cal. 408; *Kelsey v. Abbott*, 13 Cal. 609; *Lachman v. Clark*, 14 Cal. 131; *Vance v. Schuyler*, 6 Ill. 160.

When the act is required to be performed for the sake of justice or the public good, "may" will be construed as "shall" and as imposing a positive and absolute duty. *People v. Buffalo County*, 4 Neb. 150.

In *Plumer v. Marathon County*, 46 Wis. 163, a statute providing that no omission by the taxing officers of certain duties therein named, some of which are mandatory in their character, shall affect the validity of the tax, unless it affects the substantial justice of the tax, was held to be unconstitutional as an intrusion on judicial functions.

2. *Hardenburgh v. Kidd*, 10 Cal. 402; *Burgoyne v. San Francisco County*, 5 Cal. 9; *Bixler v. Sacramento County*, 59 Cal. 698; *State v. Rahway*, 43 N. J. L. 338; *Morris v. Waco*, 57 Tex. 635; *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Meriwether v. Garrett*, 102 U. S. 472. And see *In re Rahrer*, 140 U. S. 545; *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38; *Bank of U. S. v. Halstead*, 10 Wheat. (U. S.) 51; *Ketchum v. Pacific R. Co.*, 4 Dill. (U. S.) 41; *Cramer v. Stone*, 38 Wis. 259.

The question of the expediency of a state tax or of the imposition of a tax, cannot be delegated, but must be settled definitely and finally by the legislature itself. *People v. Fire Assoc. of Philadelphia*, 92 N. Y. 311.

3. *Hydes v. Joyes*, 4 Bush (Ky.)

464; *Mercer County Court v. Kentucky River Nav. Co.*, 8 Bush (Ky.) 300; *Louisville v. Murphy*, 86 Ky. 53; *People v. Kings County*, 52 N. Y. 556; *Robinson v. Dodge*, 18 Johns. (N. Y.) 351; *Trumbull v. White*, 5 Hill (N. Y.) 46; *Houghton v. Austin*, 47 Cal. 646; *San Francisco, etc., R. Co. v. State Board*, 60 Cal. 12; *Scofield v. Lansing*, 17 Mich. 437; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Maxwell v. State*, 40 Md. 273; *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *State v. Sickles*, 24 N. J. L. 125. And see *White v. Wheeler*, 51 Hun (N. Y.) 573.

4. *Board of Directors v. Houston*, 71 Ill. 318; *Cypress Pond Draining Co. v. Hooper*, 2 Metc. (Ky.) 350.

Under the *Illinois* constitution, portions of the territory comprising a county cannot be authorized by the legislature to create a debt which must be paid by taxation. *Madison County v. People*, 58 Ill. 456.

5. See *Warren v. Grand Haven*, 30 Mich. 24; *In re Griner*, 16 Wis. 423; *Wayman v. Southard*, 10 Wheat. (U. S.) 1.

The apportionment of a tax among individuals, or between lands with reference to benefits, may lawfully be devolved upon one or more assessors chosen by a city council, such a duty requiring for its proper performance an examination of the several premises in detail, and involving merely administrative functions. *Warren v. Grand Haven*, 30 Mich. 24.

In *Florida*, where the board of instruction fails to give an estimate of the sources of revenue, it is competent for the county commissioners to ascertain the necessary data, in order to learn the amount required to be raised by tax. *State v. County Com'rs*, 17 Fla. 418.

6. *Cooley on Taxation* (2d ed.) 62. And see *infra*, this title, *The Levy*.

upon which the law makes its action depend;<sup>1</sup> there being a distinction between the delegation of power to make the law and conferring authority or discretion as to its execution.<sup>2</sup> Cities, counties, and towns may be said to be instrumentalities for the convenient administration of local government;<sup>3</sup> upon them, subject to constitutional restrictions and limitations, the legislature may confer the power to tax to the extent necessary to good government;<sup>4</sup> and the imposition of a tax by cities, counties, or towns for their support is as much an exercise of

The legislature must determine the amount necessary and adequate to be raised by tax, and declare the amount to be levied absolutely. *Houghton v. Austin*, 47 Cal. 646.

1. *Locke's Appeal*, 72 Pa. St. 491; *Moers v. Reading*, 21 Pa. St. 188; *Field v. Clark*, 143 U. S. 697; *In re Rahrer*, 140 U. S. 561. And see *The Aurora v. U. S.*, 7 Cranch (U. S.) 362; *State v. Parker*, 26 Vt. 357; *Smith v. Janesville*, 26 Wis. 291. See also *infra*, this title, *Municipal Taxation*, sub-title, *Submission to and Consent of the People*.

2. *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 88; *In re Oliver*, 17 Wis. 681; *Field v. Clark*, 143 U. S. 649. Some of the earlier cases held that the legislature cannot delegate to the people of a state or of a municipality the power to determine whether or not a law shall be operative either within the state or some part of it. See *Barto v. Himrod*, 8 N. Y. 483; *Parker v. Com.*, 6 Pa. St. 507; *Rich v. Foster*, 4 Harr. (Del.) 479. See *LOCAL OPTION*, vol. 13, p. 990.

3. *Meriwether v. Garrett*, 102 U. S. 511; *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Hamlin v. Meadville*, 6 Neb. 227.

In *Ridenour v. Saffin*, 1 Handy (Ohio) 464, it was held that a constitutional provision conferring power upon the general assembly to organize municipal corporations for local improvement involves the power of bestowing upon them authority to provide the necessary means for sustaining and carrying out the projects of such government by taxation.

4. See *Mobile v. Dargan*, 45 Ala. 310; *Baldwin v. City Council*, 53 Ala. 439; *Farley v. Dowe*, 45 Ala. 234; *Battle v. Mobile*, 9 Ala. 324; *Osborn v. Mobile*, 44 Ala. 493; 24 Ala. 591; *Washington v. State*, 13 Ark. 752; *People v. Kelsey*, 34 Cal. 470; *Palmer v. Way*, 6 Colo. 106; *Doggett v. Walter*, 15 Fla. 355;

*Wilkinson v. Cheatham*, 43 Ga. 258; *East St. Louis v. Wehrung*, 46 Ill. 392; *Shaw v. Dennis*, 10 Ill. 405; *Fitch v. Pinckard*, 5 Ill. 69; *Sawyer v. Alton*, 4 Ill. 127; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 183; *Logansport v. Seybold*, 59 Ind. 225; *Robinson v. Schenck*, 102 Ind. 307; *Wells v. Weston*, 22 Mo. 384; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Clark County Court v. Paris, etc., Turnpike Co.*, 11 B. Mon. (Ky.) 150; *Kneiper v. Louisville*, 7 Bush (Ky.) 599; *Paris v. Berry*, 2 J. J. Marsh. (Ky.) 483; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Louisville v. Murphy*, 86 Ky. 53; *Slack v. Ray*, 26 La. Ann. 674; *New Orleans v. Kaufman*, 29 La. Ann. 283; *Watts v. Port Deposit*, 46 Md. 500; *Public School Com'rs v. Alleghany County*, 20 Md. 449; *Baltimore v. State*, 15 Md. 376; *Alexander v. Baltimore*, 5 Gill (Md.) 383; *Burgess v. Pue*, 2 Gill (Md.) 11; *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60; *Smith v. Aberdeen*, 25 Miss. 458; *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 585; *Beck v. Allen*, 58 Miss. 143; *Daily v. Swope*, 47 Miss. 367; *People v. Hurlbut*, 24 Mich. 44; *State v. St. Louis County Ct.*, 34 Mo. 546; *St. Louis v. Laughlin*, 49 Mo. 559; *St. Louis v. Manufacturers' Sav. Bank*, 49 Mo. 574; *State v. Leffingwell*, 54 Mo. 458; *Caldwell v. Burke County*, 4 Jones Eq. (N. Car.) 323; *Wingate v. Sluder*, 6 Jones (N. Car.) 552; *Thompson v. Floyd*, 2 Jones (N. Car.) 313; *Taylor v. Newberne*, 2 Jones Eq. (N. Car.) 141; *State v. Noyes*, 30 N. H. 279; *People v. Brooklyn*, 4 N. Y. 419; *Townsend v. New York*, 16 Hun (N. Y.) 362; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349; *Terrel v. Wheeler*, 49 Hun (N. Y.) 262; *Hill v. Higdon*, 5 Ohio St. 243; *Cincinnati, etc., R. Co. v. Clinton Co.*, 1 Ohio St. 77; *Durach's Appeal*, 62 Pa. St. 491; *Philadelphia v. Greble*, 38 Pa. St. 339;



the taxing power of the state as a tax imposed directly by the state.<sup>1</sup>

Under the constitutions of some states the legislature cannot impose a tax for corporate purposes, having power only by proper enabling acts to submit the matter to the action of the local officers or of the people of the municipality, where the purpose is not one constituting a municipal obligation to the general government.<sup>2</sup> Some constitutions prohibit state taxation for works

*Grimm v. Weissenberg School Dist.*, 57 Pa. St. 432; *Butler's Appeal*, 73 Pa. St. 448; *Cruikshanks v. City Council*, 1 McCord (S. Car.) 360; *Newman v. Scott County*, 5 Sneed (Tenn.) 695; *Hope v. Deaderick*, 8 Humph. (Tenn.) 1; *Blessing v. Galveston*, 42 Tex. 642; *Kinney v. Zimpleman*, 36 Tex. 554; *U. S. v. New Orleans*, 98 U. S. 381; *Goddin v. Crump*, 8 Leigh (Va.) 120; *Bull v. Read*, 13 Gratf. (Va.) 78; *In re County Levy*, 5 Call (Va.) 139; *Douglass v. Harrisville*, 9 W. Va. 162; *Kuhn v. Board of Education*, 4 W. Va. 499.

The right of the legislature, in the absence of authorization or prohibition, to create towns, or other inferior municipal corporations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, is undisputed. *Houghton v. Austin*, 47 Cal. 646. But see *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 444; *Lipscomb v. Dean*, 1 Lea (Tenn.) 550; *Waterhouse v. Cleveland Public Schools*, 9 Baxt. (Tenn.) 398.

All acts of the legislature, conferring or restricting the revenue powers of a municipal corporation, are in their nature public laws, whether so declared in terms or not, of which courts are bound to take judicial notice in proceedings affecting revenue matters. *Binkert v. Jansen*, 94 Ill. 283.

#### Delegation by Territorial Government.

—The granting of municipal powers, including the power of local taxation to cities, is an ordinary act of legislation, and within the power of a territorial legislature. *Burnes v. Atchison*, 2 Kan. 454.

1. *Knowlton v. Rock County*, 9 Wis. 410; *Lumsden v. Cross*, 10 Wis. 282; *Will County v. People*, 110 Ill. 511; *Beck v. Allen*, 58 Miss. 143; *Daily v. Swope*, 47 Miss. 367; *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Chicago, etc., R. Co. v. Otoe County*, 16 Wall. (U. S.) 667.

All taxes are in fact state taxes. They are raised under authority of the state, and are all applied to state purposes, namely, to the support of government in all its departments, to the payment of its officers and agents, the erection and maintenance of public buildings, roads, and bridges, and the support of the poor. *Camden, etc., R. Co. v. Hillegas*, 18 N. J. L. 11.

2. *Mills v. Charleton*, 29 Wis. 400; *State v. Tappan*, 29 Wis. 664; *Hambrouck v. Milwaukee*, 13 Wis. 37. And see *People v. Martin*, 60 Cal. 153; *In re House Bill*, 9 Colo. 635; *People v. Salomon*, 51 Ill. 37; *People v. Chicago*, 51 Ill. 18; *Udike v. Wright*, 81 Ill. 49; *Madison County v. People*, 58 Ill. 456; *People v. Canty*, 55 Ill. 33; *Williams v. Roberts*, 88 Ill. 11; *People v. Morgan*, 90 Ill. 558; *State v. Wheeler*, 33 Neb. 563; *State v. Goldstucker*, 40 Wis. 124.

In *People v. Martin*, 60 Cal. 153, it was held that a constitutional provision against the imposition of local taxes by the legislature includes license taxes, and that under such a prohibition they can be imposed only by the local authorities.

Statutes conferring upon certain courts power to revise and amend an assessment, and to order a new assessment in whole or in part, are not subject to the objection that they confer power to levy taxes upon property within a municipality upon an agency entirely independent of municipal government, or that they require the judiciary to exercise functions belonging wholly to the legislative department. *State v. Ensign* (Minn. 1893), 56 N. W. Rep. 1006. And see *State v. Hennepin County*, 33 Minn. 235.

In *Will County v. People*, 110 Ill. 511, it was held that a legislative act imposing half the expense of town bridges upon the counties in which they are situated, does not impose a tax for strictly local corporate purposes, and is not invalid under the constitu-

of internal improvement, requiring local interests to be left in the hands of the proper local officers.<sup>1</sup> The state cannot authorize a municipal corporation to lay a tax which the state could not itself impose,<sup>2</sup> and an unlimited power to raise taxes and raise money, aside from and beyond what may be necessary and proper for legitimate municipal purposes, cannot be conferred.<sup>3</sup> Nor can the power to tax be delegated for any except local or corporate purposes,<sup>4</sup> and municipalities cannot be clothed with power to tax beyond their corporate limits or their own local purposes.<sup>5</sup>

Constitutional provisions authorizing corporate authorities of municipalities to lay taxes for corporate purposes, constitute a limitation upon the power of the legislature to grant the right to lay taxes to any other than the local authorities of the municipal-

tional provision requiring power to impose such taxes to be vested in the corporate authorities.

In *State v. Hennepin County*, 33 Minn. 235, it was held that an act creating a board of park commissioners for the acquisition of lands for public parks, the title to which was to vest in the city, and making it a department of the city government, does not infringe a constitutional provision authorizing municipal corporations only to levy assessments for local improvements.

1. *People v. Springwells Tp.*, 25 Mich. 153; *Anderson v. Hill*, 54 Mich. 477; *Ryerson v. Utley*, 16 Mich. 274; *People v. State Treasurer*, 23 Mich. 499; *People v. Detroit*, 28 Mich. 228; *People v. Detroit*, 29 Mich. 343. And see *Allor v. Wayne County*, 43 Mich. 76.

The term "internal improvements," as used in the constitutional restriction, relates to public internal improvements and local concerns for general county purposes, and not to improvements for special local purposes, where the improvements are made by assessments upon the property improved. *McGehee v. Mathus*, 21 Ark. 40. And see *Gillett v. McLaughlin*, 69 Mich. 547.

A work which is planned and directed by a state agency is a state work, and while the fact that its expense is charged on a certain locality may make the proceeding objectionable on independent grounds, it does not alter its character. *People v. Springwells Tp.*, 25 Mich. 153.

An act imposing a tax upon specified townships for the purpose of improving the channel of a stream, is in conflict with the provision of the *Michigan* constitution that the state shall

not engage in any work of internal improvement unless by granting land therefor. *Anderson v. Hill*, 54 Mich. 477.

In *Dawson County v. McNamar*, 10 Neb. 276, the building of a county courthouse was held not to be a work of internal improvement.

2. *O'Donnell v. Bailey*, 24 Miss. 386; *Illinois Female College v. Cooper*, 25 Ill. 148; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Haywood v. Savannah*, 12 Ga. 404; *Stuyvesant v. New York*, 7 Cow. (N. Y.) 588; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600; *Memphis v. Hernando Ins. Co.*, 6 Baxt. (Tenn.) 527; *Union Bank v. State*, 9 Yerg. (Tenn.) 490.

But this does not mean that the state may not permit municipalities to tax that which it does not tax. The rule applies to the power. See *Ex p. Montgomery*, 64 Ala. 463; *Johnston v. Macon*, 62 Ga. 645. See also *infra*, this title, *Municipal Taxation*.

3. *Foster v. Kenosha*, 12 Wis. 618; *Brodhead v. Milwaukee*, 19 Wis. 624; *Hooper v. Emery*, 14 Me. 375.

4. *Livingston County v. Darlington*, 101 U. S. 407.

In *Foster v. Kenosha*, 12 Wis. 618, a charter provision that no tax shall be levied or money borrowed beyond what may be needed for legitimate municipal purposes, without the previous sanction of a majority of the voters, was held not to be a limitation upon the power of the municipality to levy taxes or contract debts—the duty of imposing the proper limitation belonging to the legislature and being one which cannot be transferred to others.

5. See *infra*, this title, *Place of Taxation*; *Municipal Taxation*.

ity or district to be taxed,<sup>1</sup> or for any other than corporate purposes.<sup>2</sup> So provisions limiting the rate of taxation operate as a limitation upon the legislative power to authorize municipal taxation.<sup>3</sup> Constitutional prohibitions against local and special tax laws, and against special acts conferring corporate powers, preclude the legislature from delegating the power to tax by special or local enactment.<sup>4</sup>

**6. Waiver or Relinquishment of the Power.**—The legislative right of taxation may be waived or relinquished. This may be done by an act in the nature of a contract based on a sufficient consideration, either for a specified period or permanently, in particular instances,<sup>5</sup> and, having been done, statutes attempting to

1. *Udpike v. Wright*, 81 Ill. 49; *Board of Directors v. Houston*, 71 Ill. 318; *Harward v. St. Clair, etc., Levee, etc., Co.*, 51 Ill. 130; *People v. Salomon*, 51 Ill. 37; *Gage v. Graham*, 57 Ill. 144; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *School Trustees v. People*, 63 Ill. 299; *People v. McAdams*, 82 Ill. 356; *People v. Chicago*, 51 Ill. 17; *Lovington v. Wider*, 53 Ill. 302; *Cornell v. People*, 107 Ill. 372; *Elmwood Tp. v. Marcy*, 92 U. S. 289; *Livingston County v. Darlington*, 101 U. S. 411. And see *Schultes v. Eberly*, 82 Ala. 242.

In *Harward v. St. Clair, etc., Levee, etc., Co.*, 51 Ill. 130, it was held that by the phrase "corporate authorities," as used in the *Illinois* constitution, must be understood those municipal officers who are either directly elected by the people subject to taxes, or appointed in some mode to which they have given their consent.

In *School Trustees v. People*, 63 Ill. 299, it was said that, in *Illinois*, school districts were not municipal corporations, within the constitution, which could be vested with power to tax.

2. *Harward v. St. Clair, etc., Levee, etc., Co.*, 51 Ill. 130; *School Trustees v. People*, 63 Ill. 299; *People v. Dupuyt*, 71 Ill. 651; *Johnson v. Campbell*, 49 Ill. 317; *Madison County v. People*, 58 Ill. 463; *Sleight v. People*, 74 Ill. 47; *Livingston County v. Darlington*, 101 U. S. 411.

3. *State v. Van Every*, 75 Mo. 530; *Hebard v. Ashland County*, 55 Wis. 145.

Under the *North Carolina* constitution, taxation for state and county purposes, combined for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. *French v. New Hanover County*, 74 N. Car. 692.

The *New York* constitutional provision, prohibiting the creation of debts except to a limited extent, unless the laws authorizing them are submitted to the people, does not apply to municipal debts. *People v. Flagg*, 46 N. Y. 401.

4. *Hallo v. Helmer*, 12 Neb. 87.

Under the *New Jersey* constitution, all legislation for the regulation of internal affairs of municipalities must be general and applicable to all alike. A departure from the rule can be justified only where, by reason of the existence of a substantial difference between municipalities, a general law would be inappropriate to some while it would be appropriate to, and desirable for, others; and in such case the municipalities in which the peculiarity exists, would constitute a class by themselves, and the legislation would, in fact, be general because applying to all of a class. *Hammer v. State*, 44 N. J. L. 667.

Constitutional provisions authorizing the legislature to confer the power to tax upon certain municipalities, do not prohibit it from conferring the same power upon other municipalities. *Darst v. Griffin*, 31 Nev. 668; *State v. Dodge County*, 8 Neb. 124.

5. *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Armstrong v. Athens County*, 16 Pet. (U. S.) 281; *Wells v. Central Vermont R. Co.*, 14 Blatchf. (U. S.) 426; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Humphrey v. Pegues*, 16 Wall. (U. S.) 244; *New Jersey v. Yard*, 95 U. S. 104; *Minot v.*

lay taxes in disregard of such waiver cannot be sustained.<sup>1</sup> But a waiver or relinquishment can only be effected by a clear expression of the legislative will,<sup>2</sup> or by necessary implication.<sup>3</sup>

Philadelphia, etc., R. Co., 2 Abb. (U. S.) 323; Louisville, etc., R. Co. v. Com., 10 Bush (Ky.) 43; Com. v. Richmond, etc., R. Co., 81 Va. 355; State Bank v. People, 5 Ill. 303; East Hartford v. Hartford Bridge Co., 17 Conn. 93; Seymour v. Hartford, 21 Conn. 486; Mobile, etc., R. Co. v. Kennedy, 74 Ala. 566; English v. Sacramento County, 19 Cal. 172; New York, etc., R. Co. v. Sabine, 26 Pa. St. 242; State v. Petway, 2 Jones Eq. (N. Car.) 396; State v. Butler, 86 Tenn. 614. And see St. Louis, etc., R. Co. v. Loftin, 98 U. S. 559; Chicago Bridge Co. v. Binghampton Bridge Co., 3 Wall. (U. S.) 51. And see *supra*, this title, *Impairment of Contract Obligations*.

A public purpose to be attained by law constitutes a sufficient consideration on which a legislative contract exempting property from taxation may be based. Washington University v. Rouse, 8 Wall. (U. S.) 439. And see St. Vincent College v. Schaafir, 104 Mo. 261.

But a mere conveyance to public uses is not sufficient to constitute a contract. First Ecclesiastical Soc. v. Hartford, 38 Conn. 274; Brainard v. Colchester, 31 Conn. 407; Lord v. Litchfield, 36 Conn. 116; *overruling* Atwater v. Woodbridge, 6 Conn. 223; Osborne v. Humphrey, 7 Conn. 339; Parker v. Redfield, 10 Conn. 490; Landon v. Litchfield, 11 Conn. 260.

1. Osborne v. Mobile, 16 Wall. (U. S.) 481; Pacific R. Co. v. Maguire, 20 Wall. (U. S.) 36; New Jersey v. Wilson, 7 Cranch (U. S.) 164; Humphrey v. Pegues, 16 Wall. (U. S.) 247; Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430; Washington University v. Rouse, 8 Wall. (U. S.) 439; Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436; Franklin Branch Bank v. Ohio, 1 Black (U. S.) 474; Northwestern University v. People, 99 U. S. 309; McGee v. Mathis, 4 Wall. (U. S.) 143; *In re* Stevens County (Minn. 1887), 31 N. W. Rep. 942; State v. Butler, 86 Tenn. 614.

So a state may limit itself by contract to a particular rate of taxation beyond which future legislatures may not go. Gordon v. Appeal Tax Court, 3 How. (U. S.) 133; Piqua Bank v. Knoop, 16

How. (U. S.) 369; Dodge v. Woolsey, 18 How. (U. S.) 331; Mechanics, etc., Bank v. Thomas, 18 How. (U. S.) 384.

2. Tomlinson v. Branch, 15 Wall. (U. S.) 469; Pacific R. Co. v. Maguire, 20 Wall. (U. S.) 36; Minot v. Philadelphia, etc., R. Co., 2 Abb. (U. S.) 323; Morgan v. Louisiana, 93 U. S. 217; Providence Bank v. Billings, 4 Pet. (U. S.) 561; Delaware Railroad Tax, 18 Wall. (U. S.) 206; Tomlinson v. Jessup, 15 Wall. (U. S.) 454; North Missouri R. Co. v. Maguire, 20 Wall. (U. S.) 46; Society for Savings v. Coite, 5 Wall. (U. S.) 606; Philadelphia R. Co. v. Maryland, 10 How. (U. S.) 393; Ohio L. Ins. Co. v. Dabolt, 16 How. (U. S.) 416; Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436; Wilmington, etc., R. Co. v. Reid, 13 Wall. (U. S.) 264; Southwestern R. Co. v. Wright, 116 U. S. 231; Hoge v. Richmond, etc., R. Co., 99 U. S. 348; Anne Arundel County v. Annapolis, etc., R. Co., 47 Md. 592; Scotland County v. Missoudi, etc., R. Co., 65 Mo. 123; New York, etc., R. Co. v. Sabin, 26 Pa. St. 242; Jones, etc., Mfg. Co. v. Com., 69 Pa. St. 137; Union Pac. R. Co. v. Philadelphia, 83 Pa. St. 429; Louisville, etc., R. Co. v. Com., 10 Bush (Ky.) 43; Bradley v. McAtee, 7 Bush (Ky.) 667; State v. Petway, 2 Jones Eq. (N. Car.) 396; Presbyterian Theological Seminary v. People, 101 Ill. 580; East Saginaw Mfg. Co. v. East Saginaw, 19 Mich. 259; Richmond v. Richmond, etc., R. Co., 21 Gratt. (Va.) 604; Probasco v. Moundsville, 11 W. Va. 501; Weston v. Shawano County, 44 Wis. 256.

The establishment of the mode of ascertaining the value of the road and property of a railway company is not a legislative contract which cannot be altered by subsequent legislation. Moore v. Holliday, 4 Dill. (U. S.) 52.

3. Frederick County v. Sisters of Charity, 48 Md. 34; Baltimore v. Baltimore, etc., R. Co., 6 Gill (Md.) 288; Buchanan v. Talbot County, 47 Md. 286; Appeal Tax Court v. Gill, 50 Md. 377; Memphis Gas Light Co. v. Shelby County Taxing Dist., 109 U. S. 398; Minot v. Philadelphia, etc., R. Co., 2 Abb. (U. S.) 323. And see Livingston County v. Hannibal, etc., R.

The power to tax is not presumed to have been surrendered or abandoned,<sup>1</sup> nor can a surrender be extended by implication;<sup>2</sup> on the contrary, every reasonable intendment must be made that

Co., 60 Mo. 516; *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Southwestern R. Co. v. Wright*, 116 U. S. 231; *Chicago, etc., R. Co. v. Missouri*, 120 U. S. 569.

Contracts relied upon to prevent the exercise of the taxing power of a state are to be construed strictly against that effect. *Western v. Shawano County*, 44 Wis. 242.

In *Insurance Co. v. New Orleans*, 1 Woods (U. S.) 85, a statute providing that no insurance company whose license tax shall be \$1,000, shall be liable to any assessment throughout the state other than such license fee, was held to apply only to taxes levied by the state, and not to prohibit the imposition of municipal taxation upon the company.

1. *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242; *Erie R. Co. v. Com.*, 66 Pa. St. 84; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43; *Bradley v. McAtee*, 7 Bush (Ky.) 667; *St. Louis v. Manufacturers' Sav. Bank*, 49 Mo. 574; *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis v. Boatmen's Trust, etc., Co.*, 47 Mo. 150; *Weston v. Shawano County*, 44 Wis. 242; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259; *Bangor v. Masonic Lodge*, 73 Me. 428; *Morgan v. Louisiana*, 93 U. S. 217; *Providence Bank v. Billings*, 4 Pet. (U. S.) 561; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Society for Savings v. Coite*, 6 Wall. (U. S.) 606; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 393; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Bank of Commerce v. Tennessee*, 104 U. S. 493; *Ohio L., etc., Ins. Co. v. Debolt*, 16 How. (U. S.) 416; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 421; *Memphis Gas Light Co. v. Shelby County Taxing Dist.*, 109 U. S. 398; *Southwestern R. Co. v. Wright*, 116 U. S. 231; *Buchanan v. Talbot County*, 47 Md. 286;

*Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

It will not be presumed that the legislature intended to abandon its rights as to the method of assessing and collecting the revenues of a state. *Bank of Republic v. Hamilton County*, 21 Ill. 53.

In *Harvard College v. Boston*, 104 Mass. 470, it was held that a statutory provision exempting a corporation from all civil impositions and taxes, includes an assessment laid by municipal authorities for expenses of an improvement whereby the property taxed is benefited, but the words of the statute are not to be construed as narrowly as when occurring in a contract between individuals. They are to be regarded, not as a contract of indemnity or release, but rather as a renunciation of the taxing power.

2. *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *Bourguignon Bldg. Assoc. v. Com.*, 98 Pa. St. 64; *St. Louis v. Boatmen's Trust, etc., Co.*, 47 Mo. 150; *Baltimore v. State*, 15 Md. 376; *Weston v. Shawano County*, 44 Wis. 242; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665; *Chicago, etc., R. Co. v. Missouri*, 120 U. S. 569; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266. But see *State v. Morris, etc., R. Co.*, 49 N. J. L. 193.

A perpetual exemption from taxation in the charter of a railroad company, will not be extended to property of another railroad company with which it consolidates, without express words or a necessary intendment to that effect in the statute under which the consolidation is made. *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.

In *Gordon v. Baltimore*, 5 Gill (Md.) 231, it was held that a provision which precludes the state from taxing a corporation, does not operate to preclude its taxation by a municipal division of the state. But see *Gardiner v. State*, 21 N. J. L. 557.

In *People v. Forrest*, 29 Hun (N. Y.) 548, it was held that an agreement between a village and a waterworks company, that the company shall be exempted from all corporation taxes, in consideration of its furnishing water for fountains, drinking troughs, and

it was not designed to surrender the power.<sup>1</sup> Immunity from taxation is a personal privilege and not transferable;<sup>2</sup> though if an exemption from taxation is attached to the land it is a privilege which will descend to a purchaser from the original owner in whose hands it was exempted.<sup>3</sup>

for extinguishing fires, does not exempt it from town, county, and state taxes.

1. *Buchanan v. Talbot County*, 47 Md. 286; *Baltimore v. Baltimore*, etc., R. Co., 6 Gill (Md.) 288; *Baltimore v. State*, 15 Md. 376; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *Kentucky Cent. R. Co. v. Bourbon County* (Ky. 1885), 6 Ky. Law Rep. 495; *Philadelphia*, etc., R. Co. *v. Maryland*, 10 How. (U. S.) 393; *Tucker v. Ferguson*, 22 Wall. (U. S.) 575.

In *Weston v. Shawano County*, 44 Wis. 242, where an act was passed exempting all lands granted to the state to aid in the construction of a certain road, from taxation, while the title should remain in the state or in the contractor to construct the road, and an amendatory act afterwards passed, limited the exemption to a certain time, it was held that the amendatory act was valid as to lands which, at the time of its passage, the state owned, and had not contracted to convey to the contractor.

In *Chicago*, etc., R. Co. *v. Missouri*, 122 U. S. 561, it was held that taxes may be levied upon railroads leased or sold to foreign corporations, even though the state is precluded, by provisions in its charter, from taxing the road in the hands of the original owner.

2. *Morgan v. Louisiana*, 93 U. S. 217; *Pickard v. East Tennessee*, etc., R. Co., 130 U. S. 637; *East Tennessee*, etc., R. Co. *v. Hamblin County*, 102 U. S. 273; *Armstrong v. Athens County*, 16 Pet. (U. S.) 281; *Com. v. Owensboro*, etc., R. Co., 81 Ky. 572; 17 Am. & Eng. R. Cas. 428; *St. Paul*, etc., R. Co. *v. McDonald*, 34 Minn. 195; *State v. Minnesota Cent. R. Co.*, 36 Minn. 246; *St. Louis*, etc., R. Co. *v. Berry*, 113 U. S. 465; *Louisville*, etc., R. Co. *v. Palmes*, 109 U. S. 244; *Annapolis*, etc., R. Co. *v. Anne Arundel County*, 103 U. S. 1; *Wilson v. Gaines*, 103 U. S. 417; *Chicago*, etc., R. Co. *v. Missouri*, 122 U. S. 561; *Memphis*, etc., R. Co. *v. Gaines*, 97 U. S. 697; *Memphis*, etc., R. Co. *v. Berry*, 112 U. S. 609; nor does it pass on foreclosure sale. *Chesapeake*, etc., R. Co. *v. Miller*, 114 U. S. 176; *Pickard v.*

*East Tennessee*, etc., R. Co., 130 U. S. 637; *Trask v. Maguire*, 18 Wall. (U. S.) 391; *Alexandria Canal*, etc., *Bridge Co. v. District of Columbia*, 1 Mackey (D. C.) 217; *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661; *State v. Butler*, 15 Lea (Tenn.) 104; *Memphis*, etc., R. Co. *v. Berry*, 41 Ark. 436; *St. Louis*, etc., R. Co. *v. Berry*, 41 Ark. 509. In *Pickard v. East Tennessee*, etc., R. Co., 130 U. S. 634, it was held that immunity from taxation can be transferred only upon express statutory direction.

The privilege of exemption from taxation enjoyed by the railroad company does not pass with the road to a lessee thereof. *Alexandria Canal*, etc., *Bridge Co. v. District of Columbia* (D. C. 1891), 7 Am. & Eng. R. Cas. 325.

In *New Haven v. Sheffield*, 30 Conn. 172, it was held that where property exempted by contract not to tax, is sold, the exemption applies to the fund raised therefrom and not to the property itself.

3. *State v. Hicks*, 9 Yerg. (Tenn.) 486; *State v. Whitworth*, 22 Fed. Rep. 75; 17 Am. & Eng. R. Cas. 411; *International*, etc., R. Co. *v. Smith County*, 65 Tex. 21; *Com. v. Owensboro*, etc., R. Co., 81 Ky. 572; 17 Am. & Eng. R. Cas. 428; *East Tennessee*, etc., R. Co. *v. Pickard*, 24 Fed. Rep. 614; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *In re Stevens County* (Minn.), 31 N. W. Rep. 942; *State v. Winona*, etc., R. Co., 21 Minn. 315; *St. Paul*, etc., R. Co. *v. Parcher*, 14 Minn. 297; *State v. Northern Pac. R. Co.*, 36 Minn. 207. And see *State v. Morris*, etc., R. Co., 49 N. J. L. 193; *State v. Nashville*, etc., R. Co., 12 Lea (Tenn.) 583; *Seaboard*, etc., R. Co. *v. Norfolk County*, 83 Va. 195.

In *Nichols v. New Haven*, etc., Co., 42 Conn. 103, it was held that a corporation taking all the rights and immunities of another corporation, takes the same exemption of its capital from taxation which the other corporation enjoyed.

**Criticisms on and Denial of the Power of the Legislature to Bind the State Permanently.**—A good deal has been

**V. PURPOSES OF TAXATION—1. Must be Public.**—The purpose of taxation is the raising of revenue<sup>1</sup> for a public purpose.<sup>2</sup> That

said and written against the right of a legislature to bind the state permanently by legislation waiving or relinquishing the right to tax. See the dissenting opinion of Miller, J., concurred in by Chase, C. J., and Field, J., in *Washington University v. Rouse*, 8 Wall. (U. S.) 439. See also *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 282; *State v. Hannibal, etc.*, R. Co., 75 Mo. 208. And see various dissenting opinions, etc.

1. *Frost v. Flick*, 1 Dak. Ter. 131; *People v. Doe*, 36 Cal. 220; *People v. McCreery*, 34 Cal. 433; *Palmer v. Stumph*, 29 Ind. 329; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Fletcher v. Oliver*, 25 Ark. 289; *Matter of New York*, 11 Johns. (N. Y.) 77; *Hilbish v. Catherman*, 64 Pa. St. 154; *Philadelphia Assoc. v. Wood*, 39 Pa. St. 73; *King v. Portland*, 2 Oregon 147; *Reeves v. Wood County*, 8 Ohio St. 333.

The constitutions of *Texas* and *Virginia* provide that the legislature shall have no right to lay taxes or impose burdens upon the people, except to raise revenue sufficient for the economical administration of the government. See also *Beck v. Allen*, 58 Miss. 143.

In *Mason v. Lancaster*, 4 Bush (Ky.) 406, it was said by Williams, C. J., that "It is possible that a statute so flagrantly beyond revenue purposes as to indicate other objects under its guise, might be violative of constitutional rights; but before this court would determine such, it would have to appear palpable and unmistakable." And in *Durach's Appeal*, 62 Pa. St. 491, it was said that "A government which assumes the office of controlling and directing the lawful industry of its citizens into channels which it may choose to deem best, assumes what does not legitimately belong to it."

The term "revenue," when used with reference to funds derived from taxation, is best interpreted, in absence of qualifying words and circumstances implying a different signification, as confined to the usual public income taxation. *Laughlin v. Santa Fe County*, 3 N. Mex. 264. And see *Fletcher v. Oliver*, 25 Ark. 289; *Harper v. Elberton*, 23 Ga. 566; *U. S. v. Norton*, 91 U. S. 568. It is a general term embracing city, town, and county, as well

as state, revenue. *State v. Van Every*, 75 Mo. 530.

The term "taxation," as used in the *Oregon* constitution, is limited to the meeting of such expenses as are necessary for the maintenance of the general government of state, county, city, etc.; but the full power resides in the legislative department to provide for other expenses belonging to any other branch of taxation, as it is commonly understood, in their discretion. *King v. Portland*, 2 Oregon 147.

Where an imposition has reference to police as well as revenue, a particular business may be taxed while others are spared, not only because it may be most able to bear the burden, but also because such surroundings attach themselves to the business taxed, as to render the discouragement and discipline of active taxation wise and politic. *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654. And see *POLICE POWER*, vol. 18, p. 739; *INTOXICATING LIQUORS—Regulations as to Licensing*, vol. 11, p. 591.

2. *Cypress Pond Draining Co. v. Hooper*, 2 Metc. (Ky.) 350; *Anderson v. Kerns Draining Co.*, 14 Ind. 202; 77 Am. Dec. 63; *Clark v. Des Moines*, 19 Iowa 199; *Weismer v. Douglas*, 64 N. Y. 91; 21 Am. Rep. 586; *People v. Batchellor*, 53 N. Y. 128; 13 Am. Rep. 480; *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *Opinion of Justices*, 58 Me. 590; *Coates v. Campbell*, 37 Minn. 498; *State v. Foley*, 30 Minn. 350; *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39; *Clee v. Sanders*, 74 Mich. 692; *People v. Saginaw County*, 26 Mich. 22; *Hitchcock v. St. Louis*, 49 Mo. 484; *State v. Smith* (N. J. 1887), 11 Atl. Rep. 321; *Tyler v. Beacher*, 44 Vt. 651; 8 Am. Rep. 398; *Reeves v. Wood County*, 8 Ohio St. 333; *Knowlton v. Rock County*, 9 Wis. 410; *Soens v. Racine*, 10 Wis. 271; *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718; *Whiting v. Sheboygan, etc.*, R. Co., 25 Wis. 167; 3 Am. Rep. 30; *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622; *Gove v. Epping*, 41 N. H. 539; *Spencer v. Joint School District*, 15 Kan. 262; *Citizens' Sav. Assoc. v. Topeka*, 3 Dill. (U. S.) 376; *Jarroll v. Moberly*, 103 U. S. 580; *Cole v. La Grange*, 113 U. S. 1; *Osborne v. Adams County*, 106 U. S. 181; *Osborne v.*

a tax is intended to destroy a use deemed against the policy of the government, does not necessarily render the tax unlawful.<sup>1</sup>

**2. General Rule of Construction.**—It is the essential character of the direct object of the expenditure contemplated which determines the validity of the tax therefor, and not the magnitude of the interest to be affected, nor the degree to which the general advantage of the community may be ultimately benefited. If the enterprise is strictly private, incidental

Adams County, 109 U. S. 1; *Kelly v. Pittsburgh*, 104 U. S. 81; *McMillen v. Anderson*, 95 U. S. 37; *People v. Flagg*, 46 N. Y. 401; *Matter of New York*, 11 Johns. (N. Y.) 80; *Stockton, etc., R. Co. v. Stockton*, 41 Cal. 173; *People v. Saginaw County*, 26 Mich. 22; *Gurnee v. Chicago*, 40 Ill. 165; *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *People v. State Treasurer*, 23 Mich. 499; *Bradley v. New York, etc., R. Co.*, 21 Conn. 305; *Silsbee v. Stockle*, 44 Mich. 561; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Warren v. Henly*, 31 Iowa 31; *English v. People*, 96 Ill. 566; *Bissell v. Kankakee*, 64 Ill. 249; 21 Am. Rep. 554; *Scammon v. Chicago*, 44 Ill. 269; *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185; *State v. Western Union Tel. Co.*, 73 Me. 518; *Central Branch, etc., R. Co. v. Smith*, 23 Kan. 745; *Lowell v. Oliver*, 8 Allen (Mass.) 247; *Freeland v. Hastings*, 10 Allen (Mass.) 570; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Bradshaw v. Omaha*, 1 Neb. 16; *Mobile v. Dargan*, 45 Ala. 310; *Feldman v. Charleston*, 23 S. Car. 57; 55 Am. Rep. 6; *State v. Clinton*, 26 La. Ann. 561; *Sharpless v. Philadelphia*, 21 Pa. St. 157; 59 Am. Dec. 759; *Spencer v. Merchant*, 100 N. Y. 585; *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *Donnelly v. Decker*, 58 Wis. 461; 46 Am. Rep. 637; *Wauwatosa v. Guyon*, 25 Wis. 271; *Bennington v. Park*, 50 Vt. 178; *Seely v. Sebastian*, 4 Oregon 25; *Bloodgood v. Mohawk, etc., R. Co.*, 18 Wend. (N. Y.) 9; 31 Am. Dec. 313; *Curtis v. Whipple*, 24 Wis. 350; 1 Am. Rep. 187; *Citizens' Sav., etc., Assoc. v. Topeka City*, 20 Wall. (U. S.) 65; *Parkinsburgh v. Brown*, 106 U. S. 487; *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678; *Cole v. La Grange*, 113 U. S. 1; *State v. Osawkee Tp.*, 14 Kan. 418; 19 Am. Rep. 99; *Williams v. School Dist. No. 6*, 33 Vt. 271; *First Nat. Bank v. Concord*, 50 Vt. 257; *Louisville, etc., R. Co. v. Davidson County*, 1 Sneed (Tenn.) 637; 62 Am. Dec. 424; *Hammett v. Philadelphia*, 65 Pa. St. 152; 3

Am. Rep. 615; *Philadelphia Assoc. v. Wood*, 39 Pa. St. 73.

The validity depends upon the ultimate use and object of the tax, and not upon the channel through which it is applied. *Bennington v. Park*, 50 Vt. 178; *Perry v. Keene* (N. H.), 15 Am. Law. Reg. 397; *Atkins v. Randolph*, 31 Vt. 247; *Coates v. Campbell*, 37 Minn. 498; *Brown v. Hertford*, 100 N. Car. 92; *Wood v. Oxford*, 97 N. Car. 227; *Kimball v. Mobile*, 3 Woods (U. S.) 555; *Bard v. Augusta*, 30 Fed. Rep. 906. A tax for a mere private purpose is unconstitutional, even though collected and applied by public officers; and a tax for a public purpose may be valid, even though levied, collected, and used, under the direction of an individual or private corporation. *Sharpless v. Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759; *Davidson v. Ramsey County*, 18 Minn. 482; *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678; *Taylor v. Ypsilanti*, 105 U. S. 60. And see *infra*, this title, *Municipal Taxation*.

Where the purpose for which an act provides for taxation is partly public and partly private, and the amount to be raised for each cannot be distinguished and severed, the act is void. *Coates v. Campbell*, 37 Minn. 498.

1. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 539; followed in *Merchant's Nat. Bank v. U. S.*, 101 U. S. 1, sustained the validity of U. S. Rev. Stat., § 3413, requiring the payment of a tax of ten per cent. imposed on state banks or national banks for paying out the notes of individuals or state banks used in circulation; it being conceded that the taxation in question was intended to destroy the use of state currency.

A tax on a business cannot be enjoined on the ground of possible inability of the parties to pay it, whereby it may work irreparable injury by breaking up their business. The enforcement of any tax may possibly work an injury of this nature. *Young-*



benefit to the public, however certain and great, does not justify the public aid in its behalf.<sup>1</sup> The question whether money required is in the nature of a tax, or is an illegal exaction under the name and guise of a tax, is a judicial one,<sup>2</sup> the presump-

blood *v.* Sexton, 32 Mich. 406; 20 Am. Rep. 654.

1. *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39; *Citizens' Sav., etc., Assoc. v. Topeka City*, 20 Wall. (U. S.) 655; *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *Curtis v. Whipple*, 24 Wis. 350; 1 Am. Rep. 187; *People v. Parks*, 58 Cal. 624; *Feldman v. Charleston*, 23 S. Car. 57; 55 Am. Rep. 6; *Weismer v. Douglas*, 64 N. Y. 91; 21 Am. Rep. 586; though incidental benefit to individuals will not vitiate a tax, the purpose of which is governmental. *Soens v. Racine*, 10 Wis. 271; *Taylor v. Ypsilanti*, 105 U. S. 60. It is enough if an improvement be for the common and general benefit of all the citizens, as distinguished from work from which only incidental benefits may flow. *People v. Kelly*, 5 Abb. N. Cas. (N. Y.) 383; 76 N. Y. 489.

A town cannot divide among the inhabitants thereof, according to families, the money received under the statute "providing for the disposition and payment of the public money apportioned to the State of *Maine*, on deposit, by the government of the *United States*." *Hooper v. Emery*, 14 Me. 375. Tax levies and expenditures need not be confined to such as are absolutely needful to the continued existence of organized government. *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *Sharpless v. Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759; and the test of the public use of an improvement is not a right of enjoyment wholly at the public expense, but a common and equal right, free from unreasonable discrimination. *Holt v. Antrim*, 64 N. H. 284; *Perry v. Keene*, 56 N. H. 514. Public uses may differ in nature and kind, and in the degree or extent of the public enjoyment. There may be various degrees of the same kind of public use. *Whiting v. Sheboygan*, etc., R. Co., 25 Wis. 167; 3 Am. Rep. 30.

The courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily levied, and the objects and purposes which have been considered necessary to the support

and for the proper use of the government. *Citizens' Sav., etc., Assoc. v. Topeka City*, 20 Wall. (U. S.) 661.

**Eminent Domain.**—The rule has been laid down that the taxing power may be exercised for any object which will justify the exercise of the right of eminent domain. *Stewart v. Park County*, 30 Iowa 9. And see *Opinion of Justices*, 150 Mass. 592; *Covington v. Southgate*, 15 B. Mon. (Ky.) 491; *Opinion of Judges*, 58 Me. 590; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *Garrard County Ct. v. Kentucky River Nav. Co. (Ky.)*, 10 Am. Law Reg. N. S. 151. But in *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400, it was said that the fact that the state may exercise the power of eminent domain in behalf of an enterprise, does not determine its right to exercise the power of taxation in aid of the same object; the principles governing eminent domain correspond to those controlling the police power rather than to those applying to the power of taxation, and its exercise has regard rather to the public need than to the public character of its object. And see *Whiting v. Sheboygan, etc., R. Co.*, 25 Wis. 167; 3 Am. Rep. 30.

2. *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Shawnee County v. Carter*, 2 Kan. 131; *Denny v. Mattoon*, 2 Allen (Mass.) 361; 79 Am. Dec. 784; *Holden v. James*, 11 Mass. 396; *People v. State Treasurer*, 23 Mich. 499; *Turner v. Althaus*, 6 Neb. 54; *Good v. Zercher*, 12 Ohio 367; *Norman v. Heist*, 5 W. & S. (Pa.) 171; 40 Am. Dec. 493; *Greenough v. Greenough*, 11 Pa. St. 494; 51 Am. Dec. 567; *Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *Norris v. Waco*, 57 Tex. 635; *Allen v. Drew*, 44 Vt. 174; *Hooper v. Emery*, 14 Me. 375; *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185. And see *Prince v. Boston*, 148 Mass. 285.

Whether lands should bear a burden, or a share of a burden, for another's benefit, is a question of property and private rights, and a proper one for the determination of the court. *Bradshaw v. Omaha*, 1 Neb. 16.

**Federal Jurisdiction.**—The nature of taxation, what purposes are public and

tion being in favor of the validity of the legislative action.<sup>1</sup>

**3. What Purposes are Public.**—The construction and maintenance of highways and bridges have for their object the accommodation of the public, and are legitimate purposes of taxation;<sup>2</sup> so railroads are considered public improvements in the nature of highways promoting the general welfare of the public, and taxation to aid in their construction or maintenance is upheld by the

what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine in such a manner as to be binding upon the federal courts. *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678.

1. The decision of the legislature is entitled to great respect, *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *State v. Clinton*, 26 La. Am. 561; *Feldman v. Charleston*, 23 S. Car. 57; 55 Am. Rep. 6; and to justify a court in declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised, must be so clear and palpable as to be immediately perceptible to every mind. *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *Speer v. School Directors*, 50 Pa. St. 150; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24; *Stockton, etc., R. Co. v. Stockton*, 41 Cal. 173; *Wells v. Weston*, 22 Mo. 384; *English v. Oliver*, 28 Ark. 317; *People v. Kelly*, 5 Abb. N. Cas. (N. Y.) 383; 76 N. Y. 489; *Guilford v. Chenango County*, 13 N. Y. 149; *Kelly v. Pittsburgh*, 85 Pa. St. 170; 27 Am. Dec. 733; *Morgan v. Com.*, 55 Pa. St. 456; *Ahl v. Gleim*, 52 Pa. St. 432. And see *Beekman v. Saratoga, etc., R. Co.*, 3 Paige (N. Y.) 73; 22 Am. Dec. 679.

If there be the least possibility that making the gift will be in any degree promotive to the public welfare, it becomes a question of policy and not of natural justice, and the determination of the legislature is conclusive. *Booth v. Woodbury*, 32 Conn. 128. And see *Sharpless v. Philadelphia*, 21 Pa. St. 174; 59 Am. Dec. 759; *Schenley v. Allegheny*, 25 Pa. St. 128; *Hammitt v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 344; *Citizen's Sav., etc., Assoc. v. Topeka City*, 20 Wall. (U. S.) 655; *People v. East Saginaw*, 33 Mich. 164; *Bennington v. Park*, 50 Vt. 178; *Shackford v. New-*

*ington*, 46 N. H. 415; *Tulane Education Fund v. Board of Assessors*, 38 La. Ann. 292; *Norris v. Waco*, 57 Tex. 635; *Davey v. Galveston County*, 45 Tex. 291; *Bloomfield, etc., Gas Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Tide-water Co. v. Coster*, 18 N. J. Eq. 519; 90 Am. Dec. 634.

If the purpose designated by the legislature lies so near the border line that it may be doubtful on which side it has domicile, the courts will not set their judgment against that of the law-makers. *Weismer v. Douglas*, 64 N. Y. 91; 21 Am. Rep. 586; *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268; 14 Am. Rep. 99. And see *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; 8 Am. Rep. 480. In *Thomas v. Leland*, 24 Wend. (N. Y.) 65, it was said that the power of taxation acts upon communities, and may be exerted in favor of any object which the legislature shall deem for the public benefit.

2. *Com. v. McWilliams*, 11 Pa. St. 61; *McClenachan v. Curwin*, 3 Yeates (Pa.) 362; *Dillingham v. Snow*, 5 Mass. 547; *O'Kane v. Treat*, 25 Ill. 557; *Ricketts v. Spraker*, 77 Ind. 371; *Atty. Gen'l v. Bay County*, 34 Mich. 46; *State v. Com'rs*, 37 Ohio St. 526; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 442; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *People v. Flagg*, 46 N. Y. 401; *People v. Kelly*, 5 Abb. N. Cas. (N. Y.) 383; 76 N. Y. 481; *Bennington v. Park*, 50 Vt. 178; *Whiting v. Sheboygan, etc., R. Co.*, 25 Wis. 167; 3 Am. Rep. 30.

To purchase a toll road in order to make it free to the public, is a public purpose. *Warder v. Clark County*, 38 Ohio St. 639. But an assessment for the purpose of erecting a bridge has been held void where the bridge rests in part on private land. *Pacific Bridge Co. v. Kirkhan*, 54 Cal. 558.

**Canals.**—Canals and other artificial water ways are considered public highways, within the above rule. *Thomas v. Leland*, 24 Wend. (N. Y.) 65. And see *HIGHWAY*, vol. 9, p. 262.

weight of authority.<sup>1</sup> The construction of harbors,<sup>2</sup> piers, breakwaters, etc.;<sup>3</sup> the building of levees to prevent the overflow of land;<sup>4</sup> providing for the drainage and reclamation of bodies of swamp and overflowed lands;<sup>5</sup> the manufacture and distribution

1. **Railroads.**—*Sharpless v. Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759; *Taylor v. Ypsilanti*, 105 U. S. 60; *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678; *New Buffalo Tp. v. Cambria Iron Co.*, 105 U. S. 73; *Davidson v. Ramsey County*, 18 Minn. 482; *Perry v. Keene*, 56 N. H. 514. Notwithstanding the road is without the state. *Bennington v. Park*, 50 Vt. 178. And see *Pennsylvania R. Co. v. Philadelphia*, 47 Pa. St. 189. See also *infra*, this title, *Municipal Taxation*, sub-tit., *Purposes*.

The mere fact that individuals are to own the railroads and receive the tolls, in no wise impairs or diminishes the advantages to be derived from them, to the public. *Gibson v. Mason*, 5 Nev. 283.

The public use consists in the right of the public to the carriage of persons and property, upon tendering the proper consideration, and in the power of the state to control the franchise and limit the tolls, *Whiting v. Sheboygan, etc.*, R. Co., 25 Wis. 186; 3 Am. Rep. 30; and the private benefit, instead of being the occasion of the grant, is but the reward springing from the services rendered. *Taylor v. Ypsilanti*, 105 U. S. 60.

In *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666, the work of a railroad was held to be as much public as if it were constructed by the state, the court refusing to follow the courts of the state where the case arose, on the ground that the question belonged to the domain of general jurisprudence, and that in such cases the federal court must hear and determine for itself.

The building of a railway, if connected with a municipality, tends to improve the means of travel and transportation, and consequently to promote one of the primary objects for which the municipality was created. *Rogers v. Burlington*, 3 Wall. (U. S.) 654. But the contrary rule has been adopted by some authorities, upon the ground that the development of the material prosperity of the state is a mere incident to the business carried on, and that railroading in private hands is not to be distinguished, in its legal characteristics, from other private

enterprises. See *infra*, this title, *Municipal Taxation*, sub-tit., *Purposes*; *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *People v. State Treasurer*, 23 Mich. 499; *Whiting v. Sheboygan, etc.*, R. Co., 25 Wis. 167; 3 Am. Rep. 30.

2. **Harbors.**—Taxation for the construction of harbors, and to meet liabilities incurred under contracts for their construction, is upheld. *State v. Milwaukee*, 25 Wis. 122; *President, etc., of Revenue v. State*, 45 Ala. 399. And see *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166; *Police Jury v. Shreveport*, 5 La. Ann. 661; *State v. Fagan*, 22 La. Ann. 545; *Stevens v. Walker*, 15 La. Ann. 577; *People v. Vanderbilt*, 26 N. Y. 287; *Gould v. Hudson River R. Co.*, 6 N. Y. 522.

3. *Soens v. Racine*, 10 Wis. 271; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166.

4. *Daily v. Swope*, 47 Miss. 367; *Alcorn v. Hamer*, 38 Miss. 652; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; *State v. Clinton*, 26 La. Ann. 561; *Selby v. Levee Com'rs*, 14 La. Ann. 437; *Bishop v. Marks*, 15 La. Ann. 147; *State v. Maginnis*, 26 La. Ann. 558; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; 72 Am. Dec. 276; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166.

A levee tax is not an internal improvement, within a constitutional provision prohibiting a state from engaging in such work. Such provisions relate to public internal improvements and local concerns for general or county purposes, and not to improvements for special local purposes where the improvements are made by assessments on the property improved. *McGehee v. Mathis*, 21 Ark. 40.

5. **Reclamation of Land.**—*Hagar v. Yolo County*, 47 Cal. 222; *Hyde Park v. Spencer*, 118 Ill. 446; *McChesney v. Hyde Park* (Ill. 1891), 28 N. E. Rep. 1102; *Dingley v. Boston*, 100 Mass. 544; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; 77 Am. Dec. 63; *State v. Henry County*, 41 Ohio St. 423; *Chesbrough v. Com'rs*, 37 Ohio St. 508; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Seely v. Sebastian*, 4 Oregon 25; *Donnelly v. Decker*, 58 Wis. 461;

of gas or electric light;<sup>1</sup> the supply of pure water to a large number of inhabitants;<sup>2</sup> the erection of a market-house,<sup>3</sup> the maintenance of a fire department,<sup>4</sup> and the protection and promotion of

46 Am. Rep. 637; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518; 90 Am. Dec. 634; *People v. Nearing*, 27 N. Y. 306; *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Shelley v. St. Charles County*, 17 Fed. Rep. 909; *Boro v. Phillips County*, 4 Dill. (U. S.) 216.

But the legislature cannot authorize the levy of a tax for the construction on private property of a drain in which the public are not concerned. *People v. Saginaw County*, 26 Mich. 22. And see *Cypress Pond Draining Co. v. Hooper*, 2 Metc. (Ky.) 350. Such as draining farms to render them more productive. *Anderson v. Kerns Draining Co.*, 14 Ind. 199; 77 Am. Dec. 63.

If lands are reclaimed by some work or method of improvement which may be used by the public, such as a canal for carrying purposes, the combination of reclaiming the lands and providing facilities of transportation will bring the enterprise under the principles of both eminent domain and taxation. *Donnelly v. Decker*, 58 Wis. 461; 46 Am. Rep. 637.

A claim that lots were drained because such drainage was essential to the public health and welfare, must be sustained by proof. *Matter of Church of Holy Sepulchre*, 61 How. Pr. (N. Y.) 315.

**Storage of Debris.**—Though the drainage of a state is a public purpose, the storage of *débris* from mines is, in its nature, a private enterprise. *People v. Parks*, 58 Cal. 624.

**1. Gas and Electric Light.**—The manufacture and distribution of gas or electric light is a public purpose in which a city may engage. *Opinion of Justices*, 150 Mass. 592. And see *Bloomfield, etc., Gas Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Hamilton Gas Light, etc., Co. v. Hamilton*, 37 Fed. Rep. 832.

It is no objection to an act authorizing the issue of municipal bonds to secure a supply of natural gas, that the main object of the act is to enable the city to supply its individual inhabitants with fuel at a cheaper rate than they could obtain it from other sources. So long as the act is for the benefit of all the citizens of the municipality, it

does not lose its character as an act for a public purpose. *Fellows v. Walker*, 39 Fed. Rep. 651.

**2. Water.**—*Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Hardy v. Waltham*, 3 Met. (Mass.) 163; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Burlington Water Co. v. Woodward*, 49 Iowa 63; *Grant v. Davenport*, 36 Iowa 396; *Chadwick v. Maginnis*, 94 Pa. St. 117; *Wells v. Atlanta*, 43 Ga. 67.

The government of the *United States* has power to construct an aqueduct and to impose taxes therefor, for the purpose of supplying water to the city of Washington from within the limits of the State of *Maryland*, and may use and occupy land for that purpose in *Maryland*, with her permission and consent. *Reddall v. Bryan*, 14 Md. 444.

In *Allentown v. Henry*, 73 Pa. St. 404, it was held that an act incorporating a water company, which is unconstitutional so far as it seeks to authorize a private corporation to levy and collect a tax upon a citizen, may be made available by an act permitting the city to buy the works and franchises of such corporation.

A municipality, under authority from the legislature to make all contracts which they may deem necessary for the welfare of the city, may contract for the construction of water-works. *Rome v. Cabot*, 28 Ga. 50.

**3. Market-house.**—Where a town built a market-house two stories high, and appropriated the lower story for the purposes of a market-house, which was *bona fide* their principal and leading object in erecting the building, the appropriation of the upper story to other subordinate purposes, was held not such an excess of authority as to render the erection of the building, and the raising of the money therefor, illegal. *Spaulding v. Lowell*, 23 Pick. (Mass.) 71.

**4. Fire Apparatus.**—*Van Sicklen v. Burlington*, 27 Vt. 70; *Torrey v. Millbury*, 21 Pick. (Mass.) 64. It is immaterial whether the fire apparatus was purchased with public funds, or funds raised by private subscription. *Allen v. Taunton*, 19 Pick. (Mass.) 485. Where a fire department is a private corporation, it is not within the

the public health, are all public objects for the furtherance of which taxes may be laid.<sup>1</sup>

The power to tax for the payment of debts is coextensive with the power to incur the indebtedness;<sup>2</sup> and a tax may be

power of the legislature to confer upon it the power to tax. *State v. Smith* (N. J. 1887), 11 Atl. Rep. 321.

Where an act authorized the issue of bonds of a village, principally to aid in the construction of a dam for the purpose of improving a private water power, it is immaterial that the act stated that such water power was for the use of the public fire department, and it is, nevertheless, unconstitutional. *Coates v. Campbell*, 37 Minn. 498. And see MUNICIPAL CORPORATIONS, vol. 15, p. 1054.

1. *Anderson v. Kerns Draining Co.*, 14 Ind. 199; 77 Am. Dec. 63; *People v. Macomb County*, 3 Mich. 475; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Dingley v. Boston*, 100 Mass. 544; *Solomon v. Tarver*, 52 Ga. 405; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 442. And see *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *Taylor v. Board of Health*, 31 Pa. St. 73; *In re Draining Co.*, 11 La. Ann. 338; *Miller v. Craig*, 11 N. J. Eq. 175; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701.

Where a board of health of a township necessarily incurs expense by removing a person affected with a contagious disease, and the persons liable for his support are unable to pay such expenses, they are a charge against the county, which it is the duty of the board of supervisors to allow. *People v. Macomb County*, 3 Mich. 475.

2. *Nougues v. Douglass*, 7 Cal. 65; *Com. v. Allegheny County*, 37 Pa. St. 277; *Com. v. Perkins*, 43 Pa. St. 400; *Alcorn v. Ilamer*, 38 Miss. 652. And see *Louisville v. Murphy*, 86 Ky. 53; *State v. Milwaukee*, 25 Wis. 122.

The obligation of a tax may have relation to debts already incurred, or it may be, in anticipation, dependent on future contingencies. *Morton v. Comptroller Gen'l*, 4 S. Car. 430. And it is not necessary that the demand should be a legal one; where a moral obligation exists, legal effect may be given to it. *Guilford v. Chenango County*, 13 N. Y. 143; *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566; 29 Am. Dec. 623;

*State v. Richland Tp.*, 20 Ohio St. 362; *State v. Board of Education*, 38 Ohio St. 3; *In re Vacation of Howard St.*, 142 Pa. St. 601; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Burr*, 13 Cal. 343; *Beals v. Amador County*, 35 Cal. 625; *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *Curtis v. Whipple*, 24 Wis. 354; 1 Am. Rep. 187; *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622; *Lycoming v. Union*, 15 Pa. St. 166; 53 Am. Dec. 575; *Beals v. Amador County*, 35 Cal. 624; *Warder v. Clark County*, 38 Ohio St. 639; *State v. Hoffman*, 35 Ohio St. 435; *Board of Education v. McLandsborough*, 36 Ohio St. 227; *New Orleans v. Clark*, 95 U. S. 644. And see *Baker v. Windham*, 13 Me. 74; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Pike v. Middleton*, 12 N. H. 278; *Shermann v. Carr*, 8 R. I. 431. Also *Pease v. Chicago*, 21 Ill. 500; *Faas v. Warner*, 96 Pa. St. 215; *Bristol v. Johnson*, 34 Mich. 123.

An act authorizing the levy and collection of a tax to compensate the owners of lots for damages sustained by the removal of a county seat to another town, has been held constitutional. *Wilkinson v. Cheatham*, 43 Ga. 258. And an act imposing a tax upon a local district of the state for a public improvement, as a canal, was held valid, notwithstanding that previous to its passage a number of individuals in such district had entered into a contract with the state, binding themselves to pay the whole expense of the improvement. *Thomas v. Leland*, 24 Wend. (N. Y.) 65.

And taxation, to make good the losses of parties who have suffered from the acts of rioters, has been held to be for a public use. *Darlington v. New York*, 31 N. Y. 164; 88 Am. Dec. 248.

Towns have power to raise money to indemnify their officers against liabilities incurred, or damages sustained, in the *bona fide* discharge of their duties, even though they are not legally bound to indemnify them. *Fuller v. Groton*, 11 Gray (Mass.) 340; *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 568; 29 Am. Dec. 623; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *Friend v.*

imposed to meet general or contingent expenses not yet incurred.<sup>1</sup> Necessary public buildings may be provided;<sup>2</sup> and the purchase and embellishment of land for a park for the enjoyment of the citizens.<sup>3</sup>

The establishment and maintenance of schools;<sup>4</sup> the suste-

Gilbert, 108 Mass. 408. And see *Mount v. State*, 90 Ind. 29; 46 Am. Rep. 192. But in *Bristol v. Johnson*, 34 Mich. 123, a statute providing for raising money by tax to reimburse a township treasurer for the sum paid by him to make good an amount of the public money, of which he had been robbed, was held to be unconstitutional and void; though in *Ford v. Clough*, 8 Me. 334; 23 Am. Dec. 513, it was held that a town might release a doubtful claim against its treasurer, thereby making him a competent witness.

In *Friend v. Gilbert*, 108 Mass. 408, it was held that a town has power to make compensation, over and above the contract price, for labor done in building a town house.

1. *Webster v. Baltimore County*, 51 Md. 395; *Freeland v. Hastings*, 10 Allen (Mass.) 570; *State v. Milwaukee*, 25 Wis. 122. And see *Spring v. Olney*, 78 Ill. 101. But see *Midland v. Roscommon Tp.*, 39 Mich. 424.

There is no valid distinction, in principle, between a right to raise money for a specific object yet to be accomplished, and a right to raise it to defray the expense of the same object after it has been done. *Lowell v. Oliver*, 8 Allen (Mass.) 247. And see *Morton v. Comptroller Gen'l*, 4 S. Car. 430; *Hilbish v. Catherman*, 64 Pa. St. 154.

In *Marion County v. Louisville*, etc., R. Co., 91 Ky. 388, it was held that the collection of a turnpike tax levied by a county under proper authority, cannot be defeated upon the ground that there was no turnpike debt due when the levy was made, when it appears that money had been borrowed from the sinking fund of the county to pay the debt, and had not been repaid. Power to levy taxes for general or contingent, or any other expenses not otherwise provided for, is sufficiently broad to authorize the levy of a tax to pay ordinary debts. *Spring v. Olney*, 78 Ill. 101.

But the improper appropriation of a fund raised to meet general or contingent expenses, vitiates the tax and all proceedings under it. *Culbertson v.*

*Witbeck Co.*, 127 U. S. 326; *Hitchcock v. St. Louis*, 49 Mo. 484.

In *Culbertson v. Witbeck Co.*, 127 U. S. 326, it was held that where the record of the proceedings of a county board shows an appropriation of a sum of money for illegal purposes, immediately followed by the levy of a tax for a contingent fund to defray general expenses, oral testimony showing that the sum was actually paid, together with record evidence of the payment of taxes afterwards levied for similar purposes, is sufficient to show that the sum voted was paid out of the levy then made, and that the levy and subsequent proceedings were consequently invalid.

2. *Harris v. Dubuclet*, 30 La. Ann. 662; but not if the state debt is thereby increased beyond the amount limited by the constitution. *Nougues v. Douglass*, 7 Cal. 65.

An appropriation may be made for the repair of a public clock. *Willard v. Newburyport*, 12 Pick. (Mass.) 227.

3. *Atty. Gen'l v. Burrell*, 31 Mich. 25; *People v. Salomon*, 51 Ill. 37; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *People v. Brislin*, 80 Ill. 423; *Dunham v. People*, 96 Ill. 331; *State v. Leffingwell*, 54 Mo. 458; *Matter of Central Park Com'rs*, 50 N. Y. 493; *Austin v. Coggeshall*, 12 R. I. 329; 34 Am. Rep. 648. And see *Matter of Prospect Park*, 60 N. Y. 398.

4. *Schools*.—*Burr v. Carbondale*, 76 Ill. 456; *Horton v. Mobile School Com'rs*, 43 Ala. 598; *Board of Public Education v. Barlow*, 49 Ga. 232; *Marks v. Purdue University*, 37 Ind. 155; *Merrick v. Amherst*, 12 Allen (Mass.) 500; *Cushing v. Newburyport*, 10 Met. (Mass.) 508; *Opinion of Justices*, 68 Me. 582; *Com. v. Hartman*, 17 Pa. St. 118; *Smith v. McCarthy*, 56 Pa. St. 359; *Felty v. Uhler*, 10 Phila. (Pa.) 512; *Hanson v. Vernon*, 27 Iowa 28; 4 Am. Rep. 215; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Bennington v. Park*, 50 Vt. 178; *Williams v. School Dist. No. 6*, 33 Vt. 271; *Curtis v. Whipple*, 24 Wis. 350; 1 Am. Rep. 187; *Kelly v. Pittsburgh*, 104 U. S. 78; *Antoni v. Wright*, 22 Gratt. (Va.) 857; *Gordon v.*

nance and support of the poor;<sup>1</sup> donations for charitable purposes;<sup>2</sup> pensions to persons who have served in the army or navy,

Cornes, 47 N. Y. 613; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Collins v. Henderson*, 11 Bush (Ky.) 74; *Dillingham v. Snow*, 5 Mass. 547; *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 442; *Munson v. Collingwood*, 9 U. C. C. P. 497. And see *SCHOOLS*, vol. 21, p. 838.

The power of towns to raise money for the support of town schools is not restricted to the amount necessary to support the schools, originally provided for, but they may also grant money to support other town schools for instruction in branches of knowledge not required nor taught in such schools. *Cushing v. Newburyport*, 10 Met. (Mass.) 508. And high schools in which other languages than English are taught, may be maintained. *Stuart v. School Dist. No. 1*, 30 Mich. 69.

**Normal schools** are public institutions in aid of which the power to tax may be granted, even though the constitution expressly directs the establishment of other forms of schools, and omits the mention of normal schools. *Briggs v. Johnson County*, 4 Dill. (U. S.) 148.

The constitutional provision directing the maintenance of free schools for at least four months, amounts to a mandate to the legislature to provide the means of sustaining a free school in each district in the state for that time at least, and does not prohibit a larger provision. *State v. Miller*, 65 Mo. 50.

**Private and Sectarian Schools.**—But the power to tax must be exercised in aid of public schools only, taxation in aid of mere private or sectarian institutions being illegal and void. *Atchison, etc., R. Co. v. Atchison*, 47 Kan. 712; *People v. McAdams*, 82 Ill. 256; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 25; *Jenkins v. Andover*, 103 Mass. 94; *Curtis v. Whipple*, 24 Wis. 350; 1 Am. Rep. 187. And see *Higgins v. Prater*, 91 Ky. 6. But see *Merrick v. Amherst*, 12 Allen (Mass.) 500.

In *Barrett v. Winnipeg*, 19 Can. Sup. Ct. 374, an act depriving Catholics of the right to have their children taught according to the rules of their church, and compelling them to contribute to the support of schools to which they could not conscientiously send their children, was held to be

beyond the power of the legislature, and void.

**Schoolhouse.**—It has been held that a schoolhouse to be leased to an academy corporation may be erected, *Holt v. Antrim*, 64 N. H. 284; and a district may unite with other parties in the erection of a building, one part to be owned by the district as a schoolhouse, and the other to be owned by other parties as a public hall. *Eddy v. Wilson*, 43 Vt. 362; *George v. School Dist.*, 6 Met. (Mass.) 497.

**1. Support of Poor.**—The *Shepherd's Fold v. New York*, 96 N. Y. 137; *Knowlton v. Rock County*, 9 Wis. 410. And see *State v. Douglas County*, 18 Neb. 601.

In *State v. Nelson County*, 1 N. Dak. 88, a statute authorizing counties to issue bonds to procure seed grain for needy farmers resident therein, was held to be for a public purpose, and therefore constitutional, it being intended as a measure for the necessary support of the poor; and in *Briggs v. Whipple*, 6 Vt. 95, where the overseers of the poor incurred expense in defending a suit brought against them, on account of acts performed by them with a view to rendering assistance to a pauper, a tax voted by the town to defray such expenses was held to be legal.

But the poor who may be assisted and supported at public expense are those who are entirely destitute and helpless, and dependent on public charity. *State v. Osawkee Tp.*, 14 Kan. 418; 19 Am. Rep. 99. And see *Budd v. New York*, 143 U. S. 517.

**2. Charities.**—*Booth v. Woodbury*, 32 Conn. 118. And see *People v. Glowacki*, 2 Thomp. & C. (N. Y.) 436. But special legislation is necessary to authorize a municipality to tax for such purposes. *St. Mary's Industrial School v. Brown*, 45 Md. 310.

Gifts to unfortunate classes of society, as the indigent, blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords or other mementoes for past services, involving the general good indirectly and in a slight degree, are frequently made, and never questioned. *Booth v. Woodbury*, 32 Conn. 118. See also *Baldwin v. Douglas County* (Neb. 1893), 55 N. W. Rep. 875.

or who have performed other public services;<sup>1</sup> and bounties to volunteers enlisting in the military service of the *United States*,<sup>2</sup> are all considered public purposes for which a tax may be levied.

But donations of money raised by taxation are invalid when the donee is a mere private institution and not under the control of the government, and having no connection with it. *Hitchcock v. St. Louis*, 49 Mo. 484; *Philadelphia Assoc. v. Wood*, 39 Pa. St. 82. But see *Shepherd's Fold v. New York*, 96 N. Y. 137.

1. *Booth v. Woodbury*, 32 Conn. 118. See also *PENSIONS*, vol. 18, p. 283.

In *Exempt Fireman's Fund v. Rome*, 93 N. Y. 313, taxation for the benefit of firemen who had earned exemption by the performance of duty for a required period, was upheld, notwithstanding a constitutional provision prohibiting giving the moneys of the state to, or in aid of, any association, corporation, or private undertaking.

2. **Bounties.**—*Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *Dinehart v. LaFayette*, 19 Wis. 677; *Wahlschlager v. Liberty*, 23 Wis. 363; *Booth v. Woodbury*, 32 Conn. 118; *Taylor v. Thompson*, 42 Ill. 9; *Henderson v. Lagow*, 42 Ill. 360; *Briscoe v. Allison*, 43 Ill. 291; *Misner v. Bullard*, 43 Ill. 470; *Johnson v. Campbell*, 49 Ill. 316; *Stebbins v. Leaman*, 47 Ill. 352; *State v. Sullivan*, 43 Ill. 412; *Veazie v. China*, 50 Me. 518; *Cunningham v. Mitchell*, 67 Pa. St. 78; *Speer v. School Directors*, 50 Pa. St. 150; *Ahl v. Gleim*, 52 Pa. St. 432; *Cass Tp. v. Dillen*, 16 Ohio St. 38; *State v. Harris*, 17 Ohio St. 608. And see *Jones v. Chamberlain*, 109 N. Y. 100; *Cunningham v. Mitchell*, 67 Pa. St. 78; *Kunkle v. Franklin*, 13 Minn. 127; 97 Am. Dec. 226; *Comer v. Folsom*, 13 Minn. 205; *Wilson v. Buckmass*, 13 Minn. 441. And see *MUNICIPAL CORPORATIONS*, vol. 15, p. 1052. But see *Ferguson v. Landram*, 1 Bush (Ky.) 548, where it was held that no state, by her own legislation, can tax her own citizens for aiding or opposing the prosecution of a national war for which they have been, or are liable to be, taxed by the general government.

Towns cannot be compelled to levy a tax for such a purpose. *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622; *Tyson v. School Directors*, 51 Pa. St. 9.

The bounties which may be paid are those paid, or agreed to be paid, for

and not to soldiers. No effective support or assistance is furnished by giving increased compensation to those already enlisted and whose services as soldiers are already subjected to the government, *Fowler v. Danvers*, 8 Allen (Mass.) 80; *Stetson v. Kempton*, 13 Mass. 272; but a vote to pay a bounty to those who have enlisted or shall enlist, is invalid only as to those who have enlisted at its passage. *Crowell v. Hopkinton*, 45 N. H. 9; *Shackford v. Newington*, 46 N. H. 415. See also *Briscoe v. Allison*, 43 Ill. 291; *Taylor v. Thompson*, 42 Ill. 9.

It is not unconstitutional to impose a tax, for the purpose of relieving the inhabitants of a town from the burden of a draft, upon persons who were not liable to be drafted into service. The tax is for the common benefit. *State v. Jackson*, 31 N. J. L. 189.

Taxation may be used for the purpose of refunding money contributed into a common fund for the general purpose of filling quotas of troops. *Freeland v. Hastings*, 10 Allen (Mass.) 670; *Fowler v. Danvers*, 8 Allen (Mass.) 80; Opinion of Judges, 52 Me. 595; *Shackford v. Newington*, 46 N. H. 415; *Waldo v. Portland*, 33 Conn. 363; *Bartholomew v. Harwinton*, 33 Conn. 408; *Booth v. Woodbury*, 32 Conn. 128; *Johnson v. Campbell*, 49 Ill. 316; *Misner v. Bullard*, 43 Ill. 470; *Sullivan v. State*, 66 Ill. 75; *State v. Jackson*, 31 N. J. L. 190; *Weister v. Hude*, 52 Pa. St. 474; *Kelly v. Marshall*, 69 Pa. St. 319; *Susquehanna Depot v. Barry*, 61 Pa. St. 317; *Micheltree v. Sweezy*, 70 Pa. St. 278; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433; 98 Am. Dec. 237. And see *Buhl v. Springwells Tp.*, 14 Mich. 398; *Washington County v. Berwick*, 56 Pa. St. 467; *Felty v. Uhler*, 10 Phila. (Pa.) 513. But when the money is advanced by individuals, it must have been on the faith that it would be refunded. *State v. Sullivan*, 43 Ill. 412; *Cass Tp. v. Dillon*, 16 Ohio 38; *Miller v. Grandy*, 13 Mich. 540; *People v. Woodhull*, 14 Mich. 28; *Micheltree v. Sweezy*, 70 Pa. St. 278; *Tyson v. School Directors*, 51 Pa. St. 9; *Perkins v. Milford*, 59 Me. 315; *Cole v. Bedford*, 97 Mass. 326; *Estey v. Westminster*, 97 Mass. 324; *Cover v. Baytown*, 12 Minn. 124. But



**4. What Purposes are Not Public.**—Taxes cannot be levied to aid a mere private manufacturing enterprise;<sup>1</sup> nor to aid individuals in rebuilding a large district destroyed by fire;<sup>2</sup> nor by towns and municipalities to furnish amusements, or celebrate the anniversary

see *Hilbish v. Catherman*, 64 Pa. St. 154, and *State v. Richland Tp.*, 20 Ohio St. 362; and moneys advanced in aid of families or persons who have enlisted and have been duly mustered into the military service of the *United States*, may be repaid by taxation. *Lowell v. Oliver*, 8 Allen (Mass.) 247; *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *Dinehart v. LaFayette*, 19 Wis. 677. But taxes cannot be imposed for the purpose of refunding money paid by individuals for obtaining substitutes. *Freeland v. Hastings*, 10 Allen (Mass.) 570; *Estey v. Westminster*, 97 Mass. 324; *Moulton v. Raymond*, 60 Me. 121; *Opinion of Judges (Me.)*, 2 Am. L. Reg. N. S. 621; *Thompson v. Pittston*, 59 Me. 545; *Crowell v. Hopkinton*, 45 N. H. 9; *Shackford v. Newington*, 46 N. H. 415; *Kelly v. Marshall*, 69 Pa. St. 319; *Drake v. Phillips*, 40 Ill. 388; *Usher v. Colchester*, 33 Conn. 567; *Ferguson v. Landram*, 5 Bush (Ky.) 230; 96 Am. Dec. 350; 1 Bush (Ky.) 548. And see *Taylor v. Thompson*, 42 Ill. 9; *Kunkle v. Franklin*, 13 Minn. 127; 97 Am. Dec. 226.

In *People v. Onondaga County*, 16 Mich. 254, it was held that where individuals raised money on their own credit for bounty purposes, with some expectation that the town authorities would assume it, and a town meeting did subsequently assume it without statutory authority for such action, such attempted assumption was invalid. And in *Tyson v. School Directors*, 51 Pa. St. 9, it was held that a declaration at a meeting of a fund association, made by its president, that all payments of money were to be considered as lent to the township, made under the belief that the legislature would so amend the law as to authorize its collection, was not an assurance of repayment, which would authorize the imposition of a tax.

1. *Opinion of Justices*, 58 Me. 590; *English v. People*, 96 Ill. 566; *Bissell v. Kankakee*, 64 Ill. 249; 21 Am. Rep. 554; *Central Branch, etc., R. Co. v. Smith*, 23 Kan. 745; *Commercial Bank v. Iola*, 9 Kan. 689; *Cushing v. Newburyport*, 10 Met. (Mass.) 510; *Coates v. Campbell*, 37 Minn. 498; *State v. Foley*, 30 Minn. 350; *Cook v. Sumner*

*Mfg. Co.*, 1 Sneed (Tenn.) 608; *Scuffletown Fence Co. v. McAllister*, 12 Bush (Ky.) 312; *Commercial Nat. Bank v. Iola*, 2 Dill. (U. S.) 353; *Citizens' Sav., etc., Assoc. v. Topeka City*, 20 Wall. (U. S.) 655; although the amount loaned is secured by a mortgage on the works; *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185; *Parkersburg v. Brown*, 106 U. S. 487. And the fact that the corporation would tend to increase the business prosperity of the town, does not render its purpose public. *Weismer v. Douglas*, 64 N. Y. 91; 21 Am. Rep. 586.

Where a village agreed, in consideration of the erection of a stove mill within its limits, giving employment to 70 persons, "to expend one thousand two hundred dollars in making public improvements by draining the marsh, and improving the highways and streets around the ground to be occupied by" the mill, the money to be subject to the check of the mill owner, this was held to be an appropriation for private purposes which would not warrant a tax. *Clee v. Sanders*, 74 Mich. 692.

Taxes cannot be expended in constructing a dam for the purpose of improving a private water power. *Coates v. Campbell*, 37 Minn. 498.

Where a private corporation is organized for the double purpose of building a railway and erecting a cotton compress, a special tax voted in its behalf is valid to the extent that it is to be used for the purpose of building the railway only; that being a public improvement, and the other being a mere private enterprise. *MacKenzie v. Wooley*, 39 La. Ann. 944.

In *Burlington Tp. v. Beasley*, 94 U. S. 310, bonds issued by a town to aid in the construction and equipment of a steam custom mill owned by individuals, were upheld under two statutes, one of which provided for the issue of bonds to aid in building bridges in the construction of railroads, water power, or other works of internal improvement, and the other declaring that all custom grist mills are public mills.

2. *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39; *Feldman v. Charleston*, 23 S. Car. 57; 55 Am. Rep. 6.

of a great event of national or historical interest ; <sup>1</sup> nor can money raised by taxation be given away.<sup>2</sup>

5. **Must Benefit the Locality Taxed.**—The tax must inure to the benefit of the district or locality taxed ; <sup>3</sup> but local taxation for a

1. A town has no authority to appropriate money to be used in celebrating the Fourth of July, *Hood v. Lynn*, 1 Allen (Mass.) 103; *Gerry v. Stoneham*, 1 Allen (Mass.) 319; *New London v. Brainard*, 22 Conn. 552; *Hodges v. Buffalo*, 2 Den. (N. Y.) 110; or the anniversary of the surrender of Lord Cornwallis, *Tash v. Adams*, 10 Cush. (Mass.) 252; nor can a municipal corporation raise money to furnish entertainment for guests of the municipality. *Law v. People*, 87 Ill. 385; *Hodges v. Buffalo*, 2 Den. (N. Y.) 110. And see MUNICIPAL CORPORATIONS, vol. 15, p. 1051.

2. It is not competent for the legislature to make a gift of the common property or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom. *Hooper v. Emery*, 14 Me. 375; *Bristol v. Johnson*, 34 Mich. 123. And see *Pease v. Chicago*, 21 Ill. 500.

3. *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *Atty. Gen'l v. Bay County*, 34 Mich. 46; *Ryerson v. Utley*, 16 Mich. 276; *People v. Parks*, 58 Cal. 624; *Lockwood v. St. Louis*, 24 Mo. 20; *State v. Leflingwell*, 54 Mo. 458; *Wells v. Weston*, 22 Mo. 384; *Livingston County v. Weider*, 64 Ill. 427; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Dec. 159; *Howell v. Bristol*, 8 Bush (Ky.) 493; *People v. Public Schools*, 78 Ill. 136; *Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *In re Washington Ave.*, 69 Pa. St. 352; *Durach's Appeal*, 62 Pa. St. 491; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; 77 Am. Dec. 63; *Marks v. Purdue University*, 37 Ind. 155; *Zanesville v. Richards*, 5 Ohio St. 589; *Mobile v. Dargan*, 45 Ala. 310; *People v. Dutchess County*, 1 Hill (N. Y.) 50; *Gordon v. Cornes*, 47 N. Y. 608; *Matter of Prospect Park*, 60 N. Y. 398; *Bennington v. Park*, 50 Vt. 178; *Farris v. Vannier*, 6 Dakota 186; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; *Talbot County v. Queen Anne's County*, 50 Md. 260; *Prince George's County v. Laurel*, 70 Md. 443; *Williams v. Cammack*, 27 Miss. 209; 61

Am. Dec. 508; *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622; U. S. v. Memphis, 97 U. S. 284; *Louisiana v. Pilsbury*, 105 U. S. 295; *Harter v. Kernochan*, 103 U. S. 562; *Livingston County v. Darlington*, 101 U. S. 407; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Arbegust v. Louisville*, 2 Bush (Ky.) 271; *Bromley v. Reynolds*, 2 Utah 525; *Hutchinson v. Ozark Land Co.*, 57 Ark. 554. And see *infra*, this title, *Municipal Taxation*.

The power to tax should be exerted only in behalf of those purposes which have been recognized by legislative and judicial precedents as local purposes. *Hawkins v. Carroll County*, 50 Miss. 735.

An incorporated village has no power to levy a tax for the payment of the salaries of town officers, *Drake v. Ogden*, 128 Ill. 603; nor can the legislature compel an adjoining town to be taxed for the payment of debts previously contracted by a city. *Matter of Prospect Park*, 60 N. Y. 398.

In *Farris v. Vannier*, 6 Dakota 186, it was held that a tax upon personal property in an unorganized county, for the exclusive benefit of a contiguous organized county, was an attempt to tax one community for the benefit of another, and void.

In *Belle Point v. Pence* (Ky. 1891), 17 S. W. Rep. 197, a statute providing for taxing a town to educate an entire school district, was held invalid.

An act providing that the taxes collected for county and township purposes by several counties and townships through which a railroad ran, should be set apart by the county treasurer as a sinking fund to redeem the bonds issued by any township or townships in such county, in aid of the railroad, is unconstitutional, as its effect is to devote taxes levied for county and township purposes to the payment of the debts of only those townships issuing bonds. *Sleight v. People*, 74 Ill. 47; *Allhands v. People*, 82 Ill. 234.

**Apportionment of General Taxes to Local Districts.**—The state, however, may apportion the taxes for general purposes amongst the several counties and towns, authorizing and requiring them to provide for it by local taxation.

purpose of general interest may be valid when the benefits derived accrue principally, even though not entirely, to the locality taxed; <sup>1</sup> and if beneficial to different localities or districts, the tax may be apportioned between them in proportion to the benefits received.<sup>2</sup>

General results, however, are all that can be expected; that each taxpayer shall be benefited by the expenditure is not required.<sup>3</sup> The burden of taxation may be imposed where the legislature considers that it ought to rest,<sup>4</sup> and the unlawfulness

*People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *People v. Springwells*, 25 Mich. 153; *People v. Monroe County*, 36 Mich. 70; *People v. Jackson County*, 24 Mich. 237; *Boyce v. Sebring* (Mich. 1887), 33 N. W. Rep. 815; *Will County v. People*, 110 Ill. 511; *Cornell v. People*, 107 Ill. 372; *Talbot County v. Queen Anne's County*, 50 Md. 245; *Garrett v. Memphis*, 5 Fed. Rep. 860. And see *infra*, this title, *Compulsory Municipal Taxation*.

1. See *Will County v. People*, 110 Ill. 511; *Marks v. Purdue University*, 37 Ind. 155; *Merrick v. Amherst*, 12 Allen (Mass.) 500; *Com. v. Newburyport*, 103 Mass. 129; *People v. Springwells*, 25 Mich. 153; *Callan v. Saginaw*, 50 Mich. 7; *Kirby v. Shaw*, 19 Pa. St. 258; *Gordon v. Cornes*, 47 N. Y. 608; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *People v. Whyler*, 41 Cal. 351; *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

A city may erect improvements designed to accommodate the larger bodies with which they are identified, and pay for the same by taxation, where the city, as such, will derive benefits from having these bodies generously accommodated within its limits; but the legislature cannot compel it to do so. *Callan v. Saginaw*, 50 Mich. 7. And in *Philadelphia v. Field*, 58 Pa. St. 320, an act providing for the construction of a bridge over the Schuylkill river at Philadelphia, and requiring the city to bear the expense, was sustained. And see *Granby v. Thurston*, 23 Conn. 416.

2. *Kirby v. Shaw*, 19 Pa. St. 258; *Serrill v. Philadelphia*, 38 Pa. St. 355; *Salem Turnpike, etc., Bridge Co. v. Essex County*, 100 Mass. 282; *Com. v. Newburyport*, 103 Mass. 129; *Hingham, etc., Bridge Co. v. Norfolk County*, 6 Allen (Mass.) 353; *Carter v. Cambridge, etc., Bridge Prop.*, 104 Mass. 236; *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Matter of*

*Prospect Park*, 60 N. Y. 398; *State v. Newark*, 44 N. J. L. 424; *Bennington v. Park*, 50 Vt. 178; *Will County v. People*, 110 Ill. 511; *Hensley Tp. v. People*, 84 Ill. 544; *Burr v. Carbondale*, 76 Ill. 455; *Briggs v. Johnson County*, 4 Dill. (U. S.) 148; *State v. Sauk County*, 70 Wis. 485. And see *Spencer v. Merchant*, 100 N. Y. 585; *People v. Dutchess County*, 1 Hill (N. Y.) 50; *President, etc., of Revenue v. State*, 45 Ala. 399; *Talbot County v. Queen Anne's County*, 50 Md. 245; *Hannibal v. Marion County*, 69 Mo. 571; *Hamilton v. St. Louis County Ct.*, 15 Mo. 5; *State v. St. Louis County Ct.*, 34 Mo. 546; *Greene County v. Lenoir County*, 92 N. Car. 180.

An act providing for the construction of a state road is not rendered unconstitutional by the fact that the tax imposed for its construction obliges a town to pay more than the sum expended in building that portion of the road situated within its own limits. *Mahanoy Tp. v. Comry*, 103 Pa. St. 362.

3. *Taylor v. Thompson*, 42 Ill. 9; *Brown v. Denver*, 3 Colo. 169; *Howell v. Bristol*, 8 Bush (Ky.) 493; *Shelby County Judge v. Shelby R. Co.*, 5 Bush (Ky.) 225; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Kirby v. Shaw*, 19 Pa. St. 258; *New Orleans v. Cazelar*, 27 La. Ann. 156; *Patton v. Springfield*, 99 Mass. 627. And see *Norris v. Waco*, 57 Tex. 635; *New York, etc., R. Co. v. Merriam County*, 48 Ohio St. 249.

It is not essential to the right of taxation that the public work proposed should be one of uniform advantage to all the people of the state. *Bennington v. Park*, 50 Vt. 178; *Allen v. Jay*, 60 Me. 140; 11 Am. Rep. 185; *People v. Whyler*, 41 Cal. 351; *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; *State v. Bloomfield*, 47 N. J. L. 442; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Kelly v. Pittsburgh*, 85 Pa. St. 170; 27 Am. Dec. 733.

4. *People v. Richmond County*, 20 N. Y. 252; *Litchfield v. Vernon*, 41 N.

and unfairness must be apparent to justify the interposition of the courts.<sup>1</sup>

But it is not always necessary, to give locality to the purpose, that the expenditure should be made in the district taxed, or that the public work created by means of the tax should be erected within the district.<sup>2</sup> The purpose of procuring the location of a work of public improvement within the corporate limits of the taxing district is a local public purpose.<sup>3</sup>

**VI. THINGS TAXABLE—1. Polls.**—Poll taxes, or capitation taxes, are taxes of a specific sum upon each person.<sup>4</sup> The constitutions of many states provide for their imposition, and sometimes limit

Y. 123; *Sanborn v. Rice County*, 9 Minn. 273; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433; 98 Am. Dec. 237; *Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *Weber v. Reinhard*, 73 Pa. St. 370; 13 Am. Rep. 747; *Philadelphia v. Field*, 58 Pa. St. 326; *Hewitt's Appeal*, 88 Pa. St. 55; *Shaw v. Dennis*, 10 Ill. 405; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Livingston County v. Darlington*, 101 U. S. 407; *Kelly v. Pittsburgh*, 104 U. S. 78; *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661; *Atty. Gen'l v. Cambridge*, 16 Gray (Mass.) 247; *Linton v. Athens*, 53 Ga. 588; *Stoner v. Flournoy*, 28 La. Ann. 850; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Uhrig v. St. Louis*, 44 Mo. 458; *St. Joseph v. Farrell*, 106 Mo. 437.

In general, whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation or by laying the burden upon the district specially benefited by the expenditure. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701. And see *Boro v. Philips County*, 4 Dill. (U. S.) 216.

1. *Slack v. Maysville, etc.*, R. Co., 13 B. Mon. (Ky.) 1; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Malchus v. Highlands*, 4 Bush (Ky.) 547; *Taylor v. Thompson*, 42 Ill. 9; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Waterville v. Kennebec County*, 59 Me. 80; *Weister v. Hade*, 52 Pa. St. 474; *New Orleans v. Cazalier*, 27 La. Ann. 156. See also *People v. East Saginaw*, 33 Mich. 164; *Lamb v. Connolly (City-Ct. Bklyn.)*, 3 N. Y. Supp. 252; *Minor v. Dasput*, 43 La. Ann. 337.

2. *Stein v. Mobile*, 24 Ala. 591; *Talbot County v. Queen Anne's*

*County*, 50 Md. 245; *Wright v. People*, 87 Ill. 582; *Halsey v. People*, 84 Ill. 89; *Quincy, etc., R. Co. v. Morris*, 84 Ill. 410; *Carter v. Cambridge, etc., Bridge Prop.*, 104 Mass. 236; *Com. v. Newburyport*, 103 Mass. 129; *St. Joseph, etc., R. Co. v. Buchanan County Ct.*, 39 Mo. 485; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24; *State v. Charleston*, 10 Rich. (S. Car.) 491; *Charleston v. Wentworth St. Baptist Church*, 4 Strobb. (S. Car.) 306; *People v. Kelly*, 5 Abb. N. Cas. (N. Y.) 383; 76 N. Y. 489; *McCallie v. Chattanooga*, 3 Head (Tenn.) 317; *Louisville, etc., R. Co. v. Davidson County*, 1 Sneed (Tenn.) 637; 62 Am. Dec. 424; *Moulton v. Evansville*, 25 Fed. Rep. 382; *Chicago, etc., R. Co. v. Otoe County*, 16 Wall. (U. S.) 667; *Otoe County v. Baldwin*, 111 U. S. 1; *Montclair v. Ramsdell*, 107 U. S. 152; *Van Hostrop v. Madison City*, 1 Wall. (U. S.) 291.

Where an improvement for which taxation is imposed, is to be erected in two districts, it does not necessarily follow that the tax imposed upon one will be expended in the other. *Halsey v. People*, 84 Ill. 89; *Wright v. People*, 87 Ill. 582.

The power of a town does not extend to raising money to prosecute work in another town. *Concord v. Boscawen*, 17 N. H. 465; *Riley v. Rochester*, 9 N. Y. 64. And see *State v. Leffingwell*, 54 Mo. 458.

3. *Livingston County v. Darlington*, 101 U. S. 407; *Burr v. Carbondale*, 76 Ill. 455; *Hensley Tp. v. People*, 84 Ill. 544; *Marks v. Purdue University*, 37 Ind. 155; *Wasson v. Wayne County (Ohio)*, 27 Wkly. L. Bull. 134; *Merrick v. Amherst*, 12 Allen (Mass.) 500.

4. *Head Money Cases*, 18 Fed. Rep. 135; *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *Glasgow v. Rowse*, 43 Mo. 480.

their amount,<sup>1</sup> and define the purposes to which the fund raised from them shall be applied, as, for example, for schools or highways.<sup>2</sup> In *Ohio* and *Maryland* they are declared oppressive and are prohibited.<sup>3</sup> Sometimes their payment in services or labor is authorized.<sup>4</sup>

The imposition of poll taxes is not prohibited by the constitutional requirements of equality and uniformity of taxation.<sup>5</sup> Nor do such constitutional provisions preclude exemption from poll taxes.<sup>6</sup>

Residence, not citizenship, fixes the liability for a poll tax.<sup>7</sup>

Under the *United States* constitution, the federal government can lay capitation or other direct taxes only in proportion to the federal census.<sup>8</sup>

**2. Property**—*a.* IN GENERAL.—The term "property," when used to designate the subjects of taxation, includes both real and

1. See constitutions of the various states. As to the constitutionality of poll taxes, see *Faribault v. Misener*, 20 Minn. 396; *Sawyer v. Alton*, 4 Ill. 127; *Armstrong County v. Coleman*, 99 Pa. St. 6; *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65; *Hassett v. Walls*, 9 Nev. 387; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Burch v. Savannah*, 42 Ga. 600.

2. See *State v. Cobb*, 8 S. Car. 123; *Shaver v. Robinson*, 59 Ala. 195; *Sawyer v. Alton*, 4 Ill. 127; *Woodard v. Isham*, 43 Vt. 123.

**Collection.**—In *Labadie v. Dean*, 47 Tex. 90, it was held that a county poll tax imposed by the act of the legislature does not, in order to authorize its collection, require an order of the county court.

3. See *Ohio* constitution, and *Maryland* Declaration of Rights.

4. *Sawyer v. Alton*, 4 Ill. 127. See also *Hassett v. Walls*, 9 Nev. 387; *Miller v. Gorman*, 38 Pa. St. 309.

It has been held that the assessment of road labor is not a capitation tax. *Pleasant v. Kost*, 29 Ill. 490; *Fox v. Rockford*, 38 Ill. 451; *Macomb v. Twaddle*, 4 Ill. App. 254; *Sawyer v. Alton*, 4 Ill. 127; *Overseers of Poor v. Overseers of Poor*, 6 Johns. (N. Y.) 92; *Johnston v. Macon*, 62 Ga. 652. And see *Starksboro v. Hinesburgh*, 13 Vt. 215.

5. *O'Kane v. Treat*, 25 Ill. 458; *Smith v. Aberdeen*, 25 Miss. 458; *Jones v. Person County*, 107 N. Car. 248. And see *Washington v. State*, 13 Ark. 752; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Faribault v. Misener*, 20 Minn. 396;

*Sawyer v. Alton*, 4 Ill. 127; *Pleasant v. Kost*, 29 Ill. 490; *Ottawa County v. Nelson*, 19 Kan. 234; 27 Am. Rep. 101; *Comer v. Folsom*, 13 Minn. 219; *Fox v. Rockford*, 38 Ill. 451; *Macomb v. Twaddle*, 4 Ill. App. 254; *State v. Halifax*, 4 Dev. (N. Car.) 345. See also *supra*, this title, *Power to Tax*.

6. *Faribault v. Misener*, 20 Minn. 396. See also Opinion of Justices, 1 Met. (Mass.) 580.

7. *State v. Ross*, 23 N. J. L. 517; *Herriman v. Stowers*, 43 Me. 497; *Parsons v. Bangor*, 61 Me. 457; *Thorn-dike v. Boston*, 1 Met. (Mass.) 242; *Cabot v. Boston*, 12 Cush. (Mass.) 52; *Lee v. Boston*, 2 Gray (Mass.) 484; *Carnoe v. Freetown*, 9 Gray (Mass.) 357; *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65; *Woodard v. Isham*, 43 Vt. 123; *On Yuen Hai Co. v. Ross*, 8 Sawy. (U. S.) 384; *State v. Casper*, 36 N. J. L. 367.

A person liable for poll taxes in one town, cannot be legally assessed for the same in another town, and if so assessed, even with his own consent, he cannot be compelled to pay the tax in the latter town. *Preston v. Boston*, 12 Pick. (Mass.) 7.

Persons living on lands subject to the jurisdiction of the *United States* are not subject to poll taxes levied by a state. Opinion of Justices, 1 Met. (Mass.) 580.

8. U. S. Const., art. 1, § 9. See *Vezie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *Loughborough v. Blake*, 5 Wheat. (U. S.) 317; *Springer v. U. S.*, 102 U. S. 587.

personal estate,<sup>1</sup> and usually applies to everything which is visible, tangible, and capable of valuation, and which is the subject of ownership;<sup>2</sup> thus licenses are property;<sup>3</sup> and corporate franchises are property, and taxable as such.<sup>4</sup>

6. **PERSONAL PROPERTY.**—The capital stock and the accumulated surplus of a corporation and the shares of its capital stock<sup>5</sup> are taxable as personal property. Mortgages and other securities for indebtedness, money secured on mortgage or otherwise,<sup>6</sup> moneys due on contract for the sale of real estate,<sup>7</sup> and obliga-

1. *Primm v. Belleville*, 59 Ill. 142; *Jacksonville v. McConnel*, 12 Ill. 138; *Hunsaker v. Wright*, 30 Ill. 147; *State v. Collins*, 43 N. J. L. 562.

2. See *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 243; 21 Am. Rep. 704; *People v. Rains*, 23 Cal. 133; *Primm v. Belleville*, 59 Ill. 142; *People v. Worthington*, 21 Ill. 171; 74 Am. Dec. 86.

In *Covington Gas Light Co. v. Covington*, 84 Ky. 94, it was held that the terms "personal estate, and any property of any kind," include gas pipes, meters, lamp posts, and the like.

Vessels are subject to state taxation. *Oteri v. Parker*, 42 La. Ann. 374. And see *State v. Southern Steamship Co.*, 13 La. Ann. 497; *Howell v. State*, 3 Gill. (Md.) 14; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273.

Growing crops are private property, and subject to taxation as such. *People v. Gerke*, 35 Cal. 677.

**Turnpike Roads.**—In *Frankfort, etc., Turnpike Co. v. Com.*, 82 Ky. 386, it was held that a statute authorizing the taxation of all property, authorized the imposition of taxes on turnpike roads, for county purposes.

Intoxicating liquors of domestic manufacture, not kept for illegal sale, are subject to taxation as property. *Dunbar v. Boston*, 101 Mass. 317.

**Dogs.**—Under the *Texas* constitution, dogs are not recognized as property subject to an *ad valorem* taxation. *Ex p. Cooper*, 3 Tex. App. 489.

**Abstract Books.**—In *Leon Loan, etc., Co. v. Board of Equalization* (Iowa, 1892), 53 N. W. Rep. 94, abstract books having an actual market value were held subject to taxation as personal property.

3. *Drysdale v. Pradat*, 45 Miss. 445; *Coulson v. Harris*, 43 Miss. 728.

4. See TAXATION (CORPORATE).

5. See TAXATION (CORPORATE).

6. *Gallatin County v. Beattie*, 3 Mont. 173; *Tax Cases*, 12 Gill & J.

(Md.) 117; *People v. Board of Supervisors* (Mich. 1888), 38 N. W. Rep. 639; *State v. Redwood Falls Bldg., etc., Assoc.*, 45 Minn. 154; *People v. Whartenby*, 38 Cal. 461; *Doland v. Mooney*, 72 Cal. 34; *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. St. 359; *Perry County v. Troutman*, 8 Pa. Co. Ct. Rep. 427. And see *Hunter's Appeal* (Pa. 1886), 10 Atl. Rep. 429; *Loughlin's Appeal* (Pa. 1887), 10 Atl. Rep. 832; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Davenport v. Mississippi, etc., R. Co.*, 12 Iowa 539; *People v. Coleman*, 53 Hun (N. Y.) 482; *State v. Gaylord*, 73 Wis. 316.

Under the *New Jersey* statutes requiring property of corporations to be assessed as are the estates of individuals, the amount of loans to stockholders of a building and loan association, which the notes, bonds, and mortgages represent in the return of the secretary, are assets, and assessable as the property of the corporation. *State v. Hornbaker*, 41 N. J. L. 519.

Where lands are sold, and the grantor reserves merely the right to repurchase, the grantee is not liable to taxation as a mortgagee of the premises. *Thomas v. Holmes County*, 67 Miss. 754.

7. *People v. Ogdensburgh*, 48 N. Y. 390; *Ouachita County v. Rumph*, 43 Ark. 525; *State v. Rand*, 39 Minn. 502. And see *Perrine v. Jacobs*, 64 Iowa 79.

Under the *Illinois* constitution, the legislature has power to impose taxes upon all credits, whether for lands sold or otherwise, and moneys loaned as well as money due for land are taxable, whether the land has been conveyed or not. *People v. Worthington*, 21 Ill. 170; 74 Am. Dec. 86; *People v. Rhodes*, 15 Ill. 304.

Where the legislature has expressly exempted mining claims from the operation of revenue laws, it cannot be presumed that it intended to indirectly subject them to taxation, by

tions for the payment of money or instruments of indebtedness,<sup>1</sup> are usually deemed to be personal estate, and subject to taxation as such.

Within the revenue laws debts due have been held to be credits and taxable as property.<sup>2</sup> But the bonds or other obligations of a state are not included in a general designation of the taxable property of the state,<sup>3</sup> though the public stocks and securities of states and municipalities are sometimes made taxable as such.<sup>4</sup> Easements and other incorporeal or inchoate rights have been held not taxable as personal property.<sup>5</sup> The term "property," as used in some of the statutes, has been held not to include credits, in-

levying a tax on the price paid for them. *State v. Moore*, 12 Cal. 56.

1. *Catlin v. Hull*, 21 Vt. 152; *Hammersley v. Franey*, 39 Conn. 176; *Irvin v. Turner*, 47 Ga. 382; *Carreker v. Walton*, 47 Ga. 394; *Hunter v. Page County*, 33 Iowa 376; *New Orleans v. Mechanics*, etc., Ins. Co., 30 La. Ann. 876; 31 Am. Rep. 232; *Cleveland, etc., R. Co. v. Pennsylvania (State Tax on Foreign Held Bonds)*, 15 Wall. (U. S.) 300. And see *Hayne v. Deliesseline*, 3 McCord (S. Car.) 374; *Deane v. Hathaway*, 136 Mass. 129; *Redmond v. Rutherford County*, 87 N. Car. 122.

**Deposit notes**, bearing interest, taken by a mutual insurance company from the members of the corporation, are taxable for county purposes, as moneys at interest; and so of stocks in which premiums paid by the insured are invested. *Fire Ins. Co. v. County*, 9 Pa. St. 413.

**Bonds** and other certificates of indebtedness of foreign corporations, in the hands of residents of the state, are taxable. *Appeal Tax Court v. Patterson*, 50 Md. 354; *Appeal Tax Court v. Gill*, 50 Md. 377.

**Judgments**, with reference to which proceedings in error are pending, are included within a provision requiring the listing for taxation of all securities due or owing. *Cameron v. Cappeller*, 41 Ohio St. 533.

2. *Jones v. Seward County*, 10 Neb. 154; *Jacksonville v. McConnel*, 12 Ill. 138; *State v. Rand*, 39 Minn. 502; *People v. Arguello*, 37 Cal. 524; *New Orleans Canal, etc., Co. v. New Orleans*, 99 U. S. 97; *Perry County v. Troutman*, 8 Pa. Co. Ct. Rep. 427; *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140; *Connor v. Waxahachie (Tex. 1889)*, 13 S. W. Rep. 30; *Ferris v. Kimble*, 75 Tex. 476. And see *Gloucester v. Gloucester*, 19 Pick. (Mass.) 542; *Perrine v. Jacobs*, 64 Iowa 79;

*State v. Craig*, 51 N. J. L. 437; *Rheinboldt v. Raine*, 6 Ohio Cir. Ct. Rep. 544.

**Choses in action** are property subject to taxation, even though secured by mortgage. *Lick v. Austin*, 43 Cal. 590; *Lamar v. Palmer*, 18 Fla. 147.

**Debts, securities, and obligations** are taxable, though they are not due. *People v. McComber (Supreme Ct.)*, 7 N. Y. Supp. 71; *People v. Arguello*, 37 Cal. 524.

A debt due from an intestate is properly taxed to the creditor, though the amount is in dispute if it is conceded to be as much as that taxed. *Deane v. Hathaway*, 136 Mass. 129.

The reassurance, reserve, and premiums of life insurance companies, being collectable, are subjects of taxation. *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292.

3. *Miller v. Wilson*, 60 Ga. 505; *State v. Assessors*, 35 La. Ann. 651. And see *Newark City Bank v. Assessors*, 30 N. J. L. 13; *State v. Stonewall Ins. Co.*, 89 Ala. 335.

**Bonds of Other States.**—See *infra*, this title, *Other Governmental Agencies*.

4. See *Hall v. Middlesex County*, 10 Allen (Mass.) 100; *Newark City Bank v. Assessors*, 30 N. J. L. 13.

The bonds of a foreign railway corporation are not "public stocks and securities," within the meaning of the *Massachusetts* tax acts. *Hale v. Hampshire County*, 137 Mass. 111.

In *Pennsylvania*, all public loans, except those issued by the *United States*, are taxable. *Wilkesbarre Deposit, etc., Bank v. Wilkesbarre*, 148 Pa. St. 601.

5. *De Witt v. Hays*, 2 Cal. 463; 56 Am. Dec. 352; *Fall River v. Bristol County*, 125 Mass. 567; *Matter of Leffer*, 5 Dem. (N. Y.) 184.

Thus rents not due on leases for years are not taxable as personal prop-

vestments, or money, but to apply to visible property only.<sup>1</sup> The legislature, may, however, impose taxes upon credits and money due as the personal estate of the creditor,<sup>2</sup> or may tax such credits and money on hand by name.<sup>3</sup>

c. REALTY.—Real property embraces every species of title, whether inchoate or complete, and whether executory or executed.<sup>4</sup>

erty. *People v. McComber* (Supreme Ct.), 7 N. Y. Supp. 71.

**Insurance Premiums — Income.** — In *Iowa*, annual premiums of an insurance company, being in the nature of an income, are not subject to taxation as personal property. *Burlington v. Putnam Ins. Co.*, 31 *Iowa* 102; *Dubuque v. Northwestern L. Ins. Co.*, 29 *Iowa* 9.

A mere claim for damages, until it has become fixed, is not taxable. *Lowell v. Street Com'rs*, 106 *Mass.* 540; *Arnold v. Middletown*, 41 *Conn.* 206; *Hancock v. Whittemore*, 50 *Cal.* 522.

1. *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521; *Covington v. Powell*, 2 Metc. (Ky.) 226; *Louisville v. Henning*, Bush (Ky.) 381; *People v. Hibernia Sav., etc., Soc.*, 51 *Cal.* 243; 21 *Am. Rep.* 704; *Pullen v. Raleigh*, 68 N. Car. 451; *Vaughan v. Murfreesboro*, 96 N. Car. 317; *Lee v. Sturges*, 46 *Ohio St.* 153; *Mifflintown v. Jacobs*, 69 *Pa. St.* 151; *Fox's Appeal*, 112 *Pa. St.* 337; *Com. v. Delaware Div. Canal Co.*, 122 *Pa. St.* 594.

2. *People v. Worthington*, 21 *Ill.* 171; 74 *Am. Dec.* 86; *Deane v. Hathaway*, 136 *Mass.* 129; *Hamersley v. Franey*, 39 *Conn.* 176; *Johnson v. Oregon City*, 3 *Oregon* 13; *Puget Sound Agricultural Co. v. Pierce County*, 1 *Wash. Ter.* 159; *People v. Ogdensburg*, 48 N. Y. 390; *Carroll v. Perry*, 4 *McLean (U. S.)* 25.

In *Bank of U. S. v. State*, 12 *Smed. & M. (Miss.)* 456, it was held that a loan by a bank incorporated in one state to a bank incorporated in another state, is subject to taxation under a law subjecting to a certain tax, loans at interest by individuals.

3. *Pollard v. State*, 65 *Ala.* 628; *Shotwell v. Moore*, 129 *U. S.* 590; *Richmond, etc., R. Co. v. Alamance County*, 84 N. Car. 504; *State v. Carson City Sav. Bank*, 17 *Nev.* 146; *Bank of Newberry v. Stegall*, 41 *Miss.* 142; *State v. Rand*, 39 *Minn.* 502; *Peavey v. Greenfield*, 64 N. H. 284; *Perry County v. Troutman*, 144 *Pa. St.* 361; *Blickensderfer v. School Directors*, 20 *Pa. St.*

38; *Rheinboldt v. Raine*, 6 *Ohio Cir. Ct. Rep.* 544.

Under such a provision they are taxable whether they bear interest or not. *Perry County v. Troutman*, 144 *Pa. St.* 361.

**Bank Deposits.**—In *Campbell v. Riviere* (Tex. 1893), 22 *S. W. Rep.* 993, it was held that money deposited is not a debt against the bank, but is money on hand, and liable to taxation.

In *Campbell v. Wiggins*, 2 *Tex. Civ. App.* 1, it was held that a depositor of money subject to sight draft cannot escape taxation thereon as cash by showing that the bank did not have that amount of money on hand.

Sums received from depositors are deposits within a law imposing a tax upon deposits, whether they have been invested or not, and without reference to their value as compared with any other standard. *Provident Inst. v. Massachusetts*, 6 *Wall. (U. S.)* 611.

**Merchants' Statements.**—Under the *Missouri* tax laws, merchants' statements are taxable by a school corporation. *State v. Kinney*, 48 *Mo.* 373.

"Debts due from solvent debtors," made taxable by statute, mean the amount of the debt which may be realized or collected; the general solvency of the debtor is not referred to. *Lamar v. Palmer*, 18 *Fla.* 147.

**Definition of Credit.**—Under the *Minnesota* statutes, the term "credits" is defined as meaning and including every claim and demand for money, or other valuable thing and other security or sum of money receivable at stated periods, due, or to become due, and all claims and demands secured by deed or mortgage due, or to become due. *State v. Rand*, 39 *Minn.* 502.

**Bonds.**—In *Sawyer v. Nashua*, 59 N. H. 404, it was held that money invested in bonds is taxable, under an authority to tax money at interest.

4. *Puget Sound Agricultural Co. v. Pierce County*, 1 *Wash. Ter.* 159; *Soulard v. U. S.*, 4 *Pet. (U. S.)* 511. See also **PROPERTY**, vol. 19, p. 285; **REAL PROPERTY**, vol. 19, p. 1028.



It includes all lands under water,<sup>1</sup> and all buildings and other structures or things erected upon, affixed to, or growing on, the land.<sup>2</sup> The term "property in lands," is not confined to title in fee, but is sufficiently comprehensive to include any usufructory interest, whether it be a leasehold or a mere right of possession.<sup>3</sup> It is competent for the legislature to treat real estate

**Corporate Franchises.**—Corporate franchises are not realty. *People v. Tax Com'rs*, 104 N. Y. 240.

1. *Lowell v. Middlesex County*, 6 Allen (Mass.) 131.

A reservoir dam, and land which it covers with water, are liable to be taxed. *Pingree v. Berkshire County*, 102 Mass. 76.

In *Lowell v. Middlesex County*, 152 Mass. 372, it was held that land held in fee, lying under a canal, is taxable to the owner thereof.

2. *Smith v. New York*, 68 N. Y. 552; *People v. Cassity*, 46 N. Y. 46; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 522; *Forbes v. Gracey*, 94 U. S. 762. And see *Quincy Bridge Co. v. Adams County*, 88 Ill. 615; *McGee v. Salem*, 149 Mass. 238; *Chicago, etc., R. Co. v. Houston County*, 38 Minn. 531; *Lowell v. Middlesex County*, 6 Allen (Mass.) 131.

All things appurtenant or affixed to the realty are usually required to be taxed with it, and as a part of it. See *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 298. And see *infra*, this title, *Upon Whom Imposed*.

In *Scully v. People*, 104 Ill. 349, it was held that an assessment upon lands and also upon rents arising therefrom as a credit, is erroneous, the latter element of value being included in the former.

**Pipes and mains for water, gas, etc.**, laid in streets or elsewhere, are real estate and taxable as such. *Willard v. Pike*, 59 Vt. 202; *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa 407; *In re Des Moines Water Co.*, 48 Iowa 324; *Paris v. Norway Water Co.*, 85 Me. 330; *Monroe Water Co. v. Frenchtown Tp.* (Mich. 1894), 57 N. W. Rep. 268; *Tide-water Pipe Line Co. v. Berry*, 53 N. J. L. 212; *State v. Berry*, 52 N. J. L. 308; *People v. Martin*, 48 Hun (N. Y.) 193; *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51 Iowa 32.

**Bridges** are taxable as real estate.

*Alexandria Canal Co. v. District of Columbia*, 1 Mackey (D. C.) 217; *State v. Mississippi River Bridge Co.*, 109 Mo. 253; *Hudson River Bridge Co. v. Patterson*, 74 N. Y. 365; *State v. Hannibal, etc., R. Co.*, 89 Mo. 98.

In *Cass County v. Chicago, etc., R. Co.*, 25 Neb. 348, and *Chicago, etc., R. Co. v. School Dist. No. 1*, 25 Neb. 359, it was held that a bridge was not taxable as part of the roadbed, right of way, or superstructure.

**Railways—Street Railways.**—Railways, either in streets or elsewhere, are lands, within the tax laws, and taxable as such. *People v. Tax Com'rs*, 23 Hun (N. Y.) 687; *Neary v. Philadelphia, etc., R. Co.* (Del. 1887), 9 Atl. Rep. 405; *Appeal Tax Court v. Western Maryland, etc., R. Co.*, 50 Md. 274; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 522; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406; *People v. Cassity*, 46 N. Y. 46; *Union Trust Co. v. Weber*, 96 Ill. 346.

So, also, the superstructure, etc., of elevated railroads. *People v. Tax Com'rs*, 82 N. Y. 459; *People v. Tax Com'rs*, 101 N. Y. 322. But as to the track of a street railway company, see *State v. Ramsey County Court*, 31 Minn. 354.

**Right of way**, as used in a statute authorizing assessment and taxation, was held not to relate to a mere intangible right, but to the strip of land appropriated by the railway company. *Keener v. Union Pac. R. Co.*, 31 Fed. Rep. 126.

**Telegraph Line.**—In *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509; 40 Am. Rep. 99, it was held that a telegraph line is taxable as real property although it has also paid a privilege tax.

3. *State v. Moore*, 12 Cal. 56; *People v. Donnelly*, 58 Cal. 144; *People v. Shearer*, 30 Cal. 645; *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638; *People v. Tax Com'rs*, 23 Hun (N. Y.) 687; *Cincinnati College v. Yeatman*, 30 Ohio St. 276; *State v. Central Pac. R. Co.*, 21 Nev. 247; *Carroll v. Safford*, 3 How. (U. S.) 441;

mortgages as interests in lands, for the purpose of taxation, and to give them a situs for that purpose, at the place where the mortgaged property is situated.<sup>1</sup> Several persons may have a property which is subject to taxation in the same land.<sup>2</sup> The interest of the occupant of a mining claim is property, and may be subjected to taxation.<sup>3</sup> A mere license or right of entry is not taxable as real estate against the licensee.<sup>4</sup>

**3. Occupations and Privileges.**—(See *infra*, this title, *Occupation, Business, and Privilege Taxes*.)

**4. Instrumentalities of Government**—*a.* IN GENERAL.—Speaking generally, it may be said that instrumentalities of government are not taxable; nor can the states tax instrumentalities of the federal government, or *vice versa*, this, on the principle that the government is not to be impeded in exercising its powers.<sup>5</sup>

*b.* OFFICES AND OFFICERS.—A public office or officer is not

*Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Taylor v. Robinson*, 34 Fed. Rep. 678; *Clove Spring Iron Works v. Cone*, 56 Vt. 603.

Rights in a reservoir of water are real estate, and taxable as such. *Winnipisogee Lake Cotton, etc., Co. v. Giltford*, 64 N. H. 337. And the same rule applies to water power. *State v. Minneapolis Mill Co.*, 26 Minn. 229.

**Lease for Ninety-nine Years.**—In *Washington Market v. District of Columbia*, 4 Mackey (D. C.) 416, a lease for ninety-nine years was held taxable as though held in fee; a statute providing that such leases should be considered as determinable fees. In *Wilgus v. Com.*, 9 Bush (Ky.) 556, the lease for ninety-nine years was held not to be taxable as real property.

1. *Detroit v. Board of Assessors*, 91 Mich. 78; *Knight v. Boston* (Mass. 1893), 35 N. E. Rep. 86; *State v. Jones*, 40 N. J. L. 105.

2. *State v. Moore*, 12 Cal. 56; *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *In re Major*, 134 Ill. 19; *People v. Board of Assessors*, 93 N. Y. 308.

There may be several distinct tenements in the same building under the same roof, as well where one is over the other as where one is beside the other. *Cincinnati College v. Yeatman*, 30 Ohio St. 276; *South Congregational Meeting House v. Lowell*, 1 Met. (Mass.) 538; *Loring v. Bacon*, 4 Mass. 575; *Cheeseborough v. Greene*, 10 Conn. 318. See *infra*, this title, *Upon Whom Imposed*.

3. *State v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 Cal. 645; *People v. Donnelly*, 58 Cal. 144; *People v. Frisbie*, 31

Cal. 146; *People v. Cohen*, 31 Cal. 210; *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54; *Stuart v. Com.* (Ky. 1893), 23 S. W. Rep. 367; *Sanderson v. Scranton*, 105 Pa. St. 469.

The owner of land, who has conveyed it, reserving the coal thereunder, and the right to mine the same, may be taxed for such mining right, though there is no proof of the existence of any coal on the land. *Major v. Pavey*, 134 Ill. 19.

Where coal or other minerals in the ground are sold or reserved separate from the land, they are not personal property, and cannot become such until severed from the land itself. *Consolidated Coal Co. v. Baker*, 135 Ill. 545.

In *Arizona*, mining claims in government property are taxable as personal, not real, property; but mines for which patents have been issued are taxable as real estate. *Waller v. Hughes* (Arizona, 1886), 11 Pac. Rep. 122.

4. *Hughes v. Vail*, 57 Vt. 41; *Clove Spring Iron Works v. Cone*, 56 Vt. 603.

5. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 315, is perhaps the leading case upon this point, the holding being that a *Maryland* law imposing a tax on the operation of a branch of the *United States Bank* was unconstitutional and void. This case was followed by *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738, and subsequent cases have recognized the principles expounded in these cases, as lying at the foundation of the law. For their application to various instrumentalities and things, see the following subdivisions of this section.

taxable; neither can an officer's salary be taxed.<sup>1</sup> These rules do not apply, however, to the taxation of the income of a mere employé of the government in common with other incomes,<sup>2</sup> and persons licensed under the revenue laws of the *United States* are not such officers as are withdrawn from the operation of the taxing powers of a state.<sup>3</sup>

c. PROPERTY USED AS A MEANS OF GOVERNMENT.—Property used as a means of government, the title to which is vested in a state or in the *United States*, is within the rule exempting the instrumentality of one government from taxation by the other;<sup>4</sup> and public moneys,<sup>5</sup> treasury notes and national bank notes,<sup>6</sup> structures, ships, munitions of war, and other property devoted to public purposes,<sup>7</sup> customhouses, post offices, arsenals, and other public buildings are within the rule.<sup>8</sup> The property of an agent of the government, however, is taxable, with other like property, in the jurisdiction in which it is situated,<sup>9</sup> unless Congress has interposed to protect it from such taxation.<sup>10</sup> Though private property is employed by the government for governmental purposes, it is not thereby exempted from ordinary taxation in the absence of legislation declaring it to be exempt.<sup>11</sup> Nor is the fact that the property was acquired or constructed, under the direction of Congress, for the uses and purposes of the government where the ownership is not in the government, sufficient in itself to exempt

1. *First Nat. Bank v. Kentucky*, 9 Wall. (U. S.) 353; *Dobbins v. Erie County*, 16 Pet. (U. S.) 435.

Nor can a tax be imposed upon a valuation of the income of the office. *Dobbins v. Erie County*, 16 Pet. (U. S.) 435.

2. *Melcher v. Boston*, 9 Met. (Mass.) 73. And see *Cherry County v. Thacher*, 32 Neb. 350.

The office of president judge is taxable under the *Pennsylvania* Act of April 11, 1799. *Northumberland County v. Chapman*, 2 Rawle (Pa.) 73.

3. *State v. Bell*, 1 Phil. (N. Car.) 76.

4. *People v. U. S.*, 93 Ill. 30; *Fagan v. Chicago*, 84 Ill. 227; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Nathan v. Louisiana*, 8 How. (U. S.) 82.

5. But the rule is otherwise where the state diverts her funds from their proper destination, and applies them to traffic, or stock jobbing, within a state. *Com. v. Morrison*, 2 A. K. Marsh. (Ky.) 75.

6. *Horne v. Green*, 52 Miss. 452; *Mitchell v. Leavenworth County*, 91 U. S. 206. In *Montgomery County v. Elston*, 32 Ind. 27; 2 Am. Rep. 327, the treasury, but not national bank

notes, were held exempt. And see *Washington v. Indianapolis Bank*, 107 Ind. 206.

7. *Desty on Taxation* 68, citing *Utica v. Churchill*, 33 N. Y. 161; 43 Barb. (N. Y.) 550; Anonymous, 9 Op. Atty. Gen'l 291. And see *Baltimore County v. Maryland Insane Hospital*, 62 Md. 127.

8. *Utica v. Churchill*, 43 Barb. (N. Y.) 550; 33 N. Y. 161; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738.

9. *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Union Pac. R. Co. v. Pemston*, 18 Wall. (U. S.) 5.

Shares of a national bank are not exempt from taxation because owned by other national banks. *National Bank of Redemption v. Boston*, 125 U. S. 60.

10. *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *First Nat. Bank v. Kentucky*, 9 Wall. (U. S.) 353.

11. *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385.

The franchise of a railroad company is property subject to taxation, and is not exempt from taxation by reason of its being a means or instrumentality employed by Congress to carry into

it,<sup>1</sup> though a state cannot tax a bank chartered by Congress as the fiscal agent of the government;<sup>2</sup> and a tax upon telegraphic messages sent by officers of the government, falls within the prohibition.<sup>3</sup>

d. OTHER GOVERNMENTAL AGENCIES.—The rule of exemption from taxation by a different government, extends to all other governmental agencies through which a government executes its constitutional powers, functions and duties.<sup>4</sup> Thus a tax upon loans of the federal government is a tax upon the exercise of the power of Congress to borrow money on the credit of the *United States*.<sup>5</sup> And a tax upon the stocks, bonds, or securities issued by the *United States*,<sup>6</sup> or upon the income derived from such securities,<sup>7</sup> is subject to the same objection. Even though property is otherwise taxable, if invested in securities of the federal government, a tax imposed upon it would be deemed an indirect tax upon such securities;<sup>8</sup> though the exemption will not be allowed where money or property is exchanged for, or converted into, nontaxable notes or securities for the sole purpose of avoiding taxation.<sup>9</sup>

operation the powers of the general government. *Central Pac. R. Co. v. State Board of Equalization*, 60 Cal. 35.

While the federal government cannot interfere with navigation upon canals or inland lakes or rivers, it may tax canal boats or any other property in the state. *North River Steam boat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

1. *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Union Pac. R. Co. v. Lincoln County*, 1 Dill. (U. S.) 314.

2. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.

The state cannot tax franchises of a corporation granted by the government of the *United States*. *California v. Central Pac. R. Co.*, 127 U. S. 1. In *Hylton v. U. S.*, 3 Dall. (U. S.) 171, however, it was said that franchises granted by a state are not necessarily exempt from federal taxation.

3. *Western Union Tel. Co. v. Texas*, 105 U. S. 466.

4. See *National Commercial Bank v. Mobile*, 62 Ala. 284; 34 Am. Rep. 15; *Bulow v. Charleston*, 1 Nott & M. (S. Car.) 527.

5. *People v. Tax Com'rs*, 2 Black (U. S.) 620; *Banks v. New York*, 7 Wall. (U. S.) 16; *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Utica v. Churchill*, 33 N. Y. 161; *Newark City Bank v. Assessors*, 30 N. J. L. 13. And see *Bank Tax Case*, 2 Wall. (U. S.) 200; *Van Allen v. Assessors*, 3 Wall. (U. S.) 573.

6. *People v. Tax Com'rs*, 2 Black (U. S.) 620; *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Carroll v. Perry*, 4 McLean (U. S.) 25; *Bank Tax Case*, 2 Wall. (U. S.) 200; *Banks v. New York*, 7 Wall. (U. S.) 16; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Campbell v. Centerville*, 69 Iowa 439; *Utica v. Churchill*, 43 Barb. (N. Y.) 550; 33 N. Y. 161; *State v. Haight*, 34 N. J. L. 128; *Newark City Bank v. Assessors*, 30 N. J. L. 13; *People v. Bradley*, 39 Ill. 130. And see *Newark City Bank v. Assessors*, 30 N. J. L. 13; *New York v. Tax Com'rs*, 4 Wall. (U. S.) 244; *Bradley v. Illinois*, 4 Wall. (U. S.) 459.

It is immaterial that the tax is on the aggregate of the taxpayer's property, and the stock is not taxed by name. *New York v. Tax Com'rs*, 2 Black (U. S.) 620.

7. *Bank of Kentucky v. Com.*, 9 Bush (Ky.) 46. But see *State v. Tax Collector*, 2 Bailey (S. Car.) 654.

8. *State v. Newark*, 39 N. J. L. 380; *State v. Rogers*, 79 Mo. 283; *St. Louis, etc., Bldg., etc., Assoc. v. Lightner*, 42 Mo. 421; *Chicago v. Lunt*, 52 Ill. 414; *German American Sav. Bank v. Burlington*, 54 Iowa 609; *Bank Tax Case*, 2 Wall. (U. S.) 200; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611. But see *St. Louis Bldg., etc., Assoc. v. Lightner*, 47 Mo. 393.

9. *Mitchell v. Leavenworth County*, 9 Kan. 344; *Ogden v. Walker*, 59 Ind. 460; *State v. Assessor*, 37 La. Ann.

The public debt of a state and the obligations given therefor are taxable in the hands of a resident of another state, whether exempted by the indebted state or not.<sup>1</sup> A tax upon a corporate franchise is valid even though some or all of the capital stock of the corporation is invested in national securities.<sup>2</sup> State banks cannot be regarded as instrumentalities or agencies of state government.<sup>3</sup>

*e.* PUBLIC PROPERTY.—A state or other sovereign government may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation in common with other property within its territory.<sup>4</sup> But public property, without any express statutory exemption, is not within the general laws imposing taxation, the term "property" being confined to private property;<sup>5</sup> the rule being the same whether the title to the property be in the state, or held in trust for and subject to the control of the

850; *Shotwell v. Moore*, 129 U. S. 590. And see *Griffin v. Heard*, 78 Tex. 607.

1. *Appeal Tax Court v. Patterson*, 50 Md. 354; *Appeal Tax Court v. Gill*, 50 Md. 377; *People v. Home Ins. Co.*, 29 Cal. 533; *Bonaparte v. Appeal Tax Court* (U. S.), 21 Am. Law Reg. 290; *Murray v. Charleston*, 96 U. S. 432; *Green v. Van Buskirk*, 7 Wall. (U. S.) 150.

2. *Home Ins. Co. v. New York*, 134 U. S. 594; *Philadelphia Contributorship, etc. v. Com.*, 98 Pa. St. 48. And see *St. Louis Bldg., etc., Assoc. v. Lightner*, 47 Mo. 393.

3. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 548. And see *Hylton v. U. S.*, 3 Dall. (U. S.) 171. But see *Com. v. Morrison*, 2 A. K. Marsh. (Ky.) 75.

4. *Trustees of Public Schools v. Trenton*, 30 N. J. Eq. 667; *Louisville v. Com.*, 1 Duv. (Ky.) 295; 85 Am. Dec. 624. And see *Pittsburgh's Appeal*, 123 Pa. St. 374; *Chadwick v. Maginnis*, 94 Pa. St. 117; *Louisville Bridge Co. v. Louisville*, 81 Ky. 189.

Congress may subject the public domain to state taxation upon such conditions as it sees fit, and if taxed, it must be done subject to such conditions. *State v. Central Pac. R. Co.*, 21 Nev. 247.

5. *Trustees of Public Schools v. Trenton*, 30 N. J. Eq. 667; *People v. Doe*, 36 Cal. 220; *People v. McCreery*, 34 Cal. 433; *West Hartford v. Board of Water Com'rs*, 44 Conn. 360; *Pittsburgh's Appeal*, 123 Pa. St. 374; *Fagan v. Chicago*, 84 Ill. 227; *Rochester v. Rush*, 80 N. Y. 302; *Camden v. Cam-*

*den Village*, 77 Me. 530; *Baltimore County v. Maryland Insane Hospital*, 62 Md. 127; *Ensminger v. Powers*, 108 U. S. 292; *Directors of Poor v. School Directors*, 42 Pa. St. 25; *Miller v. Wilson*, 60 Ga. 505; *State v. Board of Assessors*, 35 La. Ann. 651; *Nashville v. Bank of Tennessee*, 1 Swan (Tenn.) 269; *Athens City Water Works Co. v. Athens*, 74 Ga. 413; *Colored Orphans' Assoc. v. New York*, 38 Hun (N. Y.) 593; *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Worcester County v. Worcester*, 116 Mass. 193; *Cumru Tp. v. Berks County*, 112 Pa. St. 264; *People v. Donnelly*, 58 Cal. 144; *Durkee v. Greenwood County*, 29 Kan. 697; *Louisville v. Com.*, 1 Duv. (Ky.) 295; 85 Am. Dec. 624; *People v. Board of Assessors*, 47 Hun (N. Y.) 383; *State v. Gaffney*, 34 N. J. L. 133; *Chicago, etc., R. Co. v. Davenport*, 51 Iowa 451; *Erie County v. Erie*, 113 Pa. St. 360. But see *Chadwick v. Maginnis*, 94 Pa. St. 117.

Lands on tide-waters below high-water mark, and entirely separate from fast land, the title being in the state, cannot be assessed for taxes. *State v. Jersey City*, 42 N. J. L. 349.

A city is not subject to a county tax on its engine-house. *Erie County v. Erie*, 113 Pa. St. 360.

A water company which supplies a city with water, whose rates are regulated by the city council, and which, by the terms of the ordinance conferring its powers, may be purchased at a fixed price by the city, is, nevertheless, a private corporation, and its property is subject to taxation. *Des Moines Water Co.'s Appeal*, 48 Iowa 324. And

state.<sup>1</sup> The moment the title vests in the government, the property ceases to be taxable,<sup>2</sup> and so long as it remains a part of the public domain it is not subject to taxation,<sup>3</sup> but as soon as the ownership is changed and it becomes private property, the right to tax attaches.<sup>4</sup>

Where the absolute title to property remains in the *United States*, no matter for what purpose it is acquired or held, it is not subject to state or municipal taxation,<sup>5</sup> nor can it be taxed when held in trust for the *United States* while the trust remains unexecuted;<sup>6</sup> but it may be taxed as soon as the ownership is changed, even though no actual transfer has been made by the issue of a patent.<sup>7</sup>

see *Athens City Water Works Co. v. Athens*, 74 Ga. 413.

1. *Illinois Industrial University v. Champaign County*, 76 Ill. 184; *Chicago v. People*, 80 Ill. 384; *Tulane Education Fund v. Board of Assessors*, 38 La. Ann. 292; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527. But see *Mitchellville v. Polk County*, 64 Iowa 554.

In *Ryan v. Gallatin County*, 14 Ill. 78, it was held that it is only property which the state owns that is not subject to taxation, not that in the avails of which the state may or may not ultimately be entitled to share.

2. *People v. U. S.*, 93 Ill. 30; 34 Am. Rep. 155; *Sully v. Poorbaugh*, 45 Iowa 453; *Flint v. Jackson County*, 43 Kan. 656. And see *Missouri River, etc., R. Co. v. Morris*, 13 Kan. 302; *Williams v. New York* (Supreme Ct.), 12 N. Y. Supp. 501; *Quirt v. Reg.*, 19 Can. Sup. Ct. Rep. 510.

In *Sherwin v. Wigglesworth*, 129 Mass. 64, it was held that the owner of lands taken for a post office under the laws of the *United States* is not chargeable with taxes assessed upon the land pending proceedings upon the petition for the acquisition of the land.

3. *Ross v. Outagamie County*, 12 Wis. 38; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Central Pac. R. Co. v. Howard*, 51 Cal. 229; *Durkee v. Greenwood County*, 29 Kan. 697; *Dixon v. Porter*, 23 Miss. 84; *Van Brocklin v. Tennessee*, 117 U. S. 151. And see *Winona, etc., R. Co. v. Denel*, 3 Dakota 1.

4. *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 257; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Oswalt v. Hallowell*, 15 Kan. 154; *Morrison County v. St. Paul, etc., R. Co.*, 42 Minn. 451; *State v. Platt*, 24 N. J. L. 108.

When the property is conveyed be-

fore the date of assessment for any particular year, it is taxable for that year. *Martin County v. Drake*, 40 Minn. 137.

5. *People v. U. S.*, 93 Ill. 30; 34 Am. Rep. 155; *Bonner v. Phillips*, 77 Ala. 427; *Doe v. Hearick*, 14 Ind. 242; *Hall v. Dowling*, 18 Cal. 619; *People v. Shearer*, 30 Cal. 645; *Central Pac. R. Co. v. Howard*, 52 Cal. 227; *People v. Morrison*, 22 Cal. 73; *Quivey v. Lawrence*, 1 Idaho N. S. 313; *McGoon v. Scales*, 9 Wall. (U. S.) 23; *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603; *Tucker v. Ferguson*, 22 Wall. (U. S.) 572; *Van Brocklin v. Tennessee*, 117 U. S. 151; *Wright v. Cradlebaugh*, 3 Nev. 341; *Neiswanger v. Gwynne*, 13 Ohio 74; *Treat v. Lawrence*, 42 Wis. 330; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Ivinson v. Hance*, 1 Wyoming Ter. 270; *Dixon v. Porter*, 23 Miss. 84.

Neither can improvements placed upon the lands of the *United States* be taxed until title has passed or the lands themselves have become taxable. *Parker v. Winsor*, 5 Kan. 362. But see *Ivinson v. Hance*, 1 Wyoming Ter. 270, holding that they may be taxed upon failure of title.

*United States* lands to which the occupant's right to a patent is not complete, are not taxable. *Diver v. Friedheim*, 43 Ark. 203; *Douglas County v. Union Pac. R. Co.*, 5 Kan. 615.

When state lands are purchased by the *United States*, the fact that the lands were not expressly ceded by the state to the *United States* does not affect the case. *Van Brocklin v. Tennessee*, 117 U. S. 151.

6. *Tucker v. Ferguson*, 22 Wall. (U. S.) 532; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

7. *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Kansas Pac. R. Co. v.*

Where the land has been sold and the right to the patent is complete, and the equitable title is fully vested in the purchaser,<sup>1</sup> or where it has been donated and the entry made and certificate given,<sup>2</sup> it is segregated from the mass of public lands and becomes private property and taxable as such. A homestead becomes liable to taxation as soon as the owner has the right to make his final proof and complete his title.<sup>3</sup> The grantee cannot be required to pay taxes, however, until the land has been identified and determined to be covered by the grant,<sup>4</sup> and where the title has been withheld by competent authority for the purpose of

Prescott, 16 Wall. (U. S.) 603; Carroll v. Safford, 3 How. (U. S.) 441; Astrom v. Hammond, 3 McLean (U. S.) 107; Carroll v. Perry, 4 McLean (U. S.) 25; Union Pac. R. Co. v. McShane, 22 Wall. (U. S.) 444; Hunnewell v. Cass County, 22 Wall. (U. S.) 464; State v. Miami County, 63 Ind. 497; Burcham v. Terry, 55 Ark. 398; People v. Shearer, 30 Cal. 645; Robinson v. Gaar, 6 Cal. 273; Hall v. Dowling, 18 Cal. 619; Dubuque, etc., R. Co. v. Webster County, 21 Iowa 235; Logan v. Clark County (Kan. 1893), 33 Pac. Rep. 603; Missouri River, etc., R. Co. v. Morris, 13 Kan. 302; Prescott v. Beebe, 17 Kan. 320; McMahon v. Welsh, 11 Kan. 280; Saline County v. Irving, 18 Kan. 440; Puget Sound Agricultural Co. v. Pierce County, 1 Wash. Ter. 159; Wisconsin Cent. R. Co. v. Comstock, 71 Wis. 88. And see *In re St. Paul*, etc., R. Co. (Minn. 1890), 44 N. W. Rep. 72; Wheeler v. Merriman, 30 Minn. 372; Smith v. Hollis, 46 Ark. 17; Diver v. Friedheim, 43 Ark. 203; Stryker v. Polk County, 22 Iowa 131; Stockdale v. Webster County, 12 Iowa 536; Vinton v. Cerro Gordo County, 72 Iowa 155.

1. Kansas Pac. R. Co. v. Prescott, 16 Wall. (U. S.) 603; Carroll v. Safford, 3 How. (U. S.) 441; Wisconsin Cent. R. Co. v. Price County, 133 U. S. 496; Carroll v. Perry, 4 McLean (U. S.) 25; Northern Pac. R. Co. v. Walker, 47 Fed. Rep. 681; Oswalt v. Hollowell, 15 Kan. 154; Moriarty v. Boone County, 39 Iowa 634; People v. Shearer, 30 Cal. 645; Central Pac. R. Co. v. Howard, 52 Cal. 227; St. Paul, etc., R. Co. v. Robinson, 40 Minn. 360; St. Paul, etc., R. Co. v. Shanks, 40 Minn. 386; Puget Sound Agricultural Co. v. Pierce County, 1 Wash. Ter. 159; Oregon, etc., R. Co. v. Lane County (Oregon, 1892), 31 Pac. Rep. 964; Wisconsin Cent. R. Co. v. Comstock, 71 Wis. 88;

Ross v. Outagamie County, 12 Wis. 26; Farnham v. Sherry, 71 Wis. 568.

2. Townsen v. Wilson, 9 Pa. St. 270. Donation lands are chargeable with state taxes under the doctrine of relation from the date of the first entry. Witherspoon v. Duncan, 4 Wall. (U. S.) 210; Vinton v. Cerro Gordo County, 72 Iowa 155. But this doctrine cannot be invoked to burden the holder of a title and to require him, in violation of justice, to pay taxes when he holds neither the equity nor the title to the lands. Reynolds v. Plymouth County, 55 Iowa 90; Gibson v. Chouteau, 13 Wall. (U. S.) 92. And see Churchill v. Sowards, 78 Iowa 472.

3. Bellinger v. White, 5 Neb. 399; Burcham v. Terry, 55 Ark. 398. And see Chase County v. Shipman, 14 Kan. 532.

This is the case even though proceedings are suspended and further proofs demanded, which demand is not complied with. State v. Hunter (Minn. 1890), 44 N. W. Rep. 201. And see Northern Pac. R. Co. v. Walker, 47 Fed. Rep. 681; Northern Pac. R. Co. v. Wright, 51 Fed. Rep. 68.

No right to a patent for a homestead exists until after five years of continuous possession, and lands taken under the homestead act are not liable to taxation until the right to the patent exists. Long v. Culp, 14 Kan. 412; Moriarty v. Boone County, 39 Iowa 634. And see Diver v. Friedheim, 43 Ark. 203.

4. Grant v. Iowa R. Land Co., 54 Iowa 673; Iowa R. Land Co. v. Fitzpatrick, 52 Iowa 244; Cedar Rapids, etc., R. Co. v. Carroll County, 41 Iowa 153; Cedar Rapids, etc., R. Co. v. Woodbury County, 29 Iowa 247; Iowa R. Land Co. v. Story County, 36 Iowa 48; Jackson v. La Moure County, 1 N. Dak. 238; Whitney v. Gunderson, 31 Wis. 359; Wisconsin Cent. R. Co. v.

adjusting conflicting rights, the land is not liable to taxation.<sup>1</sup> Neither is the title of the *United States* divested, nor does the land become taxable where important conditions remain to be complied with before the right to the legal title vests in the preëmtor or patentee, until they are performed,<sup>2</sup> and where the certification to the performance of conditions by some officer or body is required by the terms of the grant, until the lands are so certified, the grantee has no taxable interest therein.<sup>3</sup> Nor can the lands be

Price County, 33 U. S. 496. And see *State v. Central Pac. R. Co.* (Nev. 1889), 22 Pac. Rep. 237.

The filing of a map of the location of a railway, which determines the right of the company to land under a congressional grant, describing the land granted, is a sufficient identification. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 639.

1. *Iowa R. Land Co. v. Fitchpatrick*, 52 Iowa 244; *Grant v. Iowa R. Land Co.*, 54 Iowa 673; *Iowa Homestead Co. v. Webster County*, 21 Iowa 221; *Dickerson v. Yetzer*, 53 Iowa 681; *Pitts v. Clay*, 27 Fed. Rep. 635; *Pitts v. Booth*, 15 Tex. 453. And see *Kohn v. Barr* (Kan. 1893), 34 Pac. Rep. 880. But see *Robinson v. Gaar*, 6 Cal. 273.

When a land warrant is cancelled before the issue of a patent, on the ground that the assignment was forged, no title passes, either legal or equitable, and no tax can be imposed thereon. *Durham v. Hussmann* (Iowa, 1893), 55 N. W. Rep. 11. But the bringing of an action by a county to set aside a conveyance of land made by it, will not estop the county to levy taxes upon the property during the pendency of the action. *American Emigrant Co. v. Iowa R. Land Co.*, 52 Iowa 323.

2. *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444; *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603; *Central Colorado Imp. Co. v. Pueblo County*, 95 U. S. 259; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600; *Central Pac. R. Co. v. Howard*, 51 Cal. 229; *Pueblo County v. Central Colorado Imp. Co.*, 2 Colo. 628; *Henderson v. State*, 53 Ind. 60; *Missouri River, etc., R. Co. v. Morris*, 13 Kan. 302; *Parker v. Winsor*, 5 Kan. 362; *Douglas County v. Union Pac. R. Co.*, 5 Kan. 615; *Cedar Rapids, etc., R. Co. v. Sac County*, 46 Iowa 243; *Tyler v. Cass County*, 1 N. Dak. 369; *White v. Burlington, etc., R. Co.*, 5

Neb. 393. And see *Calhoun County v. American Emigrant Co.*, 93 U. S. 124; *Sioux City, etc., R. Co. v. Robinson*, 41 Minn. 452; *Sioux City, etc., R. Co. v. King*, 41 Minn. 461; *Taylor v. Robinson*, 72 Tex. 364; *Cornwallis v. Canadian Pac. R. Co.*, 19 Can. Sup. Ct. Rep. 702. This rule does not apply to conditions subsequent to the vesting of the title. *North Wisconsin R. Co. v. Barron County*, 8 Biss. (U. S.) 414.

Until *United States* lands are paid for they do not become liable to state taxation. *Donovan v. Kloke*, 6 Neb. 124; *Diver v. Friedheim*, 43 Ark. 203; *Smith v. Hollis*, 46 Ark. 17; *People v. Shearer*, 30 Cal. 645; *Parker v. Winsor*, 5 Kan. 362. And the same rule applies to expenses required to be paid by the grantee. *Central Colorado Imp. Co. v. Pueblo County*, 95 U. S. 259; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600.

In *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153, it was held that when a railroad company becomes entitled to any portion of a tract of land granted to it by act of Congress, conditioned upon the completion of its road, or the completion of any part of its road, as prescribed by federal or state legislation, a like proportion of the grant thereupon becomes subject to assessment and taxation.

3. *Grant v. Iowa R. Land Co.*, 54 Iowa 673; *Chicago, etc., R. Co. v. Woodbury County*, 29 Iowa 247; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153; *Iowa R. Land Co. v. Story County*, 36 Iowa 48; *Iowa Falls, etc., R. Co. v. Cherokee County*, 37 Iowa 483; *Sioux City, etc., R. Co. v. Osceola County*, 50 Iowa 177. But see *Iowa Homestead Co. v. Webster County*, 21 Iowa 221; *Dubuque, etc., R. Co. v. Webster County*, 21 Iowa 235. This rule is not affected by the fact that the refusal to certify was made under a mistake of law, and was subsequently withdrawn. *Wisconsin Cent. R. Co. v.*



taxed, when the conveyance or certificate is improperly withheld, nor where the government repudiates the contract;<sup>1</sup> nor when, through the fault or mistake of the officers of the law, no title to or interest in the land is passed to the purchaser.<sup>2</sup> Where the lands are sold on credit, however, they may be taxed when the right of the purchaser is complete, even though they have not been paid for in full.<sup>3</sup>

Where the certificate is withheld on account of the neglect of the grantee to procure it to be issued, the lands are taxable from the time they are earned, although withheld from certification.<sup>4</sup> Nor will a mere contingent right of the government to make another grant upon failure of the first grantee to sell the land within a specified time, exempt it from taxation;<sup>5</sup> and where the patent is actually issued, the lands are taxable, whether the conditions have been complied with or not.<sup>6</sup> Property owned by the state

Price County, 133 U. S. 496. And see *Jackson v. La Moure County*, 1 N. Dak. 238.

But when the determination of the performance of the conditions or of the existence of the required facts must be made upon extrinsic evidence, it is not necessary that the designated officer should pass upon the question before it can be judicially determined. *Northern Pac. R. Co. v. Wright*, 51 Fed. Rep. 68. And see *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681.

1. *Moore v. Morledge*, 42 Iowa 26.

But this rule does not apply to a mere refusal to pass the title when the donee is not excluded from the use of the property. See *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496.

2. *Scott v. Chickasaw County*, 46 Iowa 253; *Reynolds v. Plymouth County*, 55 Iowa 90.

In *Northern Pac. R. Co. v. Wright*, 54 Fed. Rep. 68, it was held that a present grant of public lands attaches to the specific sections as they become capable of identification by the definite location of the road, and on a report by the government surveyor that they are non-mineral lands, they become subject to taxation, though not segregated from the public domain and though the land commissioner refuses to issue patents therefor.

In *Farnham v. Sherry*, 71 Wis. 568, it was held that where a patent was withheld, upon the ground that the warrant and its assignment to the locator were forged, and no further action was taken for six years, when it finally

turned out that the locator was entitled to the land, it was taxable to the locator for the six years in question.

3. *Carroll v. Safford*, 3 How. (U. S.) 441; *Hagenbuck v. Reed*, 3 Neb. 17; *Edgington v. Cook*, 32 Neb. 551; *Dickinson County v. Baldwin*, 29 Kan. 538. And see *Logan v. Clark County* (Kan. 1893), 33 Pac. Rep. 603; *State v. Tucker* (Neb. 1890), 56 N. W. Rep. 718.

Where one purchases lands of a municipality and holds them on contract, the stipulations of which have not been performed, the lands are taxable by the municipal government as the property of the purchaser. *Wells v. Savannah*, 87 Ga. 397.

4. *Iowa R. Land Co. v. Fitchpatrick*, 52 Iowa 244; *Grant v. Iowa R. Land Co.*, 54 Iowa 673; *Iowa Homestead Co. v. Webster County*, 21 Iowa 221; *Chicago, etc., R. Co. v. Holdsworth*, 47 Iowa 20; *Dickerson v. Yetzer*, 53 Iowa 681; *Kansas State Agr. College v. Hamilton*, 28 Kan. 376; *Douglas County v. Union Pac. R. Co.*, 5 Kan. 615; *Kansas Pac. R. Co. v. Culp*, 9 Kan. 47; *Price v. Lancaster County*, 20 Neb. 252; *State v. Central Pac. R. Co.* (Nev. 1889), 22 Pac. Rep. 237. And see *McGregor, etc., R. Co. v. Brown*, 39 Iowa 655.

5. *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444; *Dickinson County v. Baldwin*, 29 Kan. 538; *Pueblo County v. Central Colorado Imp. Co.*, 2 Colo. 628. And see *State v. Central Pac. R. Co.*, 21 Nev. 94.

6. See *State v. Central Pac. R. Co.* (Nev. 1889), 22 Pac. Rep. 237; *North Wisconsin R. Co. v. Barron County*, 8 Biss. (U. S.) 414.

or municipality, and used not for carrying on the government but for commercial purposes, is not within the exemption, unless expressly exempted,<sup>1</sup> even though the profits are to be devoted to the proper purposes of the municipality.<sup>2</sup> Private interests in government lands may be taxed.<sup>3</sup> Possession and claim of title to public lands is property and taxable as such to the claimant;<sup>4</sup> and improvements upon public lands are taxable.<sup>5</sup>

*f. INDIAN LANDS.*—Treaties made between the government and Indian tribes generally protect the Indian lands against taxation.<sup>6</sup>

In Elkhorn Land, etc., *Co. v. Dixon County*, 35 Neb. 426, it was held that where the *United States* grants lands to a state for internal improvement, and a railway company earns the lands and the state parts with its title to the company, the lands are taxable, although the *United States* did not approve of the selection until after the levy.

1. *Louisville v. Com.*, 1 Duv. (Ky.) 295; 85 Am. Dec. 624; *West Hartford v. Board of Water Com'rs*, 44 Conn. 360; *South Congregational Meeting House v. Lowell*, 1 Met. (Mass.) 538; *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. St. 164; *Erie County v. Erie Water Works Com'rs*, 113 Pa. St. 368. And see *Athens City Water Works Co. v. Athens*, 74 Ga. 413.

In *Atlantic, etc., R. Co. v. Carteret County*, 75 N. Car. 474, it was held that a constitutional provision exempting property belonging to the state from taxation does not embrace the interests of the state in business enterprises, such as railroads and the like, but applies only to the property of the state held for state purposes.

2. *Northwestern University v. People*, 80 Ill. 333; *Erie County v. Erie Water Works Com'rs*, 113 Pa. St. 368. But see *Mitchellville v. Polk County*, 64 Iowa 554.

3. *State v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 Cal. 645; *Ross v. Outagamie County*, 12 Wis. 26; *Forbes v. Gracey*, 94 U. S. 762; *Taylor v. Robinson*, 34 Fed. Rep. 678. And see *Traunell v. Faught*, 74 Tex. 557; *People v. Tax Com'rs*, 82 N. Y. 459; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. St. 164.

The title of a vendee of a county may be assessed and sold for taxes, although the legal title remains in the county. *Townsen v. Wilson*, 9 Pa. St. 270. So may the interest of a lessee of the government. *Garland County v.*

*Gaines* (Ark. 1892), 19 S. W. Rep. 602; *State v. Tucker* (Neb. 1893), 56 N. W. Rep. 718; *Taylor v. Robinson*, 34 Fed. Rep. 678.

The title or interest of the *United States* in public lands is not affected where only the possessory claim is assessed, such assessment reaching the taxpayer's interest only. *State v. Central Pac. R. Co.*, 21 Nev. 247.

In *Estes Park Toll Road Co. v. Edwards*, 3 Colo. App. 74, it was held that the right of way granted by the *United States* over public lands, which is accepted by a toll road company, and upon which it constructs and maintains a toll road, is taxable in the county in which it is located.

4. *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54; *People v. Shearer*, 30 Cal. 656; *People v. Frisbie*, 31 Cal. 146; *People v. Cohen*, 31 Cal. 210; *People v. Donnelly*, 58 Cal. 144; *Ross v. Outagamie County*, 12 Wis. 26; *McKay v. Outagamie County*, 12 Wis. 46.

5. *Quivey v. Lawrence*, 1 Idaho N. S. 313; *People v. Shearer*, 30 Cal. 645; *San Francisco v. McGinn*, 67 Cal. 110; *Oswalt v. Hallowell*, 15 Kan. 154; *Chase County v. Shipman*, 14 Kan. 532; *Smith v. New York*, 68 N. Y. 552; *Bellinger v. White*, 5 Neb. 399; *Ivinson v. Hance*, 1 Wyoming Ter. 270. And see *People v. Owyhee Min. Co.*, 1 Idaho N. S. 420; *Luttrell v. Knox County* (Tenn. 1890), 14 S. W. Rep. 802; *Hall v. Dowling*, 18 Cal. 619.

The improvements are not the property of the government. *Crocker v. Donovan*, 1 Okl. 165.

In *Chase County v. Shipman*, 14 Kan. 532, it was held that improvements made on government lands, settled upon and occupied as a homestead, are not taxable before final proof of settlement and cultivation is made. But see *contra*, *State v. Tucker* (Neb. 1893), 56 N. W. Rep. 718.

6. In *The Kansas Indians*, 5 Wall. (U. S.) 737, the *United States* Su-

g. NATIONAL BANKS.—(See NATIONAL BANKS, vol. 16, p. 143.)

5. **Incomes; Income Taxes.**—Taxes imposed upon incomes are not, strictly speaking, taxes upon property, and, consequently, not within constitutional requirements that property taxes shall be according to value.<sup>1</sup> Nor are they direct taxes, within the federal constitution.<sup>2</sup> They may be imposed upon all incomes, with such exemptions as the legislature may deem just.<sup>3</sup> In the

preme Court held that the State of *Kansas* had no right to tax lands held in severalty by Indians of certain tribes under patents issued pursuant to treaties made with those tribes. In the same case it was said that in construing treaties with the Indian tribes, rules of interpretation favorable to them were to be adopted; and that, therefore, a provision exempting their lands from "levy, sale, and forfeiture," extended to exempt from levy and sale for non-payment of taxes.

In the case of *The New York Indians*, 5 Wall. (U. S.) 761, it was held that the state had no right to tax lands, the ancient home of Indians still in possession, either for ordinary municipal purposes or for road purposes, the right to the undisturbed enjoyment of such lands having been secured by treaty with the government; and that this was so, although the attempt to tax was under a statute providing that no tax sale should affect the Indians' right of occupancy. This case was before the *United States* Supreme Court on error to the court of appeals of the State of *New York*, and the judgment in that case was reversed. See *Fellows v. Denniston*, 23 N. Y. 420. And see further on the general subject of the exemption of Indian lands from taxation, *Foster v. Blue Earth County*, 7 Minn. 140; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693; 11 Am. Dec. 351; *Harrington v. Wilson*, 29 Wis. 383; *State v. Miami County*, 63 Ind. 497; *Fellows v. Blacksmith*, 19 How. (U. S.) 366; *Hilgers v. Quinney*, 51 Wis. 62.

1. *Glasgow v. Rowse*, 43 Mo. 480.

Such a tax is imposed upon the fruits of property, *Waring v. Savannah*, 60 Ga. 93; and of labor, industry, and skill rather than upon the property. *Wilcox v. Middlesex*, 103 Mass. 544.

2. *Springer v. U. S.*, 102 U. S. 586.

**Non-residents.**—Acts of Congress, August 5th, 1861, and July 1st, 1862, imposing income taxes upon every person residing in the *United States* and citizens residing abroad, did not reach non-

resident aliens receiving incomes from property within the *United States*. The acts of March 10th, and July 13th, 1866, did impose a tax on non-resident alien bondholders. See *Northern Cent. R. Co. v. Jackson*, 7 Wall. (U. S.) 262.

3. *New Orleans v. Fourchy*, 30 La. Ann. 910; *U. S. v. Smith*, 1 Sawy. (U. S.) 277.

The power to lay an income tax is expressly conferred by the constitution of *Texas*. *Texas* Const. of 1872, art. 8, §§ 1, 2.

In *Louisiana*, an act of 19th of March, 1856, authorizing the taxing of incomes, clearly defined the incomes intended as "wages, commissions, brokerage, etc.," and did not authorize a tax upon incomes, the fruits of capital invested in merchandise, stock, etc. *New Orleans v. Hart*, 14 La. Ann. 815. Profits realized from the use of a cotton press, drays and slaves in carrying on the business of a cotton press, were not subject to taxation as income under that act. *New Orleans v. Fassman*, 14 La. Ann. 878.

In *New Hampshire*, a statute providing for taxing every person on the amount of all incomes received by him during the year, accruing from notes, bonds, or other securities not otherwise taxed under the laws of the state, might be valid as to other securities than those of the *United States*. Opinion of the Justices, 53 N. H. 637.

**Salaries of Public Officers—Judges.**—

The tax imposed by a state upon the salaries of its judges, is not in conflict with the constitutional provision that the compensation for their services shall not be diminished during their continuance in office. *Northumberland v. Chapman*, 2 Rawle (Pa.) 72.

But a state cannot levy a tax upon the emoluments of an officer of the *United States*, *Dobbins v. Erie*, 16 Pet. (U. S.) 435. Nor, on the other hand, can Congress impose a tax upon the salary of a state judge. *Buffington v. Day*, 11 Wall. (U. S.) 113.

In *City Council v. Lee*, 1 Treadw. (S. Car.) 57, it was held that the sala-

absence of constitutional restriction, incomes may be taxed even though derived from property which is also taxed,<sup>1</sup> or from a business upon which a license tax is imposed.<sup>2</sup>

Unless otherwise provided, the income taxed includes only actual acquisitions of property within the year for which the tax is levied,<sup>3</sup> and not anticipated profits;<sup>4</sup> and the income is that of a previous and not of the current year.<sup>5</sup>

**6. Legal Process.**—Taxes are sometimes imposed upon legal process with a view to adjusting upon an equitable basis as between suitors and the public, the expense of the administration of

ries of public officers are not liable to be taxed under an ordinance imposing a tax on all profit or income arising from the "pursuit of any faculty, profession, occupation, trade, or employment."

**Delegation of Power to Municipal Corporation.**—The power to tax incomes may be delegated to municipal corporations. See *Glen v. Charleston*, 1 McCord (S. Car.) 345. However, a charter authorizing a municipal corporation to tax real and personal estate, does not necessarily confer the right to tax incomes. *Savannah v. Hartridge*, 8 Ga. 23. See also *Home Ins. Co. v. Augusta*, 50 Ga. 530.

1. *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553. See also *Union Bank v. State*, 9 Yerg. (Tenn.) 490.

It is no defense to a suit for the recovery of an income tax that the income has been applied in reduction of an indebtedness upon a purchase of real estate upon which a tax is paid. *Lott v. Hubbard*, 44 Ala. 593.

2. *Drexel v. Com.*, 46 Pa. St. 31; *Burch v. Mayor, etc.*, of Savannah, 42 Ga. 596.

In *Wilcox v. Middlesex*, 103 Mass. 544, it was held that a merchant's income from his business is taxable, though he is also taxed on his stock in trade, notwithstanding a statute prohibiting taxes on income and derived from property subject to taxation; income derived from dealings in merchandise not being an income derived from property.

3. The profit made upon bonds bought in one year and sold several years after, is not to be included in the estimate of the owner's "gains, profits, and income" for the year in which the bonds were sold under the act of 1867. *Gray v. Darlington*, 15 Wall. (U. S.) 63.

A merchant, under the Internal Revenue Act of 1864, may deduct from his gross profits such debts as become insolvent during the year to which the

return relates, but not such as become so after the expiration of that year, although before the date of the return. *U. S. v. Mayer, Deady* (U. S.) 127.

**Refusal to Give Income.**—In *Alabama*, it is provided that if the taxpayer refuses to give his income, the assessor may ascertain it from inquiry and fix it to the best of his judgment. And if acting in good faith, he fixes it at an amount larger than the true income, the tax is valid and cannot be resisted. *Lott v. Hubbard*, 44 Ala. 593.

**Penalty.**—The addition of one hundred per cent. to the tax as a penalty for return of a false or fraudulent list or valuation, is constitutional. *Doll v. Evans*, 11 Am. L. Reg. N. S. 315; 15 Int. Rev. Rec. 143.

**Perjury.**—Although an act imposing a tax on incomes makes no provision for compelling a person to make oath to his return, yet if it permits him to do so, and he avails himself of the privilege, and makes a false return, he is guilty of perjury. *U. S. v. Smith*, 1 Sawy. (U. S.) 277.

4. **Promissory Notes.**—Whether promissory notes and book accounts received during the year are to be included in an estimate of income, depends upon whether they are collectible. If not so, a defendant cannot be convicted of making a false return for not including them. *U. S. v. Frost*, 9 Int. Rev. Rec. 41.

In *U. S. v. Schillinger*, 14 Blatchf. (U. S.) 71, promissory notes made for articles sold in 1871, which were payable in 1872, were not included within the gains or profits of the year 1871, upon which the tax was imposed.

5. *State v. Elfe*, 3 Strobb. (S. Car.) 395.

**Income of Person Dying Within the Year.**—An income tax is payable for that part of the year in which a person dies, preceding his death, to be collected from his estate. *Mandell v. Pierce*, 3 Cliff. (U. S.) 134.

justice.<sup>1</sup> Such taxes may be imposed as stamp fees on process, or fees for permission to enter suits, etc.,<sup>2</sup> or they may be imposed upon the unsuccessful party.<sup>3</sup>

Arbitrary exactions imposed without reference to the nature or extent of the proceeding, however, are violative of constitutional provisions requiring equality of taxation and the free dispensation of justice without purchase.<sup>4</sup>

**VII. UPON WHOM IMPOSED—1. General Principles.**—Taxation being imposed in consideration of the protection afforded the individual and his property, the individual is personally charged with the tax.<sup>5</sup> The rule is otherwise as to the unoccupied lands of

1. *Lee County v. Abrahams*, 34 Ark. 166, citing *Murphy v. State*, 38 Ark. 514.

**Tax on Civil Suits.**—The settlement of an estate in the probate court is not a civil suit, within the meaning of a constitutional provision authorizing the legislature to impose taxes on civil suits. *State v. Mann*, 76 Wis. 469; *Nunnemacher v. Mann*, 76 Wis. 498.

**Constitutional Restrictions.**—The imposition of a tax upon parties commencing suits in court, does not violate a constitutional provision that the mode of levying taxes shall be by valuation. *State v. Lancaster County*, 4 Neb. 537.

The constitutional right to obtain justice freely and without purchase, has never been understood to be a right to judicial proceedings carried on without expense to the parties. *State v. Gorman*, 40 Minn. 232. And see *Adams v. Corrison*, 7 Minn. 456; *Perce v. Hallet*, 13 R. I. 363.

2. *Lee County v. Abrahams*, 34 Ark. 166. And see *State v. Lancaster County*, 4 Neb. 537.

The state may require the payment of a tax as a condition precedent to the use of its process. *Harrison v. Willis*, 7 Heisk. (Tenn.) 35; *Robertson v. Land Com'rs*, 44 Mich. 274.

In *Smith v. Waters*, 25 Ind. 397, it was held that if a revenue stamp is required by law to be attached to a replevin bond, the failure to attach it furnishes no ground for dismissing an appeal in the action in which the bond is required; but that a replevin bond is neither a writ nor process within the meaning of the revenue law.

**When the Tax Accrues.**—A tax upon a law suit accrues when the suit is commenced, and must be paid, although the suit was compromised and dismissed before it had come to an issue. *Nashville v. Davis*, 10 Lea

(Tenn.) 474; *Elliston v. Winstead*, 10 Lea (Tenn.) 472.

3. *Harrison v. Willis*, 7 Heisk. (Tenn.) 32; *Nashville v. Davis*, 10 Lea (Tenn.) 474; *Elliston v. Winstead*, 10 Lea (Tenn.) 472; *State v. Stanley*, 3 Lea (Tenn.) 524; *State v. Nance*, 1 Lea (Tenn.) 644.

A tax imposed on each criminal conviction is a mode of making persons convicted of crime contribute to defray the expense of public prosecutions, and is constitutional. *Myrtle v. State*, 38 Ark. 514.

Proceedings to recover fines for violation of the ordinances of a town are not "criminal cases" within the meaning of a statute which imposes a tax on such cases, payable to the state. *State v. Mason*, 3 Lea (Tenn.) 649.

4. *State v. Gorman*, 40 Minn. 232. In this case a statute, requiring as a condition precedent to probate proceedings the payment of specific sums arbitrarily prescribed with reference to the value of the estate, was held unconstitutional.

5. *Green v. Craft*, 28 Miss. 70; *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *Kelsey v. Abbott*, 13 Cal. 609; *Mercier's Succession*, 42 La. Ann. 1135; *Rundell v. Lakey*, 40 N. Y. 517; *Hilton v. Fonda*, 86 N. Y. 346; *Bennett v. Buffalo*, 17 N. Y. 383; *Chapman v. Brooklyn*, 40 N. Y. 377; *Miller v. Gorman*, 38 Pa. St. 309; *Sheaffer v. McKabe*, 2 Watts (Pa.) 421; *Harbeson v. Jack*, 2 Watts (Pa.) 124; *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Stokely v. Boner*, 10 S. & R. (Pa.) 254; *Ellis v. Hall*, 19 Pa. St. 296; *McKibbin v. Charlton*, 14 Pa. St. 128; *State v. Leavenworth County*, 2 Kan. 61; *Richardson v. Boston*, 148 Mass. 508; *Sherwin v. Boston*, etc., Sav. Bank, 137 Mass. 444; *Cochran v. Guild*, 106 Mass. 29; 8 Am. Rep. 296; *Burr v. Wilcox*, 13 Allen (Mass.) 269; *Meredith v. U. S.*, 13 Pet. (U. S.) 486.

non-residents,<sup>1</sup> taxes upon such lands generally being a charge upon the land alone.

Every resident of the taxing district,<sup>2</sup> and every person owning property<sup>3</sup> or transacting business therein,<sup>4</sup> is liable to taxation. Thus, aliens,<sup>5</sup> non-residents,<sup>6</sup> minors,<sup>7</sup> corporations,<sup>8</sup> women,<sup>9</sup> and persons *non compos mentis*,<sup>10</sup> may be taxed.

The right to tax is not dependent upon citizenship.<sup>11</sup> Indians

The assessment of a tax against an individual creates not only a lien on his property, but also a personal obligation to the full amount of the tax. *New Orleans v. Day*, 29 La. Ann. 416.

1. See *infra*, this title, *Non-resident and Unseated Property*.

As a general rule, however, taxes are imposed upon the individual on account of his ownership of the property. *Rundell v. Lakey*, 40 N. Y. 517; *Mercier's Succession*, 42 La. Ann. 1135; *Meredith v. U. S.*, 13 Pet. (U. S.) 436. But when property is resorted to, it is for the purpose of ascertaining the amount with which the owner should be charged, *Green v. Craft*, 28 Miss. 70; *Kelsey v. Abbott*, 13 Cal. 609; *State v. Vanderbilt*, 33 N. J. L. 38; *Mercier's Succession*, 42 La. Ann. 1135; or to facilitate the collection of taxes. See *Green v. Gruber*, 26 La. Ann. 694.

**Local Assessments.**—As to whether a local assessment for benefits is a personal charge upon the owner of the property, see *infra*, this title, *Local Assessments*.

2. *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Pullen v. Wake County*, 66 N. Car. 361; *Catlin v. Hull*, 21 Vt. 152.

3. *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Padelford v. Savannah*, 14 Ga. 438; *Jones v. Columbus*, 25 Ga. 610; *Duer v. Small*, 17 How. Pr. (U. S. C. C.) 201; *Hilton v. Fonda*, 86 N. Y. 339; *People v. Tax Com'rs*, 23 N. Y. 224; *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 581; *Worth v. Fayetteville*, 1 Winst. Eq. (N. Car.) 70; *State v. Charleston*, 2 Spears (S. Car.) 623; *Catlin v. Hull*, 21 Vt. 152; *Turner v. Burlington*, 16 Mass. 208; *Coburn v. Richardson*, 16 Mass. 212; *Shriver v. Pittsburg*, 66 Pa. St. 446; *Bennett v. Birmingham*, 31 Pa. St. 15; *Ahl v. Gleim*, 52 Pa. St. 432.

Non residents of a state, as well as residents, are liable to taxation in respect to stock held by them in corporations within the state. *Appeal Tax*

*Cases*, 12 Gill & J. (Md.) 117. And see *Tax Court v. Patterson*, 50 Md. 368.

4. *Duer v. Small*, 17 How. Pr. (U. S. C. C.) 201; *Tazewell County v. Davenport*, 40 Ill. 197; *Padelford v. Savannah*, 14 Ga. 438; *Pearce v. Augusta*, 37 Ga. 597; *McCutchen v. Rice County*, 7 Fed. Rep. 558.

Statutes authorizing the same taxes upon non-residents pursuing their ordinary avocations within the corporation as upon inhabitants, authorize a tax upon the shares in the national bank located in the town, and held by one who conducts his ordinary business therein, but whose residence is outside the corporate limits. *Moore v. Fayetteville*, 80 N. Car. 154.

5. *Frantz's Appeal*, 52 Pa. St. 367; *Tazewell County v. Davenport*, 40 Ill. 204.

6. *Moore v. Fayetteville*, 80 N. Car. 154; *Ahl v. Gleim*, 52 Pa. St. 432; *Tazewell County v. Davenport*, 40 Ill. 204; *Duer v. Small*, 17 How. Pr. (U. S. C. C.) 201; *State v. Charleston*, 4 Strobb. (S. Car.) 217.

7. *Moore v. Fayetteville*, 80 N. Car. 154; *Smith v. Macon*, 20 Ark. 17; *Dobbins v. Erie County*, 16 Pet. (U. S.) 435.

8. See *TAXATION (CORPORATE)*.

As to the word "person" including a corporation, see *PERSON*, vol. 18, p. 404. 9. *Moore v. Fayetteville*, 80 N. Car. 154; *Smith v. Macon*, 20 Ark. 17; *Wheeler v. Wall*, 6 Allen (Mass.) 558; *Dobbins v. Erie County*, 16 Pet. (U. S.) 435.

**Taxation Without Representation.**—The maxim that taxation and representation should go together, has no application to individuals, but only to political communities as such. *Moore v. Fayetteville*, 80 N. Car. 154; *Wheeler v. Wall*, 6 Allen (Mass.) 558; *Loughborough v. Blake*, 5 Wheat. (U. S.) 317. 10. See *Dobbins v. Erie County*, 16 Pet. (U. S.) 435.

11. *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65; *Tazewell County v. Davenport*, 40 Ill. 197; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654.

who are not citizens and who preserve their tribal relations, are not liable to taxation.<sup>1</sup>

**2. Property, to Whom Taxed**—*a. GENERALLY.*—The state may declare that property shall be chargeable with taxes, no matter who is the owner or to whom it is taxed.<sup>2</sup> It is usually required that property be taxed against the owner<sup>3</sup> or occupant.<sup>4</sup> And in case of a reasonable doubt as to the ownership, it may be charged to unknown owners or to persons unknown.<sup>5</sup> Where there are several interests in the land, as of a tenant in possession or remainderman, the party in possession may be charged.<sup>6</sup>

Partnership property is taxable to the partnership as such, and not to the individual partners.<sup>7</sup> Taxes upon property owned in

1. *State v. Ross*, 7 Yerg. (Tenn.) 74. See *infra*, this title, *Indian Lands*.

The rule is different as to civilized Indians whose tribal relations have been dissolved. *Hilgers v. Quinney*, 51 Wis. 62.

2. *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Dunn v. Winston*, 31 Miss. 135; *Kennedy v. St. Louis*, etc., R. Co., 62 Ill. 395.

3. See *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Cornish Bridge v. Richardson*, 8 N. H. 207; *Kelsey v. Abbott*, 13 Cal. 609; *Blatner v. Davis*, 32 Cal. 328; *Bosworth v. Webster*, 64 Cal. 1; *Smith v. Read*, 51 Conn. 10; *Mullikin v. Reeves*, 71 Ind. 281; *Bell v. Fry*, 5 Dana (Ky.) 341; *Hayes v. Viator*, 33 La. Ann. 1162; *Thibodaux v. Keller*, 29 La. Ann. 508; *LeBlanc v. Blodgett*, 34 La. Ann. 107; *Desmond v. Babbitt*, 117 Mass. 233; *Pease v. Whitney*, 5 Mass. 580; *Dunn v. Winston*, 31 Miss. 135; *Green v. Craft*, 28 Miss. 70; *Lyman v. Anderson*, 9 Neb. 367; *State v. Union Tp.*, 36 N. J. L. 309; *State v. Hardin*, 34 N. J. L. 79; *Morrison v. McLaughlin*, 88 N. Car. 251; *Willard v. Blount*, 11 Ired. (N. Car.) 624; *Pitts v. Booth*, 15 Tex. 453; *Yenda v. Wheeler*, 9 Tex. 408; *Tracy v. Reed*, 38 Fed. Rep. 69; *Greenwalt v. Tucker*, 3 McCrary (U. S.) 166; *Moss v. Hinds*, 29 Vt. 188; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51.

As to who is an owner within the tax laws, see *infra*, this title, *Ownership*; and *OWNER*, vol. 17, p. 299.

The owner of unoccupied land must pay to the state, taxes lawfully imposed thereon. *Blackwood v. VanVliet*, 30 Mich. 118. And see *Oldtown v. Blake*, 74 Me. 280.

4. *Smith v. Read*, 51 Conn. 10; *Southworth v. Edmands*, 152 Mass. 203; *Pease v. Whitney*, 5 Mass. 380; *Zink*

*v. McManus*, 49 Hun (N. Y.) 583; *Willard v. Blount*, 11 Ired. (N. Car.) 624; *Bemis v. Phelps*, 41 Vt. 1. And see *Kelsey v. Abbott*, 13 Cal. 609; *Burpee v. Russell*, 64 N. H. 62; *Perham v. Haverhill Fibre Co.*, 64 N. H. 2; *Butler v. Oswego*, 57 Hun (N. Y.) 592; *Lynde v. Brown*, 143 Mass. 337. See *infra*, this title, *Occupancy*.

5. *French v. Spalding*, 61 N. H. 395. And see *Burpee v. Russell*, 64 N. H. 62.

The right of an assessor, to estimate property which he cannot find, does not authorize the assessment against one of property belonging to another. *State v. Sherrer*, 49 N. J. L. 610.

**Double Assessment.**—When land is assessed to the owner and also to "owner unknown" for the same tax, the latter assessment is void, and a sale thereunder confers no title upon the purchaser. *Nichols v. McGlathery*, 43 Iowa 189.

6. See *infra*, this title, *Particular Estates*.

7. *Hubbard v. Winsor*, 15 Mich. 146; *Hill v. Graham*, 72 Mich. 659; *McCoy v. Anderson*, 47 Mich. 502; *Williams v. Saginaw*, 51 Mich. 120; *Thibodaux v. Keller*, 29 La. Ann. 508; *Ricker v. American Loan*, etc., Co., 140 Mass. 346; *Van Dyke v. Carlton*, 61 N. H. 574. And see *Stockwell v. Brewer*, 59 Me. 286; *People v. Ferguson*, 8 Cow. (N. Y.) 102; *Wheeler v. Anthony*, 10 Wend. (N. Y.) 346; *Robinson v. Ward*, 13 Ohio St. 293.

Where a partnership business continues after the death of one of the partners, the property should be listed for taxation in the firm name. *Blodgett v. Muskegon*, 60 Mich. 580. So after dissolution, and during the process of winding up. *Putman v. Fife Lake Tp.*, 45 Mich. 125; *People v. Sneath*, 28 Cal. 612.

common should be imposed upon all the common owners,<sup>1</sup> though the imposition of a tax upon the individual interest of each has been upheld.<sup>2</sup>

**b. OWNERSHIP.**—The owner of property, for the purposes of taxation, is the person having the legal title thereto.<sup>3</sup> One who, by contract or otherwise, has a mere equity in the premises,<sup>4</sup> is not an owner within the tax laws. But the owner of an equitable estate may be taxed.<sup>5</sup> The fact that the title is conditional and

In *People v. Coleman*, 44 Hun (N. Y.) 20, it was held that the executors of a deceased member of a partnership are not taxable before anything becomes due to them from the surviving members of the firm.

A retiring partner need not give notice in order to relieve himself from liability for taxes afterwards imposed, *Washburn v. Walworth*, 133 Mass. 499; and an incoming partner becomes liable for the taxes assessed upon the share of the outgoing partner of whom he purchased. *Wheat v. Hamilton*, 53 Ind. 256.

1. See *Hayes v. Viator*, 33 La. Ann. 1162; *People v. McEwen*, 23 Cal. 54; *Jenkins v. Rice*, 84 Ind. 342.

In *Mercier's Succession*, 42 La. Ann. 1135, it was held that taxes assessed against two persons as joint owners, constitute a general personal obligation against them.

2. See *Payne v. Danley*, 18 Ark. 441; 68 Am. Dec. 187; *State v. Rand*, 39 Minn. 502.

3. *Tracy v. Reed*, 38 Fed. Rep. 69; *Augusta Bank v. Augusta*, 36 Me. 255; *Miner v. Pingree*, 110 Mass. 47; *Richardson v. Boston*, 148 Mass. 508; *State v. Newark*, 50 N. J. L. 66. See also *Waltham Bank v. Waltham*, 10 Met. (Mass.) 334; *Tucker v. Aiken*, 7 N. H. 113.

In *Osterhout v. Jones*, 54 Mich. 228, however, it was held that lumber awaiting transportation to the vendee, is not taxable to him if it is still to be assorted and inspected by the vendor and further payment is to be made.

Where lands are held under a parol gift not consummated by deed, they belong and must be assessed to the donor, even though the donee is in possession. *Mullikin v. Reeves*, 71 Ind. 281. And the same rule applies generally to personal property. See *Ratterman v. Ingalls*, 48 Ohio St. 468.

**Lessee.**—Thus, a lessee is not an owner. *State v. St. Louis County Ct.*, 13 Mo. App. 53; *State v. Blundell*, 24 N. J. L. 402. By statute, in *Texas*, a

tenant for three years or more is to be considered the owner. *Taylor v. Robinson*, 34 Fed. Rep. 678.

**Sewing machines leased by the owner**, subject to resumption in case of failure to pay, are properly taxable to him. *Singer Mfg. Co. v. Essex County*, 139 Mass. 266.

**Unrecorded Deed.**—The taxes should be paid by him in possession of the land under a grant or deed, although the same is not recorded. *Francis v. Washburn*, 5 Hayw. (Tenn.) 294.

4. *Tracy v. Reed*, 38 Fed. Rep. 69; *Churchill v. Sowards*, 78 Iowa 472; *Butler v. Stark*, 139 Mass. 19; *State v. St. Louis County*, 84 Mo. 234; *Taylor v. Robinson*, 72 Tex. 364; *Pitts v. Booth*, 15 Tex. 453.

Thus, where one has no taxable interest in the property, but merely a joint use thereof with the owner, he is not taxable. *Irvin v. New Orleans*, etc., R. Co., 94 Ill. 105.

**A Way.**—So the land upon which one has reserved a right of way is taxable to the owner of the fee and not to the possessor of the way. *Winston v. Johnson*, 42 Minn. 398.

**Vendee in Possession.**—It has been held that a vendee of realty in possession under a contract of sale at the date of the assessment is the real owner for purposes of taxation, whether he holds a legal title or not. *Anderson v. Harvard*, 47 Mo. App. 660; *Farber v. Purdy*, 69 Mo. 601; *Wells v. Savannah*, 87 Ga. 397; *Taylor v. Robinson*, 34 Fed. Rep. 678. And a railroad company which has acquired the right to perpetual possession of land, has been held the owner for purposes of taxation, although it has not a legal title. *Muscatine v. Chicago*, etc., R. Co., 79 Iowa 645.

5. *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159; *State v. Board of Railroad Com'rs*, 41 N. J. L. 235; *Green v. Watson*, 34 Pa. St. 332.

If land has been taxed to the bene-



subject to be divested by redemption or otherwise, does not affect the taxability of the owner.<sup>1</sup>

In ascertaining the ownership for the purposes of taxation, the record title controls;<sup>2</sup> and it is not necessary to investigate the proceedings pertaining to the title claimed in order to determine the question of the validity of the record.<sup>3</sup> Persons who own the property at the time of the assessment are the ones upon whom the tax is imposed, irrespective of prior or subsequent changes of ownership.<sup>4</sup>

c. OCCUPANCY.—An occupant, within the tax laws, is one who has the actual and exclusive use and possession of a thing.<sup>5</sup> It is

ficial owner, a subsequent sale for non-payment of the tax by the legal owner, is void. *Whitham v. Sayers*, 9 W. Va. 671.

1. *Butler v. Stark*, 139 Mass. 19; *State v. Mississippi River Bridge Co.*, 109 Mo. 253; *Maina v. Elliott*, 51 Cal. 8; *Ralston v. Hughes*, 13 Ill. 469; *Greenwalt v. Tucker*, 3 McCrary (U. S.) 166. And see *Brent v. New Orleans*, 41 La. Ann. 1098. The contrary was held in *Central Pac. R. Co. v. Howard*, 52 Cal. 227.

A party cannot be relieved from the payment of taxes and assessments on the ground that someone else might have an outstanding title to the property taxed. It is sufficient that he claims and possesses as owner. *Selby v. Levee Com'rs*, 14 La. Ann. 437. And see *infra*, this title, *Particular Estates*.

But in *Trammell v. Faught*, 74 Tex. 557, it was held that where the state reserved the right to terminate a lease of public lands at will, the lands were not taxable to the tenant under the *Texas* statute.

2. *Gee v. Clark*, 42 La. Ann. 919; *Butler v. Stark*, 139 Mass. 19; *Finney v. Boyd*, 26 Wis. 366.

A statute providing that the record owner should be deemed the true owner for taxation purposes, does not authorize an assessment in the name of a record owner who died previous to such assessment. *Sawyer v. Mackie*, 149 Mass. 269.

3. *Mason v. Bemiss*, 38 La. Ann. 935. And see *French v. Spalding*, 61 N. H. 395.

The government, in taxing land, does not attempt to determine in whom the title vests, but leaves such determination to the parties interested. *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

An assessor is not required to look into the secret ownership of personal

property, but may assess it against the apparent owner by possession or muniment of title. *The North Cape*, 6 Biss. (U. S.) 505.

4. *State v. Union Tp.*, 36 N. J. L. 309; *State v. Hardin*, 34 N. J. L. 79; *State v. Jersey City*, 44 N. J. L. 156; *San Gabriel Valley, etc., Co. v. Witmer*, 96 Cal. 623; *Campbell v. Quackenbush* (Cal. 1892), 31 Pac. Rep. 746; *Russell v. Mandell*, 73 Ill. 136; *Biggins v. People*, 96 Ill. 381; *Anderson v. Harwood*, 47 Mo. App. 660; *Richardson v. Boston*, 148 Mass. 508; *Washburn v. Walworth*, 133 Mass. 499; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54. And see *Sully v. Poorbaugh*, 45 Iowa 453; *Tallman v. Butler County*, 12 Iowa 531; *People v. McComber* (Supreme Ct.), 7 N. Y. Supp. 71. See also *Templeton v. Levee Com'rs*, 16 La. Ann. 117; *McLaren v. Sheble*, 45 Mo. 130; *State v. Williamson*, 33 N. J. L. 77; *Bemis v. Phelps*, 41 Vt. 1; *Wisconsin Cent. R. Co. v. Lincoln County*, 57 Wis. 137.

Taxes on real estate cannot be apportioned among the different persons who may become owners of it during the year. The person charged at the beginning of the tax year is liable for the taxes of the whole year, even though he disposes of the property before the day of appeal. *Shaw v. Quinn*, 12 S. & R. (Pa.) 299; *Densmore v. Haggerty*, 59 Pa. St. 189.

Where a change in ownership is a mere device to escape taxation, the rule may be different. *Jones v. Seward County*, 10 Neb. 154.

5. See *Kedfield v. Utica, etc., R. Co.*, 25 Barb. (N. Y.) 54; *National F. Ins. Co. v. McKay*, 5 Abb. Pr. N. S. (N. Y.) 445; *Bangor v. Rowe*, 57 Me. 439; *Veerhusen v. Chicago, etc., R. Co.*, 53 Wis. 689. See also OCCUPANCY, OCCUPANT, vol. 17, pp. 28, 29.

In *Flax Pond Water Co. v. Lynn*,

not necessary that the occupant should reside upon the land, if he is in receipt of the rents and profits, or has the sole and exclusive use thereof.<sup>1</sup>

*d. PARTICULAR ESTATES.*—As a general rule, taxes are imposed upon the owner or person in possession of real estate, as a whole or as one entire interest, without reference to particular estates or interests in the property.<sup>2</sup> The land being charged with the taxes,

147 Mass. 31, it was held that a company in possession of dams which cause water to cover real estate of which it is not the owner, is liable for the taxes on such real estate.

A tenant is not an occupier unless he can maintain trespass. *State v. Abbott*, 42 N. J. L. 111. And in *Weyse v. Crawford*, 85 Cal. 196, it was held that a warehouseman was not in the possession of the property within the *California* statute.

A husband residing with wife upon the wife's separate property, has been held an occupant, for purposes of taxation. *Southworth v. Edmands*, 152 Mass. 207; *Paul v. Fries*, 18 Fla. 586. A contrary decision was arrived at in *Hamilton v. Fond du Lac*, 25 Wis. 496. This is noticed and disapproved in the *Massachusetts* and *Florida* cases. In *Smith v. Read*, 51 Conn. 11, it was decided that a husband not living upon the property was not an occupant.

1. See *Tweed v. Metcalf*, 4 Mich. 586; *State v. Reinhardt*, 31 N. J. L. 218; *State v. Hoffman*, 30 N. J. L. 346; *Spangler v. York County*, 13 Pa. St. 322. And see also *OCCUPANT*, vol. 17, p. 29.

Paying wharfage on manufactured lumber, or hiring logs to be sawed at a mill, does not constitute the person an occupant of the sawmill. *Campbell v. Machias*, 33 Me. 419.

An assessor will not be chargeable with bad faith for assessing pasture land, upon which there is no dwelling house, to the owner and not to the real occupant. *Massing v. Ames*, 37 Wis. 645.

An entry and survey of land is sufficient evidence of possession. *Little v. Downing*, 37 N. H. 355.

2. *Parker v. Baxter*, 2 Gray (Mass.) 185; *Flax Pond Water Co. v. Lynn*, 147 Mass. 31; *State v. Massaker*, 26 N. J. L. 564; *Turner v. Smith*, 14 Wall. (U. S.) 553; *Biscoe v. Coulter*, 18 Ark. 423; *Merrick v. Hutt*, 15 Ark. 331; *Atkins v. Hinman*, 7 Ill. 447; *Blackwood v. Van Vliet*, 30 Mich. 118; *Willard v. Blount*, 11 Ired. (N. Car.) 624; *Brown v. Austin*, 41 Vt. 262.

A party enjoying the present use of the land is liable for the taxes thereon, unless the language of the statute imposing the tax is repugnant to such liability. *Spangler v. York County*, 13 Pa. St. 322.

*Tenant for Life.*—Taxes are chargeable against a tenant for life: *Garland v. Garland*, 73 Me. 97; *Varney v. Stevens*, 22 Me. 331; *Plympton v. Boston Dispensary*, 106 Mass. 544; *Fleet v. Dorland*, 11 How. Pr. (N. Y. Supreme Ct.) 489; *Cairns v. Chabert*, 3 Edw. Ch. (N. Y.) 312; *Carter v. Youngs*, 42 N. Y. Super. Ct. 422; *Willard v. Blount*, 11 Ired. (N. Car.) 624; *In re Cox*, 36 N. J. Eq. 448; *Weaver v. Arnold*, 15 R. I. 53; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Webb v. Burlington*, 28 Vt. 188. And see *Bidwell v. Greensheld*, 2 Abb. N. Cas. (N. Y.) 427; *King v. King*, 41 N. Y. Super. Ct. 518; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 364; *Peck v. Sherwood*, 56 N. Y. 615; *Anderson v. Hensley*, 8 Heisk. (Tenn.) 834; *Matter of Babcock*, 115 N. Y. 450.

A conditional or determinable fee is not taxable to the reversioner. *Connecticut Spiritualistic, etc., Assoc. v. East Lynne*, 54 Conn. 152. And see *Huck v. Chicago, etc., R. Co.*, 86 Ill. 352.

*Bridge Franchise.*—A grant of a bridge franchise, to a person for twenty-five years with reversion to the city, is taxable to the grantee. *Fall v. Marysville*, 19 Cal. 391.

*Mortgages.*—So lands and chattels may be assessed, regardless of the mortgages upon them. *Allen v. Harford County*, 74 Md. 294; *Central Pac. R. Co. v. Board of Equalization*, 60 Cal. 35; *Parker v. Baxter*, 2 Gray (Mass.) 185; *State v. Grey*, 29 N. J. L. 380; *Morrison v. Manchester*, 58 N. H. 538; *Fagen v. Campbell*, 5 Watts (Pa.) 287; *Fields v. Russell*, 38 Kan. 720. And see *Appeal Tax Court v. Rice*, 50 Md. 319; *Baltimore v. Canton Co.*, 63 Md. 237; *State v. Massaker*, 26 N. J. L. 564; *Ralston v. Hughes*, 13 Ill. 469; *Greenwalt v. Tucker*, 3 McCrary

all claims and pretensions must yield to such charge, and all persons must take notice.<sup>1</sup>

The whole tax upon the land may be imposed upon a lessee,<sup>2</sup> or a mortgagee.<sup>3</sup>

For the purposes of taxation, property may be treated as belonging either to the maker or holder of a bond for title.<sup>4</sup>

The statutes of some states requiring expressly that particular estates in lands shall be separately taxed,<sup>5</sup> include common owners,<sup>6</sup> and the interests of a mortgagor and a mortgagee;<sup>7</sup> and the owner and the holder of a rent charge are taxable for their respective estates.<sup>8</sup> One person may be taxed as owner of the fee and another as owner of structures upon, or minerals or quarries within the land.<sup>9</sup> Easements appurtenant to realty, however, are to be

(U. S.) 166. This rule would not be affected by the fact that a mortgage upon the land taxed or bonds secured by mortgage thereon were held and taxed in another jurisdiction. *State v. Massaker*, 25 N. J. L. 531.

1. See *infra*, this title, *Tax Liens*; *Merrick v. Hutt*, 15 Ark. 331; *Latrobe v. Baltimore*, 19 Md. 13; *Fager v. Campbell*, 5 Watts (Pa.) 287.

2. See *Washington Market v. District of Columbia*, 4 Mackey (D. C.) 416; *Sanderson v. Scranton*, 105 Pa. St. 469; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. St. 164; *Trammell v. Faught*, 74 Tex. 557; *Pease v. Whitney*, 5 Mass. 380; *Merrill v. Champagne Lumber Co.*, 75 Wis. 142; *Taylor v. Robinson*, 34 Fed. Rep. 678.

In *Atlantic, etc., R. Co. v. State*, 60 N. H. 133, it was held that a railroad leased for 99 years may be taxed either to the lessor or to the lessee.

3. See *Detroit v. Board of Assessors*, 91 Mich. 78; *Shoemaker v. The Bank*, 15 Phila. (Pa.) 297.

In *Coombs v. Warren*, 34 Me. 89, it was held that a mortgagee not in possession could not be taxed for land. See *Bath v. Whitmore*, 79 Me. 182, as to the remedy of a mortgagee of personal property when taxed. And generally, a mortgagor, and not the mortgagee, when not in possession, is considered the owner for taxation purposes. *Waltham Bank v. Waltham*, 10 Met. (Mass.) 334.

4. But as between the parties to the bond, the one taking the rents and profits, or enjoying the use for the time being, is liable for the taxes. *National Bank v. Danforth*, 80 Ga. 55.

5. See *McLaughlin v. Kain*, 45 Pa. St. 113; *Logan v. Washington County*,

29 Pa. St. 373; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Dunn v. Winston*, 31 Miss. 135; *Lafin v. Herrington*, 16 Ill. 301.

The interest of a remainderman in a fund, which is to take effect in possession after the death of a life annuitant, may be taxed. See *State v. Melroy* (N. J. 1890), 19 Atl. Rep. 732.

6. *Payne v. Danley*, 18 Ark. 441; 68 Am. Dec. 187; *Williams v. Brace*, 5 Conn. 190.

7. *State v. Runyon*, 41 N. J. L. 98; *In re Cox*, 36 N. J. Eq. 448; *State v. Massaker*, 25 N. J. L. 531; *Cruger v. Dougherty*, 43 N. Y. 107; *Bath v. Whitmore*, 79 Me. 182. See also *Detroit v. Board of Assessors*, 91 Mich. 78.

8. *Logan v. Washington County*, 29 Pa. St. 373; *Irvin v. Bank of U. S.*, 1 Pa. St. 349. And see *Daugherty v. Thompson*, 71 Tex. 192; *State v. Taylor* (Tex. 1888), 12 S. W. Rep. 176.

But the owner of a ground rent in fee is not liable for any of the taxes assessed on the land out of which the rent issues. *Philadelphia Library Co. v. Ingham*, 1 Whart. (Pa.) 72.

Whether there is such an estate in the lessee of a part of a building as amounts to interest in the realty, and whether, in such case, the lessee should pay the taxes upon the part occupied by him, is to be determined by the terms of the lease. *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

9. *Smith v. New York*, 68 N. Y. 552; *People v. Board of Assessors*, 93 N. Y. 308; *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511; *San Francisco v. McGinn*, 67 Cal. 110; *Hayden v. Foster*, 13 Pick. (Mass.) 497; *Gorrell v. Murphy*, 1 Pa. Leg. Gaz. 495; *Cincinnati College v. Yeatman*, 30 Ohio St. 276; *Consolidated*

taxed as a part of and belonging to the land to which they are appurtenant.<sup>1</sup>

The dower interest of a widow is not to be charged with any portion of the taxes imposed upon the land either in her husband's lifetime, or during her quarantine.<sup>2</sup>

*e. TRUSTEES, EXECUTORS, AND ADMINISTRATORS, GUARDIANS, AGENTS, ETC.*—As a general rule, property held in trust is taxable to the trustee.<sup>3</sup> Under certain circumstances trust estates have

*Coal Co. v. Baker*, 135 Ill. 545; *In re Major*, 134 Ill. 19; *People v. Tax Com'rs*, 82 N. Y. 459; *Major v. Pavey* (Ill.), 24 N. E. Rep. 973; *Forbes v. Gracey*, 94 U. S. 762; *Flax Pond Water Co. v. Lynn*, 147 Mass. 131; *Mill v. Lacey*, 110 Pa. St. 204; *Sanderson v. Scranton*, 105 Pa. St. 469; *Stuart v. Com.* (Ky.), 23 S. W. Rep. 367; *Milligan v. Drury*, 130 Mass. 428; *McGee v. Salem*, 149 Mass. 238; *State v. Mississippi Bridge Co.*, 109 Mo. 253; *Lowell v. Middlesex County*, 152 Mass. 372.

For the purpose of taxation, improvements erected by a lessee, upon lands owned by and leased from a municipal corporation, are regarded as the property of the lessee. *San Francisco v. McGinn*, 67 Cal. 110.

Where the owner of mining land has sold the right to take all the minerals from the land, but has retained the land, the owner of the land and the owner of the minerals are each taxable according to their several interests. *Logan v. Washington County*, 29 Pa. St. 373; *Sanderson v. Scranton*, 105 Pa. St. 469.

1. *Winnipiseogee Lake Cotton, etc., Mfg. Co. v. Gilford*, 64 N. H. 337; *Lowell v. Middlesex County*, 152 Mass. 372; *Bellows Falls Canal Co. v. Rockingham*, 37 Vt. 622.

In *Boston Mfg. Co. v. Newton*, 22 Pick. (Mass.) 22, it was held that water power for mill purposes when not used cannot be taxed independent of the land.

2. *Graves v. Cochran*, 68 Mo. 74; *Moore v. White*, 61 Mo. 442; *Deitz v. Beard*, 2 Watts (Pa.) 170; *Felch v. Finch*, 52 Iowa 566; *Huston v. Seeley*, 27 Iowa 183; *Williams v. Cox*, 3 Edw. Ch. (N. Y.) 178; *Harrison v. Peck*, 56 Barb. (N. Y.) 251; *Taylor v. Bentley*, 3 Redf. (N. Y.) 34. And see *O'Farrell v. Simplot*, 4 Iowa 381; *Branson v. Yancy*, 1 Dev. Eq. (N. Car.) 77. See also *Bidwell v. Greensheid*, 2 Abb. N. Cas. (N. Y.) 427.

3. *Carlisle v. Marshall*, 36 Pa. St.

397; *Greene v. Mumford*, 4 R. I. 313; *Smith v. Byers*, 43 Ga. 191; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277; *Miner v. Pingree*, 110 Mass. 47; *Richardson v. Boston*, 148 Mass. 508; *People v. Home Ins. Co.*, 29 Cal. 533; *Baltimore v. Stirling*, 29 Md. 48; *Latrobe v. Baltimore*, 19 Md. 13; *People v. Ogdensburgh*, 48 N. Y. 390; *Townbridge v. Horan*, 78 N. Y. 439; *People v. Board of Assessors*, 40 N. Y. 154; *Duval v. English Evangelical, etc., Church*, 53 N. Y. 500; *State v. Matthews*, 10 Ohio St. 437.

Notes, mortgages, etc., though outside of the taxing district, are liable to taxation in the district in which the executor resides. *Johnson v. Oregon City*, 2 Oregon 327. See *State v. Jones*, 39 N. J. L. 650.

Property situated and held by trustees residing in a taxing district, may properly be assessed to the trustees, where the beneficiary is a non-resident. *People v. Home Ins. Co.*, 29 Cal. 534; *Price v. Hunter*, 34 Fed. Rep. 355. But where the property is not in the district, though the trustee is, he is not taxable. *Lewis v. Chester County*, 60 Pa. St. 325; *Carlisle v. Marshall*, 36 Pa. St. 397. Compare *People v. Coleman*, 53 Hun (N. Y.) 482.

In *Hardy v. Yarmouth*, 6 Allen (Mass.) 277, it was held that where the trustees resided in different towns, a tax might be apportioned.

**What Taxable to Trustee.**—A trustee is liable to taxation only on the trust property in the state of his residence. *Lewis v. Chester County*, 60 Pa. St. 325. And see *People v. Tax Com'rs* (Supreme Ct.), 17 N. Y. Supp. 923.

Under the *Pennsylvania* statute imposing a tax upon property held in trust for the benefit of any "person," it was held that "person" referred to a particular individual, and that therefore property held in trust by a religious society for charitable objects was not taxable. General Assembly v. Gratz, 139 Pa. St. 497.

been made taxable to the beneficiaries.<sup>1</sup> It has been held that where the trustee resides, and the trust property is in another state, neither the beneficiary nor the trustee are taxable.<sup>2</sup>

The same rules apply to devises in trust.<sup>3</sup> Heirs or devisees of real property are subject to taxation therefor,<sup>4</sup> even though a power of sale is given the executor in the will.<sup>5</sup>

Personal property in the hands of an executor or administrator is usually taxable to him in his representative capacity.<sup>6</sup> But taxes are sometimes imposed upon the executor personally and collected out of his individual property.<sup>7</sup>

Taxes upon a deceased person's property may be charged generally to his estate, until the appointment and qualification of his

1. See *Hathaway v. Fish*, 13 Allen (Mass.) 267; *Freetown v. Fish*, 123 Mass. 355; *Ricker v. American Loan, etc., Co.*, 140 Mass. 346; *Greene v. Mumford*, 4 R. I. 313; *Dallinger v. Rapello*, 14 Fed. Rep. 32; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277.

In *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 429, it was held that a statute providing that moneyed capital in the hands of individual citizens shall be taxable, rendered taxable the beneficial owner of bonds held in trust. *Com. v. Northern Pa. R. Co.*, 129 Pa. St. 460. And the bonds, when found in the hands of a resident trustee, will be presumed to be the property of residents. *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Com. v. Northern Pa. R. Co.*, 129 Pa. St. 460.

2. *Dorr v. Boston*, 6 Gray (Mass.) 131; *Anthony v. Caswell*, 15 R. I. 159.

In *Johnson v. Oregon City*, 3 Oregon 13, it was held that where one of the executors resides in the state and transacts business pertaining to the estate, he is taxable. And see *People v. Tax Com'rs*, 38 Hun (N. Y.) 536; *Brown v. Noble*, 42 Ohio St. 405. But in *Stinson v. Boston*, 125 Mass. 348, it was held that they were liable only to the extent of their interests. See also *State v. Matthews*, 10 Ohio St. 431.

Where two of three trustees reside in the state, and the other is a non-resident, two-thirds of the trust property only can be subjected to taxation within the state. *Appeal Tax Court v. Gill*, 50 Md. 377; *People v. Coleman* (Supreme Ct.), 6 N. Y. Supp. 285; 119 N. Y. 137; *People v. Coleman*, 53 Hun (N. Y.) 482; *Davis v. Macy*, 124 Mass. 193.

3. See *Duvall v. English Evangelical, etc., Church*, 53 N. Y. 500; *Holcombe v. Holcombe*, 29 N. J. Eq. 597;

*McDougal v. Brazil*, 83 Ind. 211; *Hathaway v. Fish*, 13 Allen (Mass.) 267; *Richardson v. Boston*, 148 Mass. 508.

**Annuities.**—In *Ex p. McComb*, 4 Bradf. (N. Y.) 151, it was held that it was the duty of the executors to retain a sum sufficient to pay the annuity, and any taxes that might be assessed thereon. See *Wetmore v. State*, 18 Ohio 77.

The holder of an annuity cannot be assessed upon the sum from which the annuity is produced. *State v. Shurts*, 41 N. J. L. 279; *State v. Cornell*, 31 N. J. L. 374.

4. *Elliott v. Spinney*, 69 Me. 31; *Williams v. Cox*, 3 Edw. Ch. (N. Y.) 178; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; 9 Am. Dec. 318; *Gunning v. Carman*, 3 Redf. (N. Y.) 71.

Where a mortgage is given specifically to the legatee, the executors are not taxable therefor. *State v. Leggett*, 40 N. J. L. 308.

5. *Jackson v. Sassaman*, 29 Pa. St. 106; *Henry v. Horstick*, 9 Watts (Pa.) 412. See also *Barstow v. Big Rapids*, 56 Mich. 35.

6. *Johnson v. Oregon City*, 2 Oregon 321; *State v. Jones*, 39 N. J. L. 650; *State v. Holmdel Tp.*, 39 N. J. L. 79; *Cornwall v. Todd*, 38 Conn. 443; *People v. Ogdensburgh*, 48 N. Y. 390; *Williams v. Holden*, 4 Wend. (N. Y.) 223; *McGregor v. Vampel*, 24 Iowa 436; *Herrick v. Big Rapids*, 53 Mich. 554; *Cook v. Leland*, 5 Pick. (Mass.) 236; *Gallatin v. Alexander*, 10 Lea (Tenn.) 475. See also *Avery v. De Witt*, 72 Mich. 25.

A legatee is not assessable for a legacy not yet due. *Herrick v. Big Rapids*, 53 Mich. 554.

7. *Williams v. Holden*, 4 Wend. (N. Y.) 223; *Payson v. Tufts*, 13 Mass. 493. And see *Surget v. Newman*, 43 La. Ann. 873.

representative.<sup>1</sup> A guardian who has in his possession or under his control, real and personal property of his ward, is liable to be taxed therefor,<sup>2</sup> though such taxes are usually imposed upon the ward at his place of residence.<sup>3</sup> And so the property of a lunatic is taxed to him at his place of residence, and not to his committee.<sup>4</sup>

Receivers are taxable for the property in their hands, by virtue of the receivership, when title thereto is vested in them;<sup>5</sup> but the liability of a corporation to taxation is not affected in insolvency proceedings by the fact that its property is in the hands of a receiver.<sup>6</sup>

Moneys paid into court may be taxed to the officer in whose hands it is placed,<sup>7</sup> though the tax is sometimes imposed upon the beneficiary.<sup>8</sup>

Property or money of a principal, in the hands of an agent, is usually taxable to the principal;<sup>9</sup> but if the principal is a non-resident, and the property or money is in the hands, or under the control, of a resident agent, the agent is subject to taxation there-

The *Massachusetts* statute regulating taxation of bank shares, does not make them taxable to stockholders who hold in a representative capacity. *Revere v. Boston*, 123 Mass. 375.

1. See *Elliott v. Spinney*, 69 Me. 31; *Wood v. Torrey*, 97 Mass. 321; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277; *Carter v. New Orleans*, 33 La. Ann. 816; *Surget v. Newman*, 43 La. Ann. 873; *Dallinger v. Rapello*, 14 Fed. Rep. 35.

2. *School Directors v. James*, 2 W. & S. (Pa.) 568; 37 Am. Dec. 525; *Payson v. Tufts*, 13 Mass. 495; *Baldwin v. Fitchburg*, 8 Pick. (Mass.) 494; *Smith v. Macon*, 20 Ark. 17; *Tousey v. Bell*, 23 Ind. 423; *People v. Ogdensburgh*, 48 N. Y. 399. And see *Bedgood v. McLain*, 89 Ga. 793.

The tax may be made a personal charge against the guardian, *Payson v. Tufts*, 13 Mass. 493; and is sometimes imposed upon him at his place of residence. See *Carlisle v. Marshall*, 36 Pa. St. 397; *West Chester School Dist. v. Darlington*, 38 Pa. St. 157; *Tousey v. Bell*, 23 Ind. 423.

3. *West Chester School Dist. v. Darlington*, 38 Pa. St. 157; *Mason v. Thurber*, 1 R. I. 481; *Louisville v. Sherley*, 80 Ky. 71; *Kirtland v. Whately*, 4 Allen (Mass.) 462; *Barstow v. Big Rapids*, 56 Mich. 35; *School Directors v. James*, 2 W. & S. (Pa.) 568; 37 Am. Dec. 525.

4. A committee of the estate of a lunatic, is not within a statute making all personal estate under control of an agent, trustee, executor or adminis-

trator, taxable therefor. *People v. Tax Com'rs*, 100 N. Y. 215, reversing 36 Hun (N. Y.) 359.

5. *In re Mallory* (Supreme Ct.), 2 N. Y. Supp. 437.

6. *Philadelphia, etc., R. Co. v. Com.*, 104 Pa. St. 80; *State v. Railroad Com'rs*, 41 N. J. L. 235; *Com. v. Barnstable Sav. Bank*, 126 Mass. 526. See also *Bartlett v. Carter*, 59 N. H. 105.

7. *San Luis Obispo v. Pettit*, 87 Cal. 499; *People v. Lardner*, 30 Cal. 242.

The assessment, when levied, becomes a lien upon the money in the officer's hands. *People v. Lardner*, 30 Cal. 242.

8. See *In re Ming*, 39 N. J. Eq. 1.

Commissioners appointed by the court to divide real estate, who have sold it and invested part of the proceeds under the order of the court to secure the interest to the widow in lieu of her dower, are not taxable for the securities they hold for that purpose. *State v. Staats*, 39 N. J. L. 653; *State v. Irons*, 35 N. J. L. 464.

9. See *Boardman v. Tompkins County*, 85 N. Y. 359; *Curtis v. Richland Tp.*, 56 Mich. 178.

In *State v. Engle*, 34 N. J. L. 425, it was held that commission agents residing in the state, whose duties are to obtain orders for purchasers in other states, and to superintend the shipment of the property, have no such property in, or possession or control of, the property purchased as to render them taxable for it.

for.<sup>1</sup> A statute requiring non-residents to be taxed in the same manner as residents, would require the tax to be imposed upon the principal at the place where the property is situated.<sup>2</sup>

*f.* NON-RESIDENT AND UNSEATED PROPERTY.—Taxes on unimproved and unseated lands of non-residents are usually imposed upon the lands as such, the tax constituting a lien upon the land, but creating no personal charge against the owner.<sup>3</sup> It is competent, however, for the legislature to make property taxable to anyone upon whom rests the public duty to pay the taxes, or to see that they are paid.<sup>4</sup> But the personal property of a non-resident is not taxable as such, unless it is employed in business in the taxing district,<sup>5</sup> or has otherwise acquired a fixed *situs*

1. See *Fowler v. Springfield*, 64 N. H. 108; *Tazewell County v. Davenport*, 40 Ill. 204; *Lockwood v. Johnson*, 106 Ill. 334; *Walton v. Westwood*, 73 Ill. 125; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Hutchinson v. Board of Equalization*, 66 Iowa 35; *People v. Ogdensburgh*, 48 N. Y. 390; *People v. Willis*, 133 N. Y. 383; *People v. Smith*, 88 N. Y. 576; *Redmond v. Rutherford County*, 87 N. Car. 122; *Merrill v. Champagne Lumber Co.*, 75 Wis. 142.

Money of a non-resident in the hands of a resident agent, at the time the assessment is made out, is liable to taxation, even though it is used up and disposed of before the time for the correction of the roll. *People v. Ogdensburgh*, 48 N. Y. 390.

2. *People v. McLean*, 17 Hun (N. Y.) 204.

3. See *Moulton v. Blaisdell*, 24 Me. 283; *Alvord v. Collin*, 20 Pick. (Mass.) 418; *Rising v. Granger*, 1 Mass. 47; *Hilton v. Fonda*, 86 N. Y. 339; *People v. Chenango County*, 11 N. Y. 563; *McKibbin v. Charlton*, 14 Pa. St. 128; *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 175; *Reading v. Finney*, 73 Pa. St. 467; *Ellis v. Hall*, 19 Pa. St. 296; *Burd v. Ramsay*, 9 S. & R. (Pa.) 112; *Dewey v. Stratford*, 42 N. H. 286; *Cocheco Mfg. Co. v. Stratford*, 51 N. H. 471; *People v. Fredericks*, 33 How. Pr. (N. Y. Supreme Ct.) 162; *Allen v. Gleason*, 4 Day (Conn.) 379; *Herriman v. Stowers*, 43 Me. 497; *Lunt v. Wormell*, 19 Me. 100; *Dow v. Sudbury*, 5 Met. (Mass.) 73; *Bowles v. Clough*, 55 N. H. 389; *Miller v. Gorman*, 38 Pa. St. 309. And see *Butler v. Oswego* (Supreme Ct.), 10 N. Y. Supp. 768; *New York, etc., R. Co. v. Lyon*, 16 Barb. (N. Y.) 651; *Stewart v. Chrysler*, 100 N. Y. 382.

In *Russel v. Werntz*, 24 Pa. St. 337, it was held that unseated land assessed is the debtor for taxes, and that it is immaterial in what name it has been assessed, if there is sufficient evidence to show that the land in question was that which was taxed and sold, and that it was at the time unseated.

The tax attaches to the whole title, whether taxed to the owner by name or otherwise, or to third persons. *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166; *Fager v. Campbell*, 5 Watts (Pa.) 286.

4. *National Bank v. Danforth*, 80 Ga. 55. And see *Willard v. Blount*, 11 Ired. (N. Car.) 624.

A provision that a tax on the personal estate of non-residents may be collected from any property of the person to whom it belongs, does not render the tax invalid. *Duer v. Small*, 4 Blatchf. (U. S.) 263.

Personal property within the state belonging to a non-resident may be taxed to such owner, notwithstanding his non-residence. *People v. Home Ins. Co.*, 29 Cal. 533.

In *Maine*, unimproved lands may be taxed to an owner residing in another town in the state, and he is liable for the payment of the tax. *Oldtown v. Blake*, 74 Me. 280.

5. *St. Paul v. Merritt*, 7 Minn. 258; *Flanders v. Cross*, 10 Cush. (Mass.) 514; *Huckins v. Boston*, 4 Cush. (Mass.) 543; *Duer v. Small*, 17 How. Pr. (U. S. C. C.) 201; *Corn v. Cameron*, 19 Mo. App. 573. And see *People v. Niles*, 35 Cal. 282; *Goldgart v. People*, 106 Ill. 25; *Boston Loan Co. v. Boston*, 137 Mass. 332.

**Property Employed in Business.**—Stock in trade, employed in manufacturing, is taxable, although the firm has not its principal office there. *Lee v. Templeton*, 6 Gray (Mass.) 579.

therein.<sup>1</sup> The question of residence and non-residence, either upon the land or within the district or state, is the usual test as to the character of the tax.<sup>2</sup> At least one of the states, however, has placed the distinction between the two classes of taxation upon the question whether the lands are seated or unseated.<sup>3</sup>

Property employed in banking is property employed in business, and taxable, even though the business is in process of being closed up. *McCutchon v. Rice County*, 7 Fed. Rep. 588.

1. *Cooley on Taxation* (2d ed.) 21. And see *People v. Tax Com'rs*, 23 N. Y. 224; *Arapahoe County v. Cutter*, 3 Colo. 350; *Dunleith v. Reynolds*, 53 Ill. 45; *Irvin v. New Orleans, etc., R. Co.*, 94 Ill. 105; *St. Paul v. Merritt*, 7 Minn. 258; *In re Jefferson's Estate*, 35 Minn. 215; *Catlin v. Hull*, 21 Vt. 152; *Finch v. York County*, 19 Neb. 50; 56 Am. Rep. 741; *Redmond v. Rutherford County*, 87 N. Car. 122.

It is not necessary that the owner should reside within the state, to render the personal property situated within it liable to taxation. *Hardesty v. Fleming*, 57 Tex. 395.

State bonds which belong to a foreign insurance company, but are deposited in the state as required by law, may be assessed to the company or its resident agent. *People v. Home Ins. Co.*, 29 Cal. 533.

2. See *Hilton v. Fonda*, 86 N. Y. 339; *People v. Chenango County*, 11 N. Y. 563; *Bowles v. Clough*, 55 N. H. 389; *Brewster v. Hough*, 10 N. H. 138.

Lands in possession of an occupant cannot be taxed as non-resident lands. *Bowles v. Clough*, 55 N. H. 389; *Brewster v. Hough*, 10 N. H. 138.

Railroad lands are to be assessed as those of inhabitants, and not as non-resident lands. *People v. Cassity*, 46 N. Y. 47.

**Who are Residents.**—Persons having a settled and fixed abode and the intention to remain permanently, at least for a time, for business or other purposes, are residents. *Tazewell County v. Davenport*, 40 Ill. 197; *Stinson v. Boston*, 125 Mass. 348; *Bowles v. Clough*, 55 N. H. 389.

All those against whom the taxing power has no jurisdiction to impose a personal charge, are deemed to be non-residents. *Dow v. Sudbury*, 5 Met. (Mass.) 73; *St. Paul v. Merritt*, 7 Minn. 258; *Hilton v. Fonda*, 86 N. Y. 339; *Butler v. Oswego*, 57 Hun (N. Y.) 592.

Where it is not known to whom a piece of property belongs, it may be taxed as non-resident property. *Nelson v. Pierce*, 6 N. H. 196; *Bowles v. Clough*, 55 N. H. 389. See also *RESIDENT*, vol. 21, p. 122. And see *infra*, this title, *Place of Taxation*.

**Resident and Inhabitant Distinguished.**—The terms "resident" and "inhabitant" are not synonymous. The term "inhabitant" implies a more fixed and permanent abode than the term "resident," and frequently imports many privileges and duties which a mere resident could not claim or be subject to. A person may have a home or domicile in one state, and at the same time a residence in another state. *Tazewell County v. Davenport*, 40 Ill. 197. See also *INHABITANT*, vol. 10, p. 770.

3. See *Hathaway v. Elsbree*, 54 Pa. St. 498; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 175; *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Ellis v. Hall*, 19 Pa. St. 296; *Reading v. Finney*, 73 Pa. St. 467; *Jackson v. Stoetzel*, 87 Pa. St. 302. And see also cases hereinafter cited.

**Seated Lands — Pennsylvania Statutes.**—Seated lands are lands which are actually resided upon, cultivated, or occupied. Residence without cultivation or cultivation without residence, or both together, constitute seated lands. *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Wilson v. Watterson*, 4 Pa. St. 214; *Lackawanna Iron, etc., Co. v. Fales*, 55 Pa. St. 99; *George v. Messenger*, 73 Pa. St. 418; *Jackson v. Stoetzel*, 87 Pa. St. 305; *Wallace v. Scott*, 7 W. & S. (Pa.) 248; *Biddle v. Noble*, 68 Pa. St. 279; *Campbell v. Wilson*, 1 Watts (Pa.) 504; *Hathaway v. Elsbree*, 54 Pa. St. 498.

Occupancy is sufficient to constitute the lands seated. *Jackson v. Stoetzel*, 87 Pa. St. 305; *Lackawanna Iron, etc., Co. v. Fales*, 55 Pa. St. 99; *Biddle v. Noble*, 68 Pa. St. 279; *Jackson v. Sassaman*, 29 Pa. St. 112; *Jackson v. Fleisher*, 1 Grant (Pa.) 459; *Campbell v. Wilson*, 1 Watts (Pa.) 504; *Rosenburger v. Schull*, 7 Watts (Pa.) 390.

A temporary residence for cutting timber will justify the treating of lands



**VIII. PLACE OF TAXATION—1. In General.**—The state may tax only when the subject of the tax is within the jurisdiction, actually, or by contemplation of law;<sup>1</sup> and, speaking generally, but subject to exceptions hereafter noted, it may be said

as seated while the possession continues. *Lackawanna Iron, etc., Co. v. Fales*, 55 Pa. St. 90. Compare *George v. Messinger*, 73 Pa. St. 418; *Wilson v. Watterson*, 4 Pa. St. 214. And see generally, as to a partial use, *Watson v. Davidson*, 87 Pa. St. 270; *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Wilson v. Watterson*, 4 Pa. St. 214; *George v. Messinger*, 73 Pa. St. 414; *Jackson v. Stoetzel*, 87 Pa. St. 303; *Green v. Watson*, 34 Pa. St. 333.

Occupancy of a mere intruder will constitute the lands seated. *Campbell v. Wilson*, 1 Watts (Pa.) 504; *Biddle v. Noble*, 68 Pa. St. 279; *Jackson v. Stoetzel*, 87 Pa. St. 305; *Milliken v. Benedict*, 8 Pa. St. 169. But a permanent use is necessary to enable the trespasser to seat the land. *Jackson v. Stoetzel*, 87 Pa. St. 305; *Jackson v. Flesher*, 1 Grant (Pa.) 459. Occupation of the intruder gives it the character of seated lands only to the extent of the lands claimed by him. *Ellis v. Hall*, 19 Pa. St. 292.

The occupation will be deemed to commence at the moment of entry for the purpose of residence, cultivation, or use. *Wallace v. Scott*, 7 W. & S. (Pa.) 248; *Campbell v. Wilson*, 1 Watts (Pa.) 504; *Milliken v. Benedict*, 8 Pa. St. 169; *George v. Messinger*, 73 Pa. St. 418.

Occupation or cultivation of a part fixes the character of the whole tract, if it is sufficient to indicate the intention to seat, even though it lies in two or more political divisions. *Biddle v. Noble*, 68 Pa. St. 279; *Ellis v. Hall*, 19 Pa. St. 296; *Campbell v. Wilson*, 1 Watts (Pa.) 503; *Wilmoth v. Canfield*, 76 Pa. St. 150; *Fish v. Brown*, 5 Watts (Pa.) 441; *Jackson v. Flesher*, 1 Grant (Pa.) 459; *Altomose v. Hufsmith*, 45 Pa. St. 121.

Merely clearing a few feet or yards of a tract by an adjoining owner, is not sufficient to take from its character of unseated lands. *Fish v. Brown*, 5 Watts (Pa.) 441; *Shaeffer v. McCabe*, 2 Watts (Pa.) 221. See also *Forster v. McDivit*, 5 W. & S. (Pa.) 359; *Arthurs v. King*, 95 Pa. St. 167. But where the entirety of a tract is destroyed, a part may be seated and a

part left unseated. *Jackson v. Sassaman*, 29 Pa. St. 106; *Mitchell v. Bratton*, 5 W. & S. (Pa.) 451; *Campbell v. Wilson*, 1 Watts (Pa.) 503; *Altomose v. Hufsmith*, 45 Pa. St. 121; *Ellis v. Hall*, 19 Pa. St. 292; *Heft v. Gephart*, 65 Pa. St. 510; *Harper v. McKeenan*, 3 W. & S. (Pa.) 238.

As to what works a severance of the land, see *Biddle v. Noble*, 68 Pa. St. 279; *Altomose v. Hufsmith*, 45 Pa. St. 121; *Heft v. Gephart*, 65 Pa. St. 510.

Seated lands may become unseated by being allowed to fall into their natural state, but to change their character, their abandonment must have been unequivocal. *Stewart v. Trevor*, 56 Pa. St. 374; *Larimer v. McCall*, 4 W. & S. (Pa.) 133; *Laird v. Hiester*, 24 Pa. St. 452; *Owens v. Vanhook*, 3 Watts (Pa.) 260; *Gibson v. Robbins*, 9 Watts (Pa.) 156; *Hathaway v. Elsbree*, 54 Pa. St. 298; *Altomose v. Hufsmith*, 45 Pa. St. 121; *Negley v. Breeding*, 32 Pa. St. 325.

A mere accidental temporary suspension does not unseat the land. *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Wilson v. Watterson*, 4 Pa. St. 214; *Harbeson v. Jack*, 2 Watts (Pa.) 124; *Arthurs v. Smathers*, 38 Pa. St. 40.

Non-payment of taxes upon unseated land, by the owner, is not an abandonment of the land. *Hoffman v. Bell*, 61 Pa. St. 444.

An abandonment of part does not prevent the whole from remaining seated. *Patterson v. Blackmore*, 9 Watts (Pa.) 104. And see *Altomose v. Hufsmith*, 45 Pa. St. 121.

When the only evidence of abandonment consists of the old warrant line, and the acts of the assessor in returning the portion claimed to be abandoned as unseated, it is insufficient, as against the fact that it was used as a part of a larger seated tract, to require its submission to the jury. *Altomose v. Hufsmith*, 45 Pa. St. 121.

1. *Northern Cent. R. Co. v. Jackson*, 7 Wall. (U. S.) 262; *Berlin Mills Co. v. Wentworth's Location*, 60 N. H. 156; *Com. v. Standard Oil Co.*, 101 Pa. St. 147; *State Treasurer v. Auditor Gen'l*, 46 Mich. 224; *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300.

that a district or subdivision of the state is bound by the same rule.<sup>1</sup>

**2. Taxes on Real Property**—*a.* IN GENERAL.—The state may tax land within its limits, whether owned by a resident or non-resident,<sup>2</sup> unless such land is within the recognized exceptions, as where it belongs to an Indian tribe or to the federal government.

Land is not only to be assessed by the state in which it lies, and by it alone, but it is to be taxed, as a general rule, only in the subdivision of the state in which it is situated,<sup>3</sup> whether the subdivision be a county,<sup>4</sup> town,<sup>5</sup> school district, or other public corporation.<sup>6</sup> This is often expressly provided by statute. If the statute is silent, the law implies that such is the intention of the legislature.<sup>7</sup> It is immaterial whether the land be that of a resident or non-resident,<sup>8</sup> an individual or a corporation, foreign or domestic.<sup>9</sup> In regard to the power of a state to allow real property to be taxed in a district other than that in which it lies,

1. *Wells v. Weston*, 22 Mo. 384; *St. Charles v. Nolle*, 51 Mo. 122; 11 Am. Rep. 440; *Matter of Prospect Park*, 60 N. Y. 398; *People v. Townsend*, 56 Cal. 633.

2. *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Edwards v. Beaird*, 1 Ill. 70; *Newburyport Turnpike Co. v. Upton*, 12 Mass. 575; *Bowles v. Clough*, 55 N. H. 389.

A tax against the land of a non-resident, while it may be a lien on the land, is not a personal charge against the owner, unless he becomes a party to the proceeding for collection, and thus submits to the jurisdiction. *Hilton v. Fonda*, 86 N. Y. 339.

3. *Toby v. Haggerty*, 23 Ark. 370; *People v. Pearis*, 37 Cal. 259; *Sangamon, etc., R. Co. v. Morgan County*, 14 Ill. 163; 56 Am. Dec. 497; *Hoffman v. Woods*, 40 Kan. 382; *Hartland v. Church*, 47 Me. 169; *Taylor v. Youngs*, 48 Mich. 268; *Nashua Co. Bank v. Nashua*, 46 N. H. 389; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455; *Weeks v. Gilmanston*, 60 N. H. 500; *Patton v. Long*, 68 Pa. St. 260; *Hubbard v. Newton*, 52 Vt. 346.

The right to tax lands situated outside of a taxing district cannot be acquired by prescription. Thus, where a town had exercised jurisdiction for more than twenty years over territory outside of its limits, a tax levied upon this district was held to be void. *Ham v. Sawyer*, 38 Me. 37. And an agreement between two towns, that one shall not tax the lands of the inhabitants of the other, is invalid. *Dillingham v. Snow*, 5 Mass. 547.

The attachment of a strip of land lying within the territorial limits of a county, to an adjoining county, for judicial purposes, does not render it taxable in the latter county. *Yellowstone County v. Northern Pac. R. Co.*, 10 Mont. 414.

The real estate of a corporation may be assessed for the support of public worship in the parish where it is situated. *Amesbury Nail Factory Co. v. Weed*, 17 Mass. 53; *Goodell Mfg. Co. v. Trask*, 11 Pick. (Mass.) 514.

4. *People v. Pearis*, 37 Cal. 259.

5. *Van Rensselaer v. Cottrell*, 7 Barb. (N. Y.) 127.

6. *Rowe v. Blakeslee*, 11 Conn. 479.

7. See cases in preceding notes.

8. *State v. Gray*, 29 N. J. L. 380; *Ahl v. Gleim*, 52 Pa. St. 432.

The lands of non-residents are taxable in the school district in which they lie. *Allen v. Gleason*, 4 Day (Conn.) 376; *Rowe v. Blakeslee*, 11 Conn. 479.

9. The real estate of a foreign corporation is taxable in the township in which it is located. *State v. Berry*, 52 N. J. L. 308; 19 Am. & Eng. Corp. Cas. 586.

*New York*.—Under the statutes providing for the taxation of corporations, the real property of toll-bridge companies is to be assessed in the town or ward in which it lies. The clause in *New York Rev. Stat.* 389, § 6, directing assessment in the town or ward where the tolls are collected, applies only to personal estate. *Hudson River Bridge Co. v. Patterson*, 74 N. Y. 365.

there is some conflict.<sup>1</sup> The general rule seems to be that, in the absence of prohibition in the state constitution, such power exists; at least, where the object to be attained would benefit the district taxed,<sup>2</sup> where there is a doubt as to the question in what district the land lies,<sup>3</sup> or where the tract taxed is situated in more than one taxing district.<sup>4</sup> An unorganized district may be annexed to another for taxing purposes.<sup>5</sup> The district in which the land is located at the time of the assessment determines where the tax is to be paid. If the lines are changed subsequent to this time, but prior to the collection of the tax, it is immaterial.<sup>6</sup> The question of place is one of fact. It must be decided by the taxpayer at his peril.<sup>7</sup> If land is wrongfully assessed elsewhere, this

1. In *Wells v. Weston*, 22 Mo. 385, it was held that the legislature could not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. See Cooley on Taxation (2d ed.), pp. 1598-163; Cooley on Const. Lim. (2d ed.), p. 500.

2. In *Conwell v. Connersville*, 8 Ind. 358, an act authorizing a town to tax property within 200 yards of the corporation line, was held constitutional, though not discussed by counsel, and the court simply said: "We are not advised that such act is in conflict with the constitution." And in *Langhorne v. Robinson*, 20 Gratt. (Va.) 661, it was held that a *Virginia* act, authorizing a city to tax persons and property for half a mile around and outside of the corporate limits, to pay the interest upon the guaranty by the city of certain railroad stock, was not in violation of the *Virginia* constitution. In regard to these two cases, Judge Cooley says: "These two, however, may well be deemed doubtful cases. It is certainly difficult to understand how the taxation of a district can be defended, whose people have no voice in voting it, in selecting the purposes, or in expending it." Cooley on Taxation (2d ed.), p. 160.

In *Maryland*, an act authorizing a city to levy and collect a tax upon property adjacent thereto, for the purpose of defraying the expense of laying out streets within the city, has been held to be constitutional. *Brooks v. Baltimore*, 48 Md. 265.

3. *People v. Wilkerson*, 1 Idaho N. S. 619.

4. In *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196, the court held valid a law which imposed a tax upon the gross earnings of a railroad in lieu of all other

taxes, and which apportioned the tax thus levied to the different counties in proportion to the number of miles of road in each. The court, by Rothrock, J., said: "The power of the legislature to fix the *situs* of property for the purpose of taxation is not confined to personal property alone; it exists as to real property also." The practical effect of this decision was to give to certain localities the equivalent of a tax levied upon property outside of their jurisdiction, and to prevent them from taxing the property of the road which was within their jurisdiction. See also *People v. Fredericks*, 33 How. Pr. (N. Y.) 150; *Taylor v. Secor*, 92 U. S. 575.

5. An unorganized county may be attached to another county for revenue purposes, and taxes made payable to the treasurer of the latter county. In that case, a tax sale by the treasurer of the former county would be void. *Collins v. Storm*, 75 Iowa 36.

6. A road tax on unseated land assessed and payable by a county to a township, before the division of it, is still payable to the same township, though the land lies in a new township. *Barnett Tp. v. Jefferson County*, 9 Watts (Pa.) 166.

Where an assessment of real estate was made upon the date fixed by statute, and, before the completion of the assessment, that portion of the town in which such real estate was situated was set off to another town, the court held that the owner remained liable, nevertheless, upon the original assessment. *Harman v. New Marlborough*, 9 Cush. (Mass.) 525. See also *Swift v. Newport*, 7 Bush (Ky.) 37.

7. *People v. Wilkerson*, 1 Idaho N. S. 622.

Where, under such a statute, a farm lying in two adjoining towns has been

fact does not affect the owner's liability on an assessment rightly made.<sup>1</sup>

*b. LAND LYING IN TWO DISTRICTS.*—It is competent for the legislature to provide that a tract of land extending over two or more districts shall be taxed as a whole in one of them.<sup>2</sup> Such provision is often made by enacting that the whole shall be assessed at the residence of the owner or occupant,<sup>3</sup> or in the district in

assessed and taxed in both towns, the owner and occupant may maintain an action in the nature of a bill of interpleader against the two collectors, to determine in which town his farm is properly taxed. *Dorn v. Fox*, 61 N. Y. 264.

1. *Welty on Assessments*, §§ 34, 46.  
2. *Welty on Assessments*, § 32; *Hairs-ton v. Stinson*, 13 Ired. (N. Car.) 479. But see *Weeks v. Gilmanton*, 60 N. H. 500, which held that a provision that on the division of a town, each tract through which the divisional line passed and on which the owner lived, should be taxed, was not a proper act of legislation, and long acquiescence did not estop either town from questioning it.

A bridge across a navigable stream, separating two states, may be taxed in each state, one approach by the one and the other approach by the other. *Keokuk Bridge Co. v. People*, 145 Ill. 596; *State v. Metz*, 29 N. J. L. 122. And a boom consisting of a permanent line of piers extending across a river, with logs fastened thereto with iron chains, may be taxed as real estate; that part within the limits of one town, in that town; that within the limits of the other town, in such other town. *Hall v. Benton*, 69 Me. 346.

3. *State v. Hoffman*, 30 N. J. L. 346; *State v. Reinhardt*, 31 N. J. L. 218; *State v. Hay*, 31 N. J. L. 275; *State v. Jewell*, 34 N. J. L. 259; *State v. Jones*, 39 N. J. L. 246; *State v. Britton*, 42 N. J. L. 103; *State v. Dally*, 47 N. J. L. 84; *State v. Washer*, 51 N. J. L. 122; *Stewart v. Flummerfelt*, 53 N. J. L. 540; *Saunders v. Springsteen*, 4 Wend. (N. Y.) 429; *Dorn v. Backer*, 61 N. Y. 261, *overruling* 61 Barb. (N. Y.) 597; *People v. Gaylord*, 52 Hun (N. Y.) 335; *Tebo v. Brooklyn*, 134 N. Y. 341; *Hughey v. Horrel*, 2 Ohio 231; *Barger v. Jackson*, 9 Ohio 163; *Bausman v. Lancaster County*, 50 Pa. St. 208.

Land lying in different counties, though in separate tracts divided by a river, will be taxed in the county

where the owner resides, if it was conveyed by one deed. *People v. Wilson*, 125 N. Y. 367.

To be an "occupant," one must have such possession as would enable him to maintain an action for trespass without the aid of a paper title. *State v. Abbott*, 42 N. J. L. 111.

If the town line passes through the owner's house, his residence is in that town in which the most necessary part of the house is situated. *Judkins v. Reed*, 48 Me. 386.

In *New York*, if a town line divides a farm, and the owner resides in one of the towns, but not on the farm, and works the farm, it is taxable in the town where he lives. *People v. Gaylord*, 52 Hun (N. Y.) 335. See also *People v. Wilson*, 52 Hun (N. Y.) 388.

In *New Jersey*, where a farm, made up of land which was formerly two separate farms, upon each of which were buildings, is divided by a township line and the owner resides on, and tills the land in, one township, and another, by agreement with him, lives on and tills that in the other on shares, the whole farm is taxable to the owner in the township of his residence. *State v. Washer*, 51 N. J. L. 122. But where a farm so divided, is occupied entirely by the tenant, it is taxed at his residence as a whole, even if the owner resides in the other township but not on the farm. *State v. Britton*, 42 N. J. L. 103.

If the farm is under the control of the owner, who does not live upon it, but is cultivated by a tenant on shares, it is held to be in the possession of the owner and taxable at his residence. *State v. Hoffman*, 30 N. J. L. 346; *State v. Hay*, 31 N. J. L. 275; *State v. Jewell*, 34 N. J. L. 259.

The "five county act" of 1869, requiring all lands to be taxed in the township wherein they lie, repeals by implication the requirement of *New Jersey* Law of 1866, that an occupied farm or lot lying partly in one township and partly in another, shall be

which the greater part of the improvements are.<sup>1</sup> Such a provision will apply to the land of a partnership<sup>2</sup> or corporation, as well as to the land of an individual.<sup>3</sup> The benefit of such an enactment cannot be claimed as a right by the owner; it merely grants a privilege to the public authorities, who may, if they see fit, assess each piece in the district in which it lies.<sup>4</sup> They must, however, follow the law closely. If they assess the land as a whole in the wrong county, the assessment will be void.<sup>5</sup>

**3. Taxes on Personal Property**—*a. GENERAL RULE.*—In the taxation of personal property, two inconsistent doctrines often come into conflict; the one, *mobilia sequuntur personam*, demanding that the property shall be taxed at the owner's domicile, on the theory that personalty has no other *situs*; the other, that it shall be taxed like real property, where it is situated. Ordinarily the first rule will prevail, and, as a general rule, personal property is taxable at the domicile of its owner.<sup>6</sup> This is often so provided

assessed in the township where the occupant resides. *State v. Jones*, 39 N. J. L. 246.

1. The *Georgia* Code, § 829, provides that a plantation lying on the line between two counties shall be taxed in the one where the most improvements are. But where land belonging to the estate of a decedent and lying across the line had been divided into parcels by the executors, the court held that the land was not cultivated and carried on as one plantation, so as to come within this section of the act. *Robson v. Du Bose*, 79 Ga. 721.

2. In case of a partnership association formed under *New Jersey* Act of 1880, the residence in question is that of its principal office. If that is in neither county in which the land lies, the provision does not apply and the land cannot be taxed as a whole under *New Jersey* Revision, p. 1152, pl. 65, even though two of the members of the partnership association reside on the land. *Stewart v. Flummerfelt*, 53 N. J. L. 540.

3. *State v. Warford*, 37 N. J. L. 397.

4. *Patton v. Long*, 68 Pa. St. 260.

5. *Dorn v. Backer*, 61 N. Y. 261, *reversing* 61 Barb. (N. Y.) 597.

6. Cooley on Taxation (2d ed.), pp. 56, 372; Burroughs on Taxation, § 40; Sangamon, etc., R. Co. v. Morgan County, 14 Ill. 163; 56 Am. Dec. 493; Hooper v. Baltimore, 12 Md. 464; Phelps v. Thurston, 47 Conn. 477; People v. Campbell, 138 N. Y. 543; Salem Iron Factory Co. v. Danvers, 10 Mass. 514; Amesbury Woolen, etc.,

Mfg. Co. v. Amesbury, 17 Mass. 461; Wilson v. New York, 4 E. D. Smith (N. Y.) 675; State v. Bishop, 34 N. J. L. 45; People v. Chenango County, 11 N. Y. 563; State v. Bentley, 23 N. J. L. 532; State v. Rahway, 24 N. J. L. 56; Newark City Bank v. Assessor, 30 N. J. L. 13; Mygatt v. Washburn, 15 N. Y. 316; Com. v. American Dredging Co., 122 Pa. St. 386; Bemis v. Boston, 14 Allen (Mass.) 366.

In *Flanders v. Cross*, 10 Cush. (Mass.) 514, the court held that a building, owned by a non-resident but standing by license upon land in the state, could not be assessed and sold as personal property by the county in which it was situated, and that a purchaser entering under such sale would be a mere trespasser. Compare *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa 407.

Personal property not in the possession of a tenant, is to be taxed in the town in which the owner resides. And it makes no difference that the person assessed consented that the property should be set to him in the list of a town in which he does not reside, and that he gave to the listers, in such town, a list specifying the particular property therein. *Blood v. Sayre*, 17 Vt. 609.

A statute, requiring the owner of personal property moving into a state, to list his property in the town in which he resides, refers to the moving of the owner, and not of the property, into the state. *Johnson v. Lyon*, 106 Ill. 64. But see, as holding the view that the personal property of residents situated without the state cannot be

by statute.<sup>1</sup> The state, may, however, and often does, make it taxable at its actual *situs*.<sup>2</sup> The fact that double taxation may result from assessment in two states does not affect the validity of the assessment.<sup>3</sup> If the property has no *situs*—either actual or constructive—within the state, it cannot be taxed.<sup>4</sup> If it has a double *situs*, the legislature may choose between them.<sup>5</sup> The domicile at the time of the completion of the assessment rolls determines the place of taxation of property taxable at the place of the domicile;<sup>6</sup> similarly, the location of the property on that day, if the property is taxed at its *situs*.<sup>7</sup> Neither removal from

taxed at domicile, *Matter of Swift's Estate*, 137 N. Y. 77.

Under the *Illinois* revenue law of 1853, farming implements, stock, etc., upon a farm, must be listed in the town, county, or district where the owner resides, wherever the property be in fact. *King v. McDrew*, 31 Ill. 418.

Under 1 *New York* Rev. Stat. 908, § 5, chattels and capital owned and employed out of the state, by a resident, are liable to taxation as much as if situated or employed within the state. *People v. Tax Com'rs*, 33 Barb. (N. Y.) 116.

Under section 563 of the *Tennessee* code, relating to the taxation of slaves, slaves had to be assessed to the owner in the county where he resided, whether in his possession or not, and whether in the same county or not. *Brown v. Greer*, 3 Head (Tenn.) 695.

1. Thus, the *Massachusetts* statute defines personal estate for the purpose of taxation to include "goods, chattels, money and effects, wherever they are," etc. Supplement to Public Statutes (1890), p. 744.

2. *Dillon on Municipal Corporations* (4th ed.), § 786; *Welty on Assessments*, § 34; *Mills v. Thornton*, 26 Ill. 300; 79 Am. Dec. 377; *State v. Ross*, 23 N. J. L. 517; *People v. Tax Com'rs*, 23 N. Y. 224; *People v. Gardner*, 51 Barb. (N. Y.) 352.

A portable sawmill and a yoke of oxen kept in a county for three years by a resident of another county, are taxable in the former county. *Trammell v. Conner*, 91 Ala. 398.

An owner of personal property who, to escape taxation in one state, asserts that the *situs* of his property is in another state, cannot avoid taxation thereon in the latter state on the ground that he is a resident of the former. *Bowman v. Boyd*, 21 Nev. 281.

3. *Leonard v. New Bedford*, 16 Gray (Mass.) 292.

Where a steamboat owned by residents of *New York* was employed as a passenger and freight boat between San Francisco and Sacramento, the court held that the steamer was taxable as property in *California*, although the owner had been already taxed therefor in *New York*. *Minturn v. Hays*, 2 Cal. 590.

4. *Cooley*, Const. Lim. (6th ed.) 615; *Corn v. Cameron*, 19 Mo. App. 573.

5. *Vail v. Runyon*, 41 N. J. L. 98. An assessment of personal property to its owner at his residence, is not void for want of jurisdiction, although it is by law properly assessable in another county because of its relation to a business carried on by the owner in such county. *Clarke v. Stearns County*, 47 Minn. 552.

6. *Welty on Assessments*, § 35; *Lyman v. Fiske*, 17 Pick. (Mass.) 231; 28 Am. Dec. 293; *Mygatt v. Washburn*, 15 N. Y. 320.

In *Hilgenberg v. Wilson*, 55 Ind. 210, it was held that the fact that a person owning personal property had been assessed thereon for taxation for state and county purposes, would not prevent his being assessed upon the same property for city purposes, upon his removing with such property into a city of the county where he had been so assessed prior to the time of the completion of the assessment of a city tax.

One who comes into the State of *Georgia* after the first day of April of any year, and who has no property therein before or at that time, is not liable to either state or county taxes for that year. *White v. State*, 51 Ga. 252. But in *New Jersey*, the day of commencing the assessment determines the place. *State v. Bishop*, 34 N. J. L. 45.

7. *Wangler v. Black Hawk County*, 56 Iowa 384; *Oregon Steam Nav. Co.*

the district, taking the property out of the district, nor changes in the lines of the district after that time, will divest the liability for the tax.<sup>1</sup>

(1) *Domicile*—(See also DOMICILE, vol. 5, p. 857).—The question of domicile in matters of taxation, as in other connections, is one of fact,<sup>2</sup> the burden of proving which rests on the public body seeking to collect the tax.<sup>3</sup> If the facts show that the domicile is in a given place, it is there presumed to remain, although the taxpayer has formed an intention to remove, an actual removal being necessary to a change of domicile.<sup>4</sup> If a removal

*v. Portland*, 2 Oregon 81; *Pueblo County v. Wilson*, 15 Colo. 90.

Cotton shipped out of the state prior to the date of the assessment is not taxable. *Colbert v. Leake County*, 60 Miss. 142. See also *Templeton v. Levee Com'rs*, 16 La. Ann. 117. And where the owner removed all his stock of goods and closed up his store prior to the date of the assessment, he was held not taxable. *Field v. Boston*, 10 Cush. (Mass.) 65.

In *Pueblo County v. Wilson*, 15 Colo. 90, the court construed the *Colorado* statute which provided for the assessment of horses and cattle running at large in the county in which they are being herded or kept upon a certain day.

1. If, after a tax has been raised and assessed on the inhabitants of a district, part of the district is set off into another district, the inhabitants of such remain liable to pay the tax, the liability being fixed by the assessment. *Waldron v. Lee*, 5 Pick. (Mass.) 323. But a removal of the property from the taxing district after the assessment has been made, will not relieve the owner from liability to pay the tax already imposed, even though the owner subsequently pays a tax elsewhere. *People v. Holladay*, 25 Cal. 300; *DeArman v. Williams*, 93 Mo. 158. Nor after a levy thereon under the provisions of a statute. *State v. Easterbrook*, 3 Nev. 173. And in *Warren v. Werner*, 14 Wis. 366, where, after due service of the notice required by law to be given by the assessor, the owner of personal property, within the ten days thereafter allowed for listing his property, removed to another town, he was not thereby relieved from his liability to pay the tax imposed in the former town. See also *Barber v. Potter*, 8 R. I. 15.

2. *Lyman v. Fiske*, 17 Pick. (Mass.) 234; 28 Am. Dec. 293. Hence, for the

jury, *Bailey v. Buell*, 59 Barb. (N. Y.) 158. The facts sufficient to constitute domicile have been stated under the head of DOMICILE, vol. 5, p. 857. Some additional cases are here noted. One residing in *Rhode Island* from April to December and there voting and taxed, cannot be taxed on personal property in *New York*, although he lives there in a hired house from December to April. *People v. Barker*, 70 Hun (N. Y.) 397. See also *Kellogg v. Oshkosh*, 14 Wis. 623; *Carnoe v. Freetown*, 9 Gray (Mass.) 357.

An unmarried man is properly taxed in the county where he spends most of his time, and where his interests are, notwithstanding the fact that he keeps trunks and clothing in another county. *King v. Parker*, 73 Iowa 757. See also *Cabot v. Boston*, 12 Cush. (Mass.) 52; *Lee v. Boston*, 2 Gray (Mass.) 484; *Cochrane v. Boston*, 4 Allen (Mass.) 177.

3. A town which taxes a man as a resident, takes upon itself the burden of showing that he is such, if the right is questioned. *Cooley on Taxation* (2d ed.), p. 372; *Hurlburt v. Green*, 41 Vt. 490.

Consent to be taxed has been held not to affect the matter, if he is not in fact a resident. *Blood v. Sayre*, 17 Vt. 609.

4. *Stoddert v. Ward*, 31 Md. 562; 100 Am. Dec. 83; *Pickering v. Cambridge*, 144 Mass. 244.

In *Finley v. Philadelphia*, 32 Pa. St. 381, *Lowrie, C. J.*, said: "Clearly the liability to taxation does not depend upon the intention of any one relative to his domiciliation, for this would make the state's power of taxation dependent, in numberless cases, on the pleasure of the persons proposed to be taxed. Residence is a definite and obvious fact, and is of itself a sufficient ground of liability." *Otis v. Boston*, 12 Cush. (Mass.) 44.

The fact that a person was taxed in

with intention to remain is shown, it is immaterial what the purpose of the person removing was, even though his only object was to secure a lower rate of taxation.<sup>1</sup> One who has thus removed cannot, by still considering himself a resident at his old home and putting in a list there, avoid acquiring the new domicile.<sup>2</sup> A mere transient cannot be taxed.<sup>3</sup> A man's home, not his place of business, determines his domicile.<sup>4</sup> It is undoubtedly true, as a general principle, that a person must have some domicile,<sup>5</sup> and that a domicile once acquired remains until a new one is secured.<sup>6</sup> As far as taxation purposes are concerned, however, some courts have made an exception and held that one, by removing with intention to acquire a new domicile in another state, and having actually left the former state, loses his domicile, although he has in fact not acquired another. This doctrine doubtless rests upon the ground that the state has lost jurisdiction by the removal.<sup>7</sup> But

the town to which he has removed, is not competent evidence to show that he did not continue to be taxable in the town of his former residence. *Mead v. Boxborough*, 11 Cush. (Mass.) 362.

1. *People v. Caldwell*, 142 Ill. 434.

2. One who has removed from one township to another, and for the purpose of evading the payment of taxes in the latter, mails a schedule of his personal property to the assessors of the former township and pays taxes thereon in such township, is not relieved thereby from liability to taxation on such property in the township to which he has removed. *Mahany v. People*, 138 Ill. 311.

3. An individual is to be taxed in the place of his domicile or home, and not where he is personally residing for a mere temporary purpose, having a home in some other place. *Moore v. Wilkins*, 10 N. H. 452.

A person having a permanent residence, where he votes and pays taxes, is not subject to taxation in another place merely because he spends a few months there during the year visiting relatives. *People v. Barker*, 63 Hun (N. Y.) 630.

One coming to a state with his family and servants for a part of the year to reside in a house owned by him, does not thereby become a resident. *State v. Ross*, 23 N. J. L. 517.

A, who had emigrated to *Canada* many years before, after living there five years became a peddler, and as such traveled through *Ohio*, where he loaned money. To look after his interests, and as peddler, he visited the state as often as once a year, but car-

ried his securities with him wherever he went. It was held that he was not a resident of *Ohio*. *Grant v. Jones*, 39 Ohio St. 506.

The hiring of a yard, storage and sale of lumber therein, and erection of a small building thereon, for use of employes, does not subject a tenant to taxation there. *Loud v. Charlestown*, 103 Mass. 278.

4. *Welty on Assessments*, § 37.

5. See *DOMICILE*, vol. 5, p. 850.

6. *Matter of Nichols*, 54 N. Y. 66.

Where a taxpayer removes from one taxing district to another, and claims to have acquired a domicile in the latter district, the burden rests upon him to establish a residence therein so permanent as to exclude the existence of an intention to make a domicile elsewhere. *Hartford v. Champion*, 58 Conn. 268.

7. One who abandons his residence in the commonwealth before the first of May, with the fixed intention not to return, and has actually left the commonwealth, is not taxable on his poll and personal property there, although he may be still on the way to his new domicile. *Colton v. Longmeadow*, 12 Allen (Mass.) 598. To the same effect is *Briggs v. Rochester*, 16 Gray (Mass.) 337. The above cases are criticised in *Borland v. Boston*, 132 Mass. 89; 42 Am. Rep. 427.

The case of *Mead v. Boxborough*, 11 Cush. (Mass.) 362, held that if an inhabitant of a town removes to another town in the state, not intending to remain there permanently nor to return to his former home, he loses his domicile in such former home.



it must be said, in this connection, that the weight of authority is, however, the other way.<sup>1</sup>

(2) *Residence, Inhabitaney, etc.*—(See also INHABITANT, vol. 10, p. 770; RESIDENCE, vol. 21, p. 122).—The statutes often provide that taxation of personalty shall be at the residence of the owner. The definition of the term "residence," is elsewhere given.<sup>2</sup> It must be a fixed and permanent home, as distinguished from a temporary abiding place.<sup>3</sup> One may have two places of residence,<sup>4</sup> in which case the assessors, unless restrained by the terms of the statute, may choose between them.<sup>5</sup> If the owner lives on a farm lying in two counties, his only residence is in the county where his house is situated.<sup>6</sup> The question of residence, like that

1. *Borland v. Boston*, 132 Mass. 89; 42 Am. Rep. 427; *Matter of Nichols*, 54 N. Y. 62.

An inhabitant of the commonwealth who removes from the town of his residence, with the intention of never residing there again, and of removing to another state, is still, so long as he remains in the commonwealth, liable to taxation in that town, until he acquires another domicile. *Bulkley v. Williamstown*, 3 Gray (Mass.) 493.

An inhabitant of A left that place on March 30, with the intention of residing in C. On April 1, he arrived at B and the next day reached C, where he established his residence. It was held that, for the purpose of taxation, he was to be deemed an inhabitant of A on April 1, and was liable to taxation there. *Littlefield v. Brooks*, 50 Me. 475.

Under a *Minnesota* statute in force in 1876, imposing a tax upon "all personal property of persons residing" within the state, in reference to the quantity of property held or owned by such residents on May 1st, 1876, it was held that the personal property of one who had been a resident of the state, but who was *in itinere* on May 1st, for the purpose of making New York City the place of future residence, was subject to taxation under the statute. *McCutchen v. Rice County*, 2 McCrary (U. S.) 337.

2. See RESIDENCE, vol. 21, p. 122.

In *New Jersey*, the residence required to make one liable to a personal tax in a particular township or ward, is precisely the same in kind as that which will entitle him to vote there. *State v. Casper*, 36 N. J. L. 367.

In *Douglass v. New York*, 2 Duer (N. Y.) 110, the plaintiff resided during a

part of the year in *New York*, and was there taxed upon his personal property. The statute provided that every person should be taxed in the town or ward where he resided, for all his personal property. The court held that the plaintiff had a residence in *New York* for the purpose of taxation, although his domicile was elsewhere. This case is almost identical with *Bartlett v. New York*, 5 Sandf. (N. Y.) 44.

3. *Culbertson v. Floyd County*, 52 Ind. 361.

4. See RESIDENCE, vol. 21, p. 124.

5. *Bell v. Pierce*, 51 N. Y. 16, *affirming* 48 Barb. (N. Y.) 51.

A person taxable in a city under the *New York* statute declaring a person's residence, if he resides in two or more places during any one year, to be where his principal business is transacted, is taxable in the ward in the city where he resides. *Bowe v. Jenkins*, 69 Hun (N. Y.) 458. See also *Thayer v. Boston*, 124 Mass. 132; 26 Am. Rep. 650; *Wade v. Matheson*, 4 Lans. (N. Y.) 158; *Mann v. Clark*, 33 Vt. 55; *Church v. Rowell*, 49 Me. 367.

6. Personal property of one owning a farm lying partly in two counties, is taxable only in the county where the house in which he lives is located, under *Illinois* Revenue Act, ch. 120, § 7, making such property taxable in the county, town or district where the owner resides. *People v. Caldwell*, 142 Ill. 434.

In *Judkins v. Reed*, 48 Me. 386, the town line passed through the house of the plaintiff, and the court held that he was a resident of, and taxable in, that town in which the larger, as well as the most indispensable part of his house was situated.

In *Cheney v. Waltham*, 8 Cush.

of domicile, is one of fact to be proved by competent evidence. The assessor's list is not admissible against the party taxed.<sup>1</sup> The home of the taxpayer is his residence—not his place of business.<sup>2</sup> If one's residence is in a certain place for all other purposes, it is his residence for taxation purposes also.<sup>3</sup>

Taxes are often imposed on "inhabitants." The term "inhabitaney" is broader than domicile.<sup>4</sup> This question, like that of domicile, is one of fact, the burden of proving which is on the corporation taxing.<sup>5</sup>

"Actual place of abode," is another phrase often used in the tax laws.<sup>6</sup>

6. **TANGIBLE PERSONAL PROPERTY**—(1) *In General*.—Tangible personal property is assessed sometimes at the domicile of the owner;<sup>7</sup> sometimes at the place where it is situated.<sup>8</sup>

Money, while a mere medium of exchange, is, so far as taxation

(Mass.) 327, where a dwelling house was divided by a boundary line, the court held that the owner would be considered a resident of that town in which he performed those offices which mainly characterized his home (such as sleeping, eating, sitting, and receiving visitors), and that he had no right to elect to reside and to be taxed for his personal property in the other town.

1. *Gregory v. Bugbee*, 42 Vt. 480.

2. *Nugent v. Bates*, 51 Iowa 77; 32 Am. Rep. 117.

3. *Meserve v. Folsom*, 62 Vt. 504.

4. *Welty on Assessments*, § 36; *Burroughs on Taxation*, p. 44. A stranger coming into a town, becomes liable to a license tax as an "inhabitant and member of the corporation." *Wilmington v. Roby*, 8 Ired. (N. Car.) 254.

5. *Lyman v. Fiske*, 17 Pick. (Mass.) 231; 28 Am. Dec. 293.

To recover in an action of debt for taxes assessed upon personal property under *Maine Rev. Stat.*, ch. 6, § 12, it must be established that the defendant was an inhabitant of the plaintiff town at the time of the assessment. *Rockland v. Farnsworth*, 83 Me. 228.

6. "Actual place of abode" is where one has his home and family irrespective of business absences. *Arnold v. Davis*, 8 R. I. 341. Under the *Rhode Island* statute, providing that "all ratable personal property shall be taxed in the town in which the owner shall have had his actual place of abode for the larger portion of the twelve months next preceding the first day of April in each year,"—the "larger portion of the twelve months," means more than half of them in duration

of time. *Ailman v. Griswold*, 12 R. I. 339. See also *Green v. Gardiner*, 6 R. I. 242.

Where one moves from his own farm to the town farm in an adjoining district, under contract to carry it on for a year, intending to make it his home for the year and so continue two years thereafter, he is a resident of the latter district, even though he carries on his own farm and expects to return. *Woodward v. Isham*, 43 Vt. 123.

7. See cases in preceding notes.

8. *People v. Holladay*, 25 Cal. 30; *Oakland v. Whipple*, 39 Cal. 112; *Powell v. Madison*, 21 Ind. 335; *Rieman v. Shepard*, 27 Ind. 288; *Eversole v. Cook*, 92 Ind. 222; *Mills v. Thornton*, 26 Ill. 300; 79 Am. Dec. 377; *Dunleith v. Reynolds*, 53 Ill. 45; *Com. v. Gaines*, 80 Ky. 489; *Chauvenet v. Anne Arundel County*, 3 Md. 259; *Leonard v. New Bedford*, 16 Gray (Mass.) 292; *Colbert v. Leake County*, 60 Miss. 142; *State v. Falkinburge*, 15 N. J. L. 320; *State v. Ross*, 23 N. J. L. 517; *Barnes v. Woodbury*, 17 Nev. 383; *Steele v. Walling*, 7 R. I. 317; *State v. Charleston*, 2 Spears (S. Car.) 719. See also *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521. Thus, property consisting of oxen and a portable sawmill, which has been located and used in a certain county for nearly three years, has acquired a *situs* and will be taxed in that county. *Trammell v. Connor*, 91 Ala. 398. Coal sent by the owners to their agents in another state, to be there sold upon its arrival, becomes a part of the general mass of property in that state, and will be taxable. *Brown v. Houston*, 114 U. S. 622.

questions are concerned, a form of tangible personal property.<sup>1</sup> It may be taxed at the owner's domicile, but is generally taxed where it is actually situated.<sup>2</sup>

(2) *Animals*.—The statutes often provide for the taxation of cattle and other animals where they are herded or usually kept.<sup>3</sup>

1. *State v. Earl*, 1 Nev. 397.

2. *People v. Ogdensburgh*, 48 N. Y. 390; *McCutchan v. Rice County*, 2 McCrary (U. S.) 337. "It is property within the state and subject to taxation, it is visible and tangible, and expressly made taxable by statute, and is taxable where situated." *Liverpool Ins. Co. v. Board*, 44 La. Ann. 91. But see *Culbertson v. Floyd County*, 52 Ind. 361.

Money invested in business will be taxed, although the owner is a non-resident. *Matter of McMahon*, 66 How. Pr. (N. Y.) 190. And a law providing for the taxation of the capital of a non-resident is constitutional. *Duer v. Small*, 4 Blatchf. (U. S.) 263. In *Miner v. Fredonia*, 27 N. Y. 155, the court held that banking capital will be subject to taxation in the place where the business of such bank is located, treating this as an exception to the general rule *mobilia sequuntur personam*.

Where a resident of one state has exclusive control and management of money for investment of foreign capitalists, some of which is invested in his state, and the securities are made and held by him in his own name in such state, they are taxable in that state. *Hutchinson v. Board of Equalization*, 66 Iowa 35.

Where a foreign insurance company deposits, with the comptroller of the state, the funds required by statute to enable it to do business, it is liable for taxes upon them. *International L. Assurance Soc. v. Com'rs of Taxes*, 28 Barb. (N. Y.) 318.

3. *Smith v. Mason*, 48 Kan. 586; *Ford v. McGregor*, 20 Nev. 446; *Whitmore v. McGregor*, 20 Nev. 451. Where cattle were owned, herded and managed at the owner's "home ranch" in one county, but were turned out to graze in another county during a part of the year, it was held that they properly belonged in the county where the owner's ranch was for the purpose of taxation. The court in this case said: "But, by assigning to this class of personal property a *situs* for the purpose of taxation, independent of the mere residence of the owner, it does not necessarily follow that the property can be

legally assessed in whatever county it may first be found during the period of assessment." *Barnes v. Woodbury*, 17 Nev. 383. To the same effect is *Ford v. McGregor*, 20 Nev. 446.

The case of *Graham v. Chautauqua County*, 31 Kan. 473, presents a different state of facts. In this case the *Kansas* statute provided for the listing and taxing of cattle where they were usually kept. The cattle taxed were kept about an equal time in each township. There was nothing in the case showing that the owner had a "home ranch" in either township, and nothing to indicate that the cattle were to be taken from the township in which they were assessed, back to the township where the owner claimed they should have been assessed. The court held that the assessment was properly made in the township in which the cattle were found.

In *People v. Townsend*, 56 Cal. 633, the court declared void an act taxing migratory cattle, basing its decision upon the principle that one local community cannot be taxed for the benefit of another, even though all personal property is required to be listed and assessed in the county where it is situated. Nevertheless cattle ranging across the line will be taxed in the county where the owner resides. *Court v. O'Connor*, 65 Tex. 334. But under subsequent legislation, where pastures lie upon county boundaries, cattle are to be taxed in proportion to the pasture land situated in each county. *Nolan v. San Antonio Ranch Co.*, 81 Tex. 315.

In *Hardesty v. Fleming*, 57 Tex. 395, under a statute which provides that all property, real and personal, except such as is required to be listed and assessed elsewhere, shall be listed and assessed in the county where it is situated, it was held that where cattle ranged across the line and were within the state for five months, they were taxable there.

In *Colorado*, cattle and horses purchased outside of the state by residents, and driven into the state for the purpose of pasturage in the month of

(3) *Water Craft*.—The principles governing the taxation of vessels are not essentially different from those controlling the taxation of other personal property.<sup>1</sup> A vessel may be taxed at the domicile of the owner,<sup>2</sup> or at the place where it has its *situs*. This *situs* is at its home port.<sup>3</sup> This will generally be, as well, the place where it is registered or enrolled,<sup>4</sup> but not necessarily so, the location of the home port being a question of fact.<sup>5</sup>

October of a certain year, are not liable for the taxes of such year under *Colorado* Gen. Stat., ch. 94. *Pueblo County v. Wilson*, 15 Colo. 90.

In *Illinois*, live stock belonging to the owner of a farm which lies in two counties, in one of which he lives, and between the portions of which in each county there is no fence, so that the stock may be pastured in either county, is taxable only in the county of his residence under *Illinois* Revenue Act, ch. 120, § 7, making personal property taxable in the county of residence. Section 8, which makes such stock taxable where the farm with which they are connected is situated, when the owner does not reside thereon, does not affect the case. *People v. Caldwell*, 142 Ill. 434.

In *Massachusetts*, horses kept in the only barn upon a farm which lies in two towns, are taxable in the town where the barn is situated, under *Massachusetts* Pub. Stat., ch. 11, § 20, cl. 3, providing that "horses kept throughout the year in places other than those where the owners reside . . . shall be assessed to the owners in the places where they are kept," although the residence of the owner is on the same farm, in the other town, and the horses are used for work upon all parts of the farm. *Pierce v. Eddy*, 152 Mass. 594.

In *Nevada*, cattle are to be taxed in the county where they remain permanently and have their home. *State v. Shaw*, 21 Nev. 222.

In *Wyoming*, horses owned within the territory of the Shoshone Indian Reservation by a white person holding no official position, are taxable by the authorities of *Wyoming* in the county within which they are kept, under U. S. Rev. Stats., § 839, and the treaty of July 3d, 1868. *Torrey v. Baldwin*, 3 Wyoming 430.

1. *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423.

2. In *Hooper v. Baltimore*, 12 Md. 464, the owner of a vessel resided in

Baltimore County and the vessel was registered at the port of Baltimore, from whence she sailed. This was the nearest port of registration and the only one at which she could have been registered. The court held that the ship could not be taxed by the city for municipal purposes. See also *Pelton v. Northern Transp. Co.*, 37 Ohio St. 450.

3. *Dillon on Municipal Corporations* (4th ed.), § 787; *Irvin v. New Orleans, etc.*, R. Co., 94 Ill. 105; *Mobile v. Baldwin*, 57 Ala. 62; 29 Am. Rep. 712; *The Blanchard v. Martha Washington*, 1 Cliff. (U. S.) 466; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Hill v. The Golden Gate, Newb.* (U. S.) 308; *St. Louis v. Consolidated Coal Co.*, 113 Mo. 83; *Wilkey v. Pekin*, 19 Ill. 160; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *People v. Niles*, 35 Cal. 282; *Irvin v. New Orleans, etc.*, R. Co., 94 Ill. 105; *St. Joseph v. Saville*, 39 Mo. 461; *Gunther v. Baltimore*, 55 Md. 457; *Wheeling, etc., Transp. Co. v. Wheeling*, 9 W. Va. 170; 27 Am. Rep. 552.

Boats owned by an unincorporated company in *Ohio*, and used in that state, are taxable in the district in which the company's principal office is located, and in which the managing agent resides. *Pomeroy Salt Co. v. Davis*, 21 Ohio St. 555.

4. *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596.

6. The question of the location of the home port is one of fact. It depends wholly upon the locality of her owner's residence and not upon the place of her enrollment. *St. Louis v. Wiggins Ferry Boat Co.*, 11 Wall. (U. S.) 423.

But see *Roberts v. Charlevoix Tp.*, 60 Mich. 197, where the court held that a vessel enrolled and licensed or registered under the *United States* navigation laws, and owned by a non-resident of the state, does not become subject to the taxing power of the state by engaging in business therein.

The statute may provide, however, that the vessel shall be assessed where it is permanently employed,<sup>1</sup> or where it is registered or enrolled.<sup>2</sup> If the vessel, under the law, is taxable in any one of several places in the same jurisdiction, it can be taxed in one of them only, and any subsequent assessment will be void.<sup>3</sup> It cannot in any event be taxed at a point at which it merely touches or where it remains temporarily only.<sup>4</sup>

(4) *Logs and Lumber*.—(See also LOGS AND LUMBER, vol. 13, p. 1018).—Logs and lumber are liable to taxation like other personal property.<sup>5</sup> If *in transitu*, however, they are not taxable

1. A dredge boat, a tug boat, and mud scows owned by a foreign corporation and brought into *Alabama* for use in fulfilling a dredging contract with the national government, of indefinite duration, with a probability of other contracts to complete the improvement, are taxable within the state, although they are floating property, and although the tug is registered at the port of the owner's domicile. *National Dredging Co. v. State* (Ala. 1893), 12 So. Rep. 720.

2. *Boats*.—Under a statute providing that "all persons . . . in the state owning . . . water-craft, shall be required to list the same for assessment and taxation in the county, township, city, or town in which the same may be enrolled, registered or licensed, or kept when not enrolled, registered or licensed," it was held that an assessment at the domicile of the owner was illegal where the boat was kept and used elsewhere. *Eversole v. Cook*, 92 Ind. 222.

3. The *Illinois* statute provided for the taxation of sailing vessels, steamboats, etc., in the county, town, village or district in which the same may belong or be enrolled, registered or licensed, or kept when not enrolled, registered or licensed. It was held that after a vessel has been rightfully listed in one place, it is not subject to taxation elsewhere. *Halstead v. Adams*, 108 Ill. 609; *Vogt v. Ayer*, 104 Ill. 583.

4. *State v. Haight*, 30 N. J. L. 428; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *New Albany v. Meekin*, 3 Ind. 480; 56 Am. Dec. 522; *Mobile v. Baldwin*, 57 Ala. 61; 29 Am. Rep. 712; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 431, *reversing* 40 Mo. 580; *People v. Niles*, 35 Cal. 282; *Wilkey v. Pekin*, 19 Ill. 160. But see *Oakland v. Whipple*, 39 Cal. 112.

In *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596, Nelson, J., said: "We are satisfied that the State of *California* had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the personal property of the state; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

5. *Logs and Lumber*.—Posts, ties, and poles, kept for sale, are taxable as "merchant's goods, wares and commodities" under the *Wisconsin* statute, in the county where kept for sale, irrespective of the residence of the owner, although sales thereof are actually made in another county where the owners reside and do business as merchants. *Torrey v. Shawano County*, 79 Wis. 152; *Mitchell v. Plover Tp.*, 53 Wis. 548; *Sanford v. Spencer*, 62 Wis. 230; *Washburn v. Oshkosh*, 60 Wis. 453.

In *Michigan*, logs in camp are taxable at the place where the camp is located, if there is an office there receiving funds and making returns to headquarters. *Ryerson v. Muskegon*, 57 Mich. 383.

Logs left by an *Iowa* company in a bayou on the *Illinois* side of the Mississippi river for safe-keeping are taxable in *Illinois*. *Burlington Lumber Co. v. Willets*, 118 Ill. 559.

Fire wood, pulp wood and kiln wood cut from wild land in a town, by a resident thereof, and carried prior to April 1st to a landing situated on the track, to stay there till sold, and which is in part shipped to other parts and in part sold to local parties in the course of the year, is "personal property employed in trade," and taxable in such

at the place where they are situated.<sup>1</sup> In order to be *in transitu*, they must have actually started on their journey.<sup>2</sup> The mere fact that they are intended for shipment is not enough.<sup>3</sup> If delivered to the common carrier, or at the starting point on the ice or in the water, ready for immediate moving, their journey has begun.<sup>4</sup>

Standing, growing trees are a part of the realty and can be taxed only where it lies.<sup>5</sup>

(5) *Property in Transitu or Temporarily Present*.—In order to be taxed at a place other than the owner's domicile, an article of personality must be a part of the property of the place. It must be

towns under *Maine* Rev. Stats., ch. 6, § 14, providing that such property shall be taxed in the town where so employed on April 1st. *Gower v. Jonesboro*, 83 Me. 142.

In *Standard Oil Co. v. Combs*, 96 Ind. 179; 49 Am. Rep. 156, the court held that staves, purchased by a non-resident, and remaining in the state to receive a finishing process before shipment to another state, were taxable within the state.

Lumber on the premises of the manufacturer, awaiting transportation to the vendee, is not taxable where it is, as in a place of "storage," although the title is passed, especially if anything remains to be done to complete the transfer. *Osterhout v. Jones*, 54 Mich. 228.

1. LOGS AND LUMBER, vol. 13, p. 1049.

2. Logs, cut, hauled, and piled on the ice, to await the opening of a river, and to be floated then to another state, are not in transit, and so exempt in the state where cut and piled. *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54.

3. In *Coe v. Errol*, 116 U. S. 517, certain logs were cut in *New Hampshire*, and hauled down and deposited in and on the banks of a stream, for the purpose of being floated down the river into another state, but, by reason of low water, were delayed there nearly a year and taxed by the township in which they lay. The court held that, aside from the owner's intent to export them, the logs were not in course of commercial transportation.

4. Logs cut by contractors and delivered in a lake for convenience in storage, but for no definite time, whence the owners had contracts to transport them to another place, are in transit to the latter place, and not

taxable at the lake. *Pardee v. Free-soil Tp.*, 74 Mich. 81. See also *Corning v. Masonville Tp.*, 74 Mich. 177.

In *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286, the court held that logs cut and delivered on the ice on a river, where they lie temporarily awaiting transportation down the river, as soon as the ice shall break up, are *in transitu* and cannot be taxed. And in *Blount v. Munroe*, 60 Ga. 61, it was held that a tax could not be imposed upon lumber awaiting shipment in the hands of an exporter, which was actually shipped immediately afterwards, as such a tax would be in violation of the constitutional prohibition against a tax upon imports or exports. See also *Clarke v. Clarke*, 3 Woods (U. S.) 408.

*Michigan*.—Lumber piled at a railway station simply for shipment is not taxable as property in storage. *Monroe v. Greenhoe*, 54 Mich. 9.

Logs piled by the side of a railway track for shipment, but not actually in transit, are within the *Michigan* statute providing that property so piled shall not be deemed *in transitu*, but shall be assessed to the owner in the township where it is situated; and the fact that the contracts have been made with parties to load the logs, or that some event has occurred to prevent shipment, or that it is the owner's intention to ship in the near future, is immaterial. *Maurer v. Cliff*, 94 Mich. 194.

Under the *Michigan* statute, property in transit is taxed at the place of destination, provided that forest products in transit are to be held destined to the sorting grounds of the booming company nearest the mouth of the stream, unless the contrary is made to appear. *Brooks v. Arenac Tp.*, 71 Mich. 231; *Fletcher v. Alcona Tp.*, 72 Mich. 18.

5. *Fletcher v. Alcona Tp.*, 72 Mich. 18.

located there.<sup>1</sup> If it is merely in transit through the place, it cannot be taxed there.<sup>2</sup> This subject, so far as it concerns logs and lumber, has just been considered. The same general principles apply to all kinds of personal property. Here also the mere intention to ship is immaterial. In order to be *in transitu*, the goods must have begun their journey.<sup>3</sup> A delivery to a common carrier is enough, even though the goods have not been physically moved. Unless such delivery can be shown, however, they will not be considered as *in transitu* unless they have been actually launched on their way to their destination. The carrying of the goods to the depot and the leaving them there until a convenient time to move them, do not constitute a part of their transportation.<sup>4</sup> If actually on their journey, mere delay at a point

1. Property which happens to be temporarily within the jurisdiction cannot be taxed there. *People v. Niles*, 35 Cal. 287; *Herron v. Keeran*, 59 Ind. 473; 26 Am. Rep. 87; *Rhyno v. Madison County*, 43 Iowa 632; *Torrent v. Yager*, 52 Mich. 306; *People v. Tax Com'rs*, 23 N. Y. 242; *Bennett v. Birmingham*, 31 Pa. St. 15; *State v. Charleston*, 2 Spears (S. Car.) 719. But see *McCormick v. Fitch*, 14 Minn. 252.

A city ordinance which attempts to impose a license tax upon wagons of outside residents engaged in hauling in and out of the city, is void. *St. Charles v. Nolle*, 52 Mo. 122; 11 Am. Rep. 440.

A traveling circus and menagerie owned by a non-resident and brought into the state to be exhibited at various places, and then taken into other states for the same purpose, will not be subject to taxation within the state. *Robinson v. Longley*, 18 Nev. 71.

In *Com. v. American Dredging Co.*, 122 Pa. St. 386, the court passed upon the validity of a tax imposed upon scows, tug boats, and dredges owned by a resident of the state, but which had never been within it, and which were carried from place to place without the state, for the purpose of dredging; and stated the general rule to be, that personal property of a visible and tangible nature, permanently located within another state, would be taxable where found; but held that the property in question, being in different localities, for short periods of time and for temporary purposes, was properly taxable by the state wherein its owner resided.

2. *Olglvie v. Crawford County*, 2 McCrary (U. S.) 148; 12 Fed. Rep. 196; *Standard Oil Co. v. Bachelor*, 89 Ind.

1; *Monroe v. Greenhoe*, 54 Mich. 9; *Boyce v. Cutter*, 70 Mich. 539; *Brooks v. Arenac Tp.*, 71 Mich. 231; *Pardee v. Freesoil Tp.*, 74 Mich. 81; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286; *Coe v. Errol*, 62 N. H. 303; *Hurley v. Texas*, 20 Wis. 634.

Coal belonging to a non-resident, which is being sent across the state and which is lying at a wharf awaiting assortment and shipment, has no *situs* within the state, and cannot be taxed. *State v. Engle*, 34 N. J. L. 425; *State v. Carrigan*, 39 N. J. L. 35. But grain which has been bought by an agent for a commission and stored in a warehouse where it lies subject to the order of the owner, is not *in transitu* and will be taxable. *Walton v. Westwood*, 73 Ill. 125.

Wood cut in *California* and owned by a citizen of that state, thrown into a river and passing a certain county in *Nevada* on its way to market in another *Nevada* county, is not taxable in the former county. *Conley v. Chedic*, 7 Nev. 336.

3. *Hill v. Graham*, 72 Mich. 659; *Carrier v. Gordon*, 21 Ohio St. 609. But this case is distinguished in *Standard Oil Co. v. Bachelor*, 89 Ind. 1, in which it was held that if goods have in any sense started on their journey, they will not be subject to taxation at a place where they are at a railroad station awaiting shipment.

Where property has been purchased by a non-resident who intends to ship, but is prevented from doing so by the fact that navigation has not opened, it is taxable in the place where it is. *Carrier v. Gordon*, 21 Ohio St. 605.

4. *Coe v. Errol*, 116 U. S. 517; 62 N. H. 303.

Corn owned by a non-resident and

will not render them taxable.<sup>1</sup> When the goods have reached their destination, and have been taken in charge by one rightly asserting control, though not consigned to any specially authorized agent, and not yet unloaded, they may be taxed.<sup>2</sup>

(6) *Construction of Special Statutory Terms.*—The states, in exercising the right to tax property within their limits, frequently provide for the assessment of property, whether of residents or non-residents, employed in business within the state. Such legislation is legitimate.<sup>3</sup> In order to come within the meaning of the phrase “employed in business,” or similar expressions, the business must be other than of a merely temporary character.<sup>4</sup> Such a phrase would include property employed in a banking business.<sup>5</sup> The meaning of other expressions commonly found in statutes is considered in the note.<sup>6</sup> The law may and fre-

temporarily in cribs awaiting transportation, has been held not liable to taxation. There must, however, be a purpose to ship immediately, or at least as soon as transportation can be conveniently obtained, followed by actual shipment within a reasonable time, to exempt the property from taxation. *Ogilvie v. Crawford County*, 2 McCrary (U. S.) 148.

1. *Burroughs on Taxation*, p. 56; *State v. Engle*, 34 N. J. L. 425; *State v. Carrigan*, 39 N. J. L. 35; *Coe v. Errol*, 116 U. S. 517; 62 N. H. 303.

2. *Pittsburgh, etc., Coal Co. v. Bates*, 40 La. Ann. 226; 8 Am. St. Rep. 519.

3. *Duer v. Small*, 4 Blatchf. (U. S.) 263; *Danville Banking, etc., Co. v. Parks*, 88 Ill. 170; *Leonard v. New Bedford*, 16 Gray (Mass.) 292; *Putnam v. Fife Lake Tp.*, 45 Mich. 125; *McCoy v. Anderson*, 47 Mich. 502; *Taylor v. Love*, 43 N. J. L. 142; *Ament v. Humphrey*, 3 Greene (Iowa) 255; *Lemp v. Hastings*, 4 Greene (Iowa) 448; *Gray v. Kettell*, 12 Mass. 160; *Shaw v. Hartford*, 56 Conn. 351; *Comstock v. Grand Rapids*, 54 Mich. 641.

Where one has a factory, at a state prison, in charge of an agent, and is a jobber of the goods so made at another place, his property at the prison may be taxed under a statute providing that goods of manufacturers in the hands of agents shall be listed where the agent's business is conducted. *Selz v. Cagwin*, 104 Ill. 647.

A private banker living in one place and having a bank in another, is to be regarded as a resident of the latter place, so far as the matter of taxation is concerned. *Miner v. Fredonia*, 27 N. Y. 155.

4. *Tazewell County v. Davenport*, 40 Ill. 197; *People v. Horn Silver Min. Co.*, 105 N. Y. 76.

If the statute provides that non-residents “doing business” in the state shall be taxed on sums invested “in said business,” a tax cannot be assessed against a manufactured article sent into the state merely for sale by an agent. *People v. Tax Com'r*, 23 N. Y. 242.

5. *McCutchen v. Rice County*, 2 McCrary (U. S.) 337.

6. *Property Within the State.*—See *People v. Campbell*, 138 N. Y. 543.

*Goods in Stores, Shops, etc.*—In *Kalkaska Tp. v. Fletcher*, 81 Mich. 446, the statute provided that all goods situate in a township other than where the owner resides, should be assessed in the township where situate, if the owner hired a shop, store, etc., for use in connection with them. The defendants attached a stock of goods and rented a store in which to keep them, under the sheriff's charge, until the termination of the suit. The court held that a tax could not be imposed upon these goods, pending the attachment proceedings, for defendants were neither the owners of the goods at the time of the assessment, nor did they occupy a store within the meaning of the statute.

A building in which ice is stored is not a “store” within the meaning of a statute taxing property of non-residents having stores within the town. *Hittinger v. Westford*, 135 Mass. 258.

*Merchandise or Stock in Trade.*—Cotton cloth in process of being printed and prepared for market, is not “mer-



chandise" or "stock in trade," in the sense of the *Rhode Island* statute. *Woodman v. American Print Works*, 6 R. I. 470.

**Trading, Mercantile, or Manufacturing Business.**—A *Connecticut* statute provided for a tax upon such business, and further prescribed that "the average amount of goods kept on hand for sale during that year . . . shall be the rule of assessment and taxation." It was held that a horse and wagon of a non-resident used in the business, was not liable to taxation. *Shaw v. Hartford*, 56 Conn. 351.

**Stock in Trade, etc.**—In *Massachusetts*, statutory provision is made for the taxation of goods or stock in trade employed in the business of manufacturing or of the mechanic arts, in the place where the owner hires or occupies any store, shop or wharf. *Lee v. Templeton*, 6 Gray (Mass.) 579; *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Amesbury Woollen, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461; *Leonard v. New Bedford*, 16 Gray (Mass.) 292; *Loud v. Charlestown*, 103 Mass. 278; *Barker v. Watertown*, 137 Mass. 227; *Boston Loan Co. v. Boston*, 137 Mass. 332. But the business must be an established and not a transient one. *Hittinger v. Westford*, 135 Mass. 258; *Stinson v. Boston*, 125 Mass. 348; *Huckins v. Boston*, 4 Cush. (Mass.) 543. This provision is applicable to foreign corporations. *Blackstone Mfg. Co. v. Blackstone*, 13 Gray (Mass.) 488. The stock in trade must be actually within the town where the owner occupies a store, in order to be taxable there. *Hittinger v. Boston*, 139 Mass. 17.

The furniture of an inn is only taxable to the inn-keeper at the place of his residence. *Charlestown v. Middlesex County*, 109 Mass. 270. See also *Farwell v. Hathaway*, 151 Mass. 242.

A law similar to that of *Massachusetts* has been enacted in *Maine*. See *Ellsworth v. Brown*, 53 Me. 519.

But cotton stored in warehouses and belonging to a broker who occupies only a desk and desk room, is not taxable within this statute. *Martin v. Portland*, 81 Me. 293. See also *Campbell v. Machias*, 33 Me. 419; *Stockwell v. Brewer*, 59 Me. 286; *Desmond v. Machias Port*, 48 Me. 478.

It is provided in *Massachusetts* that "machinery employed in any branch of manufactures" shall be taxed where situated or employed. It was held,

under the law, that a portable steam sawmill temporarily located in a town on the first day of May, is not so situated or employed, within the meaning of the statute, as to be there taxable; nor can its product in timber or lumber be taxed there, if the owner's temporary occupancy of land with the sawmill is the only evidence that he there occupied a "manufactory, store, shop or wharf." *Ingram v. Cowles*, 150 Mass. 155.

The cutting of ice is not a "manufactory." *Hittinger v. Westford*, 135 Mass. 258.

**Goods Sold.**—In *Shriver v. Pittsburgh*, 66 Pa. St. 446, under a law imposing a tax "on all articles of trade or of commerce sold in the city of Pittsburgh," the court held that a tax was properly imposed upon sales made without the state by agents of parties whose store, warehouses, and business, were located within this city.

**District Where the Business is Usually Done.**—See *Munson v. Crawford*, 65 Ill. 185.

**Merchants' Goods.**—A law taxing "merchants' goods" where situated, covers lumber kept for sale. *Washburn v. Oshkosh*, 60 Wis. 453; *Sanford v. Spencer*, 62 Wis. 230.

**Place of Business.**—A firm has a "place of business" in a town where it has a factory in which it makes starch, which it stores in an adjoining warehouse until sold. Its starch is taxable in that town under *Massachusetts* Pub. St., ch. 11, § 24. *Barker v. Watertown*, 137 Mass. 227. See also *Little v. Greenleaf*, 7 Mass. 236; *Little v. Cambridge*, 9 Cush. (Mass.) 298.

**Property Within the State.**—See *State v. Ross*, 23 N. J. L. 517; *People v. Tax Com'rs*, 23 N. Y. 224; *Boardman v. Tompkins County*, 85 N. Y. 359.

**Property Stored.**—See *Manistique Lumber Co. v. Witter*, 58 Mich. 625; *Hood v. Judkins*, 61 Mich. 575. In this case the property taxed consisted of lumber piled upon land which the owners hired for that purpose and which was kept there until dried, when it was transported to the owner's place of business. *Monroe v. Greenhoe*, 54 Mich. 9, is distinguishable from the above case. Here the lumber was brought to the railroad station for transit, and the owners did not hire any place for storage, but it was piled in the yard of the party who sawed it, merely for the purposes of convenient shipment.

quently does provide that property in the hands of agents may be taxed where it is actually situated.<sup>1</sup>

c. INTANGIBLE PERSONAL PROPERTY — (1) *Debts in General*. — The general rule is that debts follow the person of the creditor, and are to be taxed at his domicile.<sup>2</sup> Some cases conflict with this principle, and regard the debt as property in the hands of the debtor, and therefore taxable at his domicile.<sup>3</sup> A general deposit at a new bank constitutes a debt,<sup>4</sup> and is taxable at the depositor's domicile.<sup>5</sup>

(2) *Negotiable Paper*. — In regard to debts evidenced by bills,

1. *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Brown v. Houston*, 33 La. Ann. 843; *Walton v. Westwood*, 73 Ill. 125; *People v. Caldwell*, 142 Ill. 434; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *McCormick v. Fitch*, 14 Minn. 252; *People v. Bug*, 66 How. Pr. (N. Y.) 242; 13 Abb. N. Cas. (N. Y.) 169; *Boardman v. Tompkins County*, 85 N. Y. 359; *Sanford v. Spencer*, 62 Wis. 230.

2. *DeVignier v. New Orleans*, 4 Woods (U. S.) 206; *People v. Whartenby*, 38 Cal. 461; *Kirtland v. Hotchkiss*, 42 Conn. 426; 19 Am. Rep. 546; *Collins v. Miller*, 43 Ga. 336; *Augusta v. Dunbar*, 50 Ga. 387; *Sivwright v. Pierce*, 108 Ill. 133; *Boyer v. Jones*, 14 Ind. 354; *Herron v. Keeran*, 59 Ind. 472; 26 Am. Rep. 87; *Foresman v. Byrns*, 68 Ind. 247; *Barber v. Farr*, 54 Iowa 57; *Babcock v. Board of Equalization*, 65 Iowa 110; *Thomas v. Mason County Ct.*, 4 Bush (Ky.) 135; *Com. v. Hays*, 8 B. Mon. (Ky.) 1; *Meyer v. Pleasant*, 41 La. Ann. 645; *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015; *Liverpool, etc., Ins. Co. v. Board of Assessors*, 44 La. Ann. 760; *Appeal Tax Court v. Patterson*, 50 Md. 354; *Worthington v. Sebastian*, 25 Ohio St. 10; *Hayne v. Dellesseline*, 3 McCord (S. Car.) 374; *Com. v. Chesapeake, etc., R. Co.*, 27 Gratt. (Va.) 344; *People v. Eastman*, 25 Cal. 601; *Bridges v. Griffin*, 33 Ga. 113; *Johnson v. Oregon City*, 2 Oregon 327; *Connor v. Waxahachie* (Tex. 1889), 13 S. W. Rep. 30; *Ferris v. Kimble*, 75 Tex. 476. Nor will the fact that a debt is reduced to judgment render it taxable within the state where the judgment is obtained. *Meyer v. Pleasant*, 41 La. Ann. 645. In *Webb v. Burlington*, 28 Vt. 188, it was held that a resident of the state might be assessed for stocks of another state which were owned by him.

Stock representing the debt of a city

is not taxable against an owner who lives out of the state. *Baltimore v. Hussey*, 67 Md. 112.

Premiums due a non-resident insurance company are credits having their *situs* at the domicile of the company, and are not taxable elsewhere. *Bailey v. Board of Assessors*, 44 La. Ann. 765.

In *Thomas v. Mason County Ct.*, 4 Bush (Ky.) 135, a debt was held taxable to the creditor, a resident of the state, although the money loaned was employed in business in another state and there taxed.

3. *Bridges v. Griffin*, 33 Ga. 113. But see *Collins v. Miller*, 43 Ga. 336; *Wilcox v. Ellis*, 14 Kan. 589; 19 Am. Rep. 107; *Blain v. Irby*, 25 Kan. 501; *Re Jefferson's Estate*, 35 Minn. 215.

In *Fisher v. Rush County*, 19 Kan. 414, A had conveyed lands situated in another state, and received, as part consideration therefor, four notes secured by a mortgage upon the land sold. The contract for the sale of the land was made in the state where the lands were situated. The notes were made payable in that state and were left there for collection. The court held that the notes were taxable only in the foreign jurisdiction, which would afford the owner his remedies for the collection of the debt, and that the court would not have recourse to a legal fiction to draw the debt into the State of *Kansas*.

If the law requires foreign insurers to deposit state or municipal bonds with the state treasurer, they may be taxed by the state where deposited. *People v. Home Ins. Co.*, 29 Cal. 532.

4. See BANKS AND BANKING, vol. 2, p. 93.

5. *San Francisco v. Mackey*, 22 Fed. Rep. 602; *Horne v. Green*, 52 Miss. 452.

In *San Francisco v. Lux*, 64 Cal. 481, the court said: "It is a settled rule that a general deposit is in effect a

notes, and bonds, there are two lines of decisions. The view which is probably the more logical is that the paper is mere evidence of indebtedness, and that the debt itself can have no actual *situs*, wherever the paper may be; hence the *situs*, in the eye of the law, is, as in the case of ordinary debts, at the residence of the creditor.<sup>1</sup> The other view is that the location of the paper determines the *situs*.<sup>2</sup> If the notes, bills, or bonds in question are in the hands of an agent, they can probably be taxed at the

loan, the relation of the bank and depositor being that of debtor and creditor."

In *Massachusetts*, money deposited in a national bank and bearing no interest, is liable to be taxed to the depositors. *Gray v. Street Com'rs*, 138 Mass. 414. But in *Varner v. Calhoun*, 48 Ala. 178, it was held that gold coin and *United States* treasury notes on deposit in New York City, were not subject to taxation in *Alabama*.

1. This will be so wherever the evidence of indebtedness be kept, so long, at least, as they are not property in the hands of an agent. *Lanesborough v. Berkshire County*, 131 Mass. 424; *Sommers v. Boyd*, 48 Ohio St. 648; *Hunter v. Board of Supervisors*, 33 Iowa 376; *DeVignier v. New Orleans*, 16 Fed. Rep. 11; *Cooley on Taxation* (2d ed.), p. 15; *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300; *New Orleans v. Mechanic's, etc., Ins. Co.*, 30 La. Ann. 876; 31 Am. Rep. 232; *Gold-gart v. People*, 106 Ill. 25; *Territory v. Delinquent Tax List* (Ariz. 1890), 24 Pac. Rep. 182; *Boyd v. Selma* (Ala. 1892), 11 So. Rep. 393.

Notes held by a bank located within the state are taxable by the state, no matter where the makers reside. *State Bank v. Richmond*, 79 Va. 113.

Where notes were kept in a bank vault for protection against fire, the owner is taxable for these at his place of residence. *Ferris v. Kimble*, 75 Tex. 475.

Under a statute taxing property, "actually within" a city, loans made by a non-resident are included, although the notes and mortgages are deposited without the city. *Johnson v. Oregon City*, 2 Oregon 327, *affirming* 3 Oregon 13.

The right to tax debts due to residents by non-residents, may be restricted by the special terms of a statute. Thus in *People v. Gardner*, 51 Barb. (N. Y.) 356, the *New York* supreme court held that a resident of the

state could not be taxed for capital invested in other states, principally in real estate securities, under the *New York* statute, which provided for the taxation of "all lands and personal estate within this state:" that the property on account of which the assessment was made had no actual location or *situs* within the state, for the moneys loaned and the securities taken and held for the payment of the loans, were actually in other states.

Mortgage securities in custody of one's agent residing in other states with authority to reinvest, etc., are not taxable as "personal estate within this state," within *New York* Rev. St. 387, § 1. *People v. Smith*, 88 N. Y. 576.

2. *People v. Home Ins. Co.*, 29 Cal. 533; *Wilcox v. Ellis*, 14 Kan. 588; 19 Am. Rep. 107; *State v. St. Louis County Ct.*, 47 Mo. 594; *Redmond v. Rutherford*, 87 N. Car. 133; *Poppleton v. Yamhill County*, 18 Oregon 377.

But though a mortgage be taxable where found, yet, in the absence of proof that the mortgage was within the county, the record of it cannot be assessed, that being merely a copy. *Galatin Co. v. Beattie*, 3 Mont. 173.

In *Poppleton v. Yamhill County*, 8 Oregon 337, a resident of the state assigned mortgages and notes to persons in another county as security for the payment of a sum of money. The tax board having found this assignment to have been made for the purpose of avoiding taxation and therefore void, the court held that he was taxable therefor in the county of his residence.

In *People v. Ogdensburgh*, 48 N. Y. 390, the agents of the non-resident had in their hands personal contracts belonging to such resident for the sale of lands, and the court held that the money due upon these applications would be taxable in the village where both the lands and the obligations were situated. The court said: "Notes, bonds, and other contracts for the payment of money have always been

agent's residence, under either of the above lines of decisions, as being property in an agent's possession, and hence coming under the general rule governing such property.<sup>1</sup> On this point, however, there is some conflict.<sup>2</sup> The agent must be authorized to do some act in reference to the negotiable paper, however. If the owner keeps exclusive control over it, it is still in his possession. In other words, there must be a *bona fide* agency.<sup>3</sup> While such securities, however, may be taxed at the agent's residence, they may be assessed, at the option of the authorities, at the owner's domicile instead.<sup>4</sup>

regarded and treated in the law as personal property; they represent the debts secured by them, they are the subject of larceny and the transfer of them transfers the debt. If this kind of property does not exist where the obligation is held, where does it exist? It certainly does not exist where the debtor may be and follow his person." But see *Lord v. Arnold*, 18 Barb. (N. Y.) 104.

Where bonds were sent out of the state for safe keeping, and not to avoid taxation, it was held that they were not taxable to the owner within the state. *State v. County Court*, 69 Mo. 454.

1. *Re Jefferson's Estate*, 35 Minn. 215; *People v. Ogdensburgh*, 48 N. Y. 390; *Catlin v. Hull*, 21 Vt. 152; *Redmond v. Rutherford*, 87 N. Car. 122; *State v. St. Louis County Ct.*, 47 Mo. 594; *Redfield v. Genesee County*, 1 Clarke Ch. (N. Y.) 42. So in *Finch v. York County*, 19 Neb. 50, the court held that notes and mortgages in the hands of an agent who managed their collection and reinvestment within the state, acquired a *situs* there for the purpose of taxation. The court said: "The power of the legislature to separate, for purposes of taxation, the *situs* of personal property, whether of a tangible nature, or in the form of choses in action, from the domicile of the owner, is unquestioned, and if such property, in any form, is within its jurisdiction it may tax it," citing *Swallow v. Thomas*, 15 Kan. 68; *Tappan v. Michigan Nat. Bank*, 19 Wall. (U. S.) 490; *Griffith v. Carter*, 8 Kan. 565.

In *Tazewell County v. Davenport*, 40 Ill. 197, the relator, a non-resident, carried on a regular and permanent business of lending money, and remained within the state long enough to transact this business. The court held that his moneys and credits employed in such business, and also money and credits of other persons

residing out of the state, but used and controlled by him as their agent, were subject to taxation within the state.

But it has been held that bonds and notes of a non-resident left in a bank for safe keeping, or in an attorney's hands for collection, or even in his own hands while temporarily sojourning within a state, are not there taxable. *Herron v. Keeran*, 59 Ind. 472.

The notes in any case must be in the actual possession of the agent. *People v. Davis*, 112 Ill. 272.

2. *State v. Gaylord*, 73 Wis. 316.

3. Thus, bonds and mortgages subject to the order and exclusive control of the owner, but left for convenience in the hands of a non-resident agent, were held not to be taxable to the agent at his place of residence. *Boardman v. Tompkins County*, 85 N. Y. 359. Likewise, where the notes in question had been removed outside of the city before the time the assessment was made for the avowed purpose of avoiding taxation. *Johnson v. Oregon City*, 3 Oregon 13. In *Collins v. Miller*, 43 Ga. 336, a note of a non-resident in the hands of his attorney, merely pending the termination of a suit which had been commenced for its collection, was held taxable at the residence of the owner. See also *Herron v. Keeran*, 59 Ind. 472; 26 Am. Rep. 87; *Hunter v. Board of Supervisors*, 33 Iowa 376.

But in *Foresman v. Byrns*, 68 Ind. 247, the court held that debts or loans made to residents of the state by non-residents were not taxable in the hands of the agent who negotiated them, and who in some cases took the mortgages directly to himself as trustee and then transferred the notes, which were made payable to the order of the maker or to bearer, to capitalists or lenders, as opportunity afforded.

4. In *Curtis v. Richland Tp.*, 56 Mich. 478, it was held that securities

(3) *Mortgages*.—A mortgage, so far as taxation is concerned, is a mere security. Hence the question of the *situs* of notes and bonds just discussed is generally held not to be affected by the fact that the paper was or was not secured by mortgage, or, if so secured, by the location of the mortgaged premises.<sup>1</sup> Many authorities have held, furthermore, that any legislation taxing a mortgage debt held by a non-resident is unconstitutional.<sup>2</sup>

in the hands of an agent who resides in a different township from the owner, are taxable in the township where the owner resides; and though, by the provisions of the tax law, these may be taxable in the hands of the agent at his place of residence, yet if the same securities are assessed in both towns, the assessment at the residence of the owner will take precedence.

In *Catlin v. Hull*, 21 Vt. 152, promissory notes and other choses in action belonging to a non-resident, were in the hands of his agent for collection, and for reinvestment of the money collected. Under the *Vermont* statute, which declared subject to taxation, "all debts due from solvent debtors," the court held that these were taxable within the state.

But where mortgage securities were in the hands of agents in other states, for the purpose of collection and reinvestment, the owner, a resident of *New York*, was held not to be taxable in this state. *People v. Smith*, 88 N. Y. 576.

In *Poppleton v. Yamhill County*, 18 Oregon 377, it was held that a board of equalization of a county has no authority to include moneys, notes, or mortgages in an assessment for the purpose of taxation, when such moneys, notes or mortgages have been sent to another state or territory to be loaned out through agents there, and which have been loaned and secured by mortgages on real property at the place where sent, such mortgages being retained by the agent in that place.

1. State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300; *Darcy v. Darcy*, 51 N. J. L. 140; *Kirtland v. Hotchkiss*, 100 U. S. 491; *affirming Kirtland v. Hotchkiss*, 42 Conn. 426; 19 Am. Rep. 546; *Davenport v. Mississippi, etc., R. Co.*, 12 Iowa 539; *State v. Massaker*, 26 N. J. L. 564; *Foresman v. Byrns*, 68 Ind. 247; *Arapahoe County v. Cutler*, 3 Colo. 349. See also *St. Paul v. Merritt*, 7 Minn. 258; *Grant v. Jones*, 39 Ohio St. 506; *Goldgart v. People*, 106 Ill. 25.

In *State v. Earl*, 1 Nev. 394, Beatty, J., speaking of a tax upon money at interest secured by a mortgage on land, said: "The tax, however, . . . is, in the opinion of this court, neither a tax on coin, which is taxed as tangible personal property, a tax on the land mortgage, which is taxed at its value, without regard to the mortgage, nor a tax on the piece or pieces of paper upon which the note and mortgage are written, but it is a tax on a chose in action; in other words, it is a tax on the right which a party has to receive or collect a certain amount of money. Choses in action are intangible, and have no locality separate from the person possessing the power to enforce the right." See also *People v. Eastman*, 25 Cal. 601.

A debt due a non-resident from a resident, although secured by a mortgage upon real estate situated in the Territory of *Arizona*, is not subject to taxation there. *Territory v. Delinquent Tax List (Arizona, 1890)*, 24 Pac. Rep. 182.

In *Bullock v. Guilford*, 59 Vt. 516, it was held that a debt owing a resident evidenced by promissory notes, secured by a mortgage on lands in another state, was taxable within the state, although the mortgagee's interest was taxed as real estate, and the notes and mortgages were kept in the state where the land itself was. Taft, J., said: "The general rule is that a debt follows the person of its owner and has its *situs* at his domicile. The *situs* of a debt is not affected by the locality of the security; it is still with the owner. Taxing the security makes the debt no less a debt than it was before such taxation."

2. In State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300, *reversing Com. v. Cleveland, etc., R. Co.*, 29 Pa. St. 370, it was held that bonds of the corporation owned by a non-resident, though secured by a mortgage on real estate, had no *situs* apart from the holder, for the mortgage, though in form a conveyance, transferred no title,

Some courts, however, proceeding on the theory that a mortgage is an interest in land, have held it taxable in the state where the land lies, although held by a non-resident.<sup>1</sup> Other courts, without going to this extent, have said that if the mortgagee is a resident of the state, but of a district different from that where the land lies, the legislature may authorize the assessment in either district.<sup>2</sup>

but was merely a security for the debt; or in the language of the court "a mortgage being there [in *Pennsylvania*] a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the state as the person of the owner." In this case the court disapproved the reasoning, but affirmed the results of *Northern Cent. R. Co. v. Jackson*, 7 Wall. (U. S.) 262.

This rule, although practically denied by some authorities (in *Pennsylvania*), yet seems to be supported both by principle and the weight of authority. *Railey v. Board of Assessors*, 44 La. Ann. 765; *Liverpool, etc., Ins. Co. v. Board of Assessors*, 44 La. Ann. 760; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268.

In *U. S. v. Erie R. Co.*, 106 U. S. 327, Mr. Justice Field said: "The tax is exacted from the creditor, the party who holds the coupons for interest. No collocation of words can change this fact. And so it was expressly adjudged with reference to a similar tax in the case of *U. S. v. Baltimore, etc., R. Co.*, 17 Wall. (U. S.) 322. . . . The money which paid the interest was, until paid, the property of the company; when it became the property of the bondholders, it was outside of the jurisdiction of the *United States*."

In *Michigan Cent. R. Co. v. Slack*, 100 U. S. 595, the court held valid an act of the *United States* (14 Stats. at Large, 138), which imposed a tax of five per cent. upon the interest payable upon its bonds, the law being specially made applicable to non-residents. This was held to be a tax or excise upon the income of the company, and

of which the interest payable on its funded debt formed a part.

In *Murray v. Charleston*, 96 U. S. 433, the court held that city bonds held by a non-resident alien could not be taxed by the city; basing its decision exclusively upon the ground that the city could not impair the obligation of its contract to pay the debt in full.

In *U. S. v. Baltimore, etc., R. Co.*, 17 Wall. (U. S.) 322, the court held that a tax imposed upon interest payable by a railroad corporation to the city of Baltimore, was a tax upon the property of a municipal corporation, and as it was not the purpose of the legislature in passing this act to impose a tax upon a municipal corporation, this tax could not be enforced.

The supreme court of *Ohio* denied the right of the state to tax a debt secured by a mortgage upon land within the state, although the securities were in the hands of an agent within the state for the purpose of collection. *Myers v. Seaberger*, 45 Ohio St. 232.

1. *Mumford v. Sewell*, 11 Oregon 67; 50 Am. Rep. 462.

A mortgage on land so far partakes of the character of realty that it is competent for the legislature to provide that the mortgage of a non-resident mortgagee shall be taxable where the land is situated. *Detroit v. Board of Assessors*, 91 Mich. 78.

In *Redfield v. Genesee County*, 1 Clarke Ch. (N. Y.) 42, it was held that debts owing to non-residents for the purchase of land within the state, and secured by mortgage, were liable to be taxed in the town and county where the debtor resided, under the *New York* Act of April 27, 1833. See also *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140; *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *Susquehanna Canal Co. v. Com.*, 72 Pa. St. 72; *Pittsburgh, etc., R. Co. v. Com.*, 66 Pa. St. 73.

2. *State v. Runyon*, 41 N. J. L. 105. But see *People v. Eastman*, 25 Cal. 603.

(4) *Miscellaneous Choses in Action*.—Choses in action generally are to be taxed at the domicile of the party whose interest therein is assessed.<sup>1</sup>

(5) *Shares of Stock*.—Shares of stock in a corporation, like other forms of intangible personal property, are taxable at the domicile of the owner,<sup>2</sup> whether the corporation be domestic or foreign,<sup>3</sup> unless the statute provides otherwise.<sup>4</sup> It is competent, however, for the state which grants corporate powers, or permits their exercise, to give to shares of stock a special *situs* for taxation purposes. It may thus provide that the stock shall all be assessed at the place of corporate residence.<sup>5</sup> The place of taxa-

1. *Bradley v. Bauder*, 36 Ohio St. 28; 38 Am. Rep. 547; *People v. Park*, 23 Cal. 138.

Where a non-resident landholder, owning real estate in the state, sells it by an executory contract, and the contract is held in the state by his agent, it is taxable as personalty where it is held. *Redmond v. Rutherford*, 87 N. Car. 122. If contracts are in agent's hands, they are taxable at his domicile. *People v. Willis*, 133 N. Y. 382.

2. *Bradley v. Bauder*, 36 Ohio St. 28; 38 Am. Rep. 547; *Evansville v. Hall*, 14 Ind. 27; *Conwell v. Connersville*, 15 Ind. 150; *Griffith v. Watson*, 19 Kan. 23; *Howell v. Cassopolis*, 35 Mich. 471; *Worth v. Ashe County*, 82 N. Car. 420; *Worth v. Ashe County*, 90 N. Car. 409; *Strong v. O'Donnell*, 10 Phila. (Pa.) 575; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600.

This is so, even though the statute provides that property to be taxable must be "in the city" or "within the city." *Ogden v. St. Joseph*, 90 Mo. 522. But see *contra*, *People v. Tax Com'r*, 4 Hun (N. Y.) 395; *People v. Tax Com'r*, 5 Hun (N. Y.) 200.

In *Connecticut*, under the statute, stock owned by residents in non-resident corporations, whether public or private, is taxable only in case such shares are not taxed in the state where the corporations are located. *Lockwood v. Weston*, 61 Conn. 211.

3. In *Seward v. Rising Sun*, 79 Ind. 351, it was held that a city has the right to tax its citizens for stock owned by them in a foreign railroad company, although a tax has been paid thereon in the state where the corporation is located. See also *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460; *McKeen v. Northampton County*, 49 Pa. St. 519; 88 Am. Dec. 515; *Dwight v. Boston*, 12 Allen (Mass.) 316.

Under a law providing for the assessment of "shares or property in any incorporated company for a bridge or a turnpike road," a resident is liable to be taxed for his stock in a turnpike company of another state. *Great Barrington v. Berkshire County*, 16 Pick. (Mass.) 572. See also *Holton v. Bangor*, 23 Me. 264; *Whitsell v. Northampton County*, 49 Pa. St. 526.

4. *Williams v. Weaver*, 75 N. Y. 30. Under *North Carolina Laws of 1891*, ch. 326, shares of stock in domestic manufacturing corporations must be taxed at the principal office or other place of business of the corporation. *Wiley v. Salisbury*, 111 N. Car. 397.

5. *Cooley on Taxation* (2d ed.), p. 23; *Welty on Assessments*, § 56; *Tappan v. Merchant's Nat. Bank*, 19 Wall. (U. S.) 490.

*Faxon v. McCosh*, 12 Iowa 527, upheld a statute providing that "corporations shall be taxed through the shares of the stockholders, and when stockholders are non-residents, their interest shall be taxed in the county in which is situated the principal business office within the state." The court said: "The interest of each shareholder is property within the jurisdiction of the state. The certificate of shares may be with the owner, but it is only paper evidence of such interest, the property it represents being within reach of the taxing power. The legislature has thought proper to provide that the property of this company, which has its existence by virtue of its enactment, shall bear its proportion of the burden of taxation in this way. Those who seek the benefit of this company, do so with this understanding." See also *Baltimore v. Baltimore City Pass. R. Co.*, 57 Md. 31; *American Coal Co. v. Allegheny County*, 59 Md. 185. But it has been held that the stock

tion of shares of national bank stock has been treated already in connection with the subject of national banks.<sup>1</sup>

d. PLACE AS AFFECTED BY OWNERSHIP AND POSSESSION.—

(1) *In General*.—The general rule as to place, stated above, presupposes that the legal title of the property and the right of possession are in the taxpayer. We are now to consider the effect of title and possession on the subject.<sup>2</sup>

(2) *Corporate Property*.—(See also CORPORATIONS, vol. 4, p. 272a).—The same principles govern the taxation of the property of a corporation as that of private individuals. Its real property is taxable where it lies; its personal property at its corporate residence or at the place where it is located, at the option of the legislature.<sup>3</sup> The subject of corporate residence is elsewhere treated.<sup>4</sup> It is there that a tax on the capital stock is levied, wherever the property represented by it may be.<sup>5</sup>

(3) *Railroad Property*.—Railroad property may be taxed in the same way as other property, namely, real property in the several districts in which it lies;<sup>6</sup> personal property at the principal office of the company.<sup>7</sup> Special provisions are often made for the taxation of railway property, which are elsewhere considered.<sup>8</sup>

(4) *Partnership Property*.—The state may authorize the taxation of the interest of a partner at his domicile, even though the business is conducted in another state.<sup>9</sup> Generally, however, the place where the business is carried on is designated as the place where the personal property of the partnership is to be taxed.<sup>10</sup> It

of banks incorporated by a state, but held and owned by non-resident stockholders, is not subject to the taxing power of the state. *Union Bank v. State*, 9 Yerg. (Tenn.) 490.

1. See NATIONAL BANKS, vol. 16, p. 187.

2. See also *supra*, this title, *Upon Whom Imposed*.

3. Cooley on Taxation (2d ed.), p. 377; *Baldwin v. Trustees of Ministerial Fund*, 37 Me. 369; *People v. McLean*, 80 N. Y. 254; *Louisville, etc., R. Co. v. Com.*, 1 Bush (Ky.) 250; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186.

4. See TAXATION (CORPORATE), vol. 25.

5. *People v. Tax Com'rs*, 51 Hun (N. Y.) 312; *Quincy R. Co. v. Adams County*, 88 Ill. 615.

6. *Dillon on Mun. Corp.* (4th ed.), § 789; *Bakewell v. Police Jury*, 20 La. Ann. 334; *Morgan's Louisiana, etc., R., etc., Co. v. Board of Reviewers* (La. 1887), 3 So. Rep. 507; *Illinois Cent. R. Co. v. Hamilton County*, 73 Iowa 313; *Railroad Co. v. Marion County*, 48 Ohio St. 249.

A railroad company should be considered as a resident of the several towns through which its road extends, within the meaning of the tax laws. And its real estate should not be "assessed as non-resident lands." *People v. Fredericks*, 48 Barb. (N. Y.) 173. Elevated railroads in New York City may be taxed as "lands" or "real estate." *People v. Tax Com'rs*, 82 N. Y. 462.

7. *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384.

8. See TAXATION (CORPORATE), vol. 25.

9. *St. John v. Mobile*, 21 Ala. 224; *Bemis v. Boston*, 14 Allen (Mass.) 366.

10. *St. John v. Mobile*, 21 Ala. 224; *Hoadley v. Essex County*, 105 Mass. 527; *Swallow v. Thomas*, 15 Kan. 66; *Putnam v. Fife Lake Tp.*, 45 Mich. 125; *McCoy v. Anderson*, 47 Mich. 502; *Fairbanks v. Kittredge*, 24 Vt. 9. This is the rule adopted, under the *Massachusetts* statute, in regard to property employed in business. *Barker v. Watertown*, 137 Mass. 227. So in *Michigan*, under the statute, personal property cannot be taxed at a place other



has been held that if the statute is silent, personalty will be taxed at its actual *situs*, on the ground that a partnership can properly have no domicile.<sup>1</sup> The legislature can always designate the place where the partnership is situated as the place of taxation.<sup>2</sup>

(5) *Property in Trust*.—Property in trust is, in the absence of a special provision of statute, taxed at the same place as though the trustee were the absolute owner.<sup>3</sup> If there are several trustees residing in different districts, the tax must be apportioned among them.<sup>4</sup>

Property is sometimes made taxable to the beneficiary, in which case the question of place is determined in the same manner as though he held the full title.<sup>5</sup>

A fund in charge of a court is taxable in the jurisdiction in whose control it is.<sup>6</sup>

than the place of business, even though it is manufactured, and some sales are made there. *McCoy v. Anderson*, 47 Mich. 502; *Putnam v. Fife Lake Tp.*, 45 Mich. 125.

A foreign firm having a resident partner in *New York*, there carrying on the business tributary to that abroad, is liable to taxation upon the amount invested in the business in *New York*. *Matter of McMahon*, 66 How. Pr. (N. Y.) 190.

1. *Taylor v. Love*, 43 N. J. L. 142.

2. The personal property of a partnership is assessable in the locality where it is, if the place of business is there. *Williams v. Saginaw*, 51 Mich. 120.

3. *Perry on Trusts* (4th ed.), § 331; *Smith v. Byers*, 43 Ga. 191. See also *Latrobe v. Baltimore*, 19 Md. 13; *Baltimore v. Stirling*, 29 Md. 48; *People v. Board of Assessors*, 40 N. Y. 154; *Lewis v. Chester County*, 60 Pa. St. 325.

A resident trustee cannot be taxed for securities without the state, in the joint possession of himself and his two non-resident co-trustees, held for non-resident beneficiaries, even though secured by liens on land within the city. *People v. Barker*, 135 N. Y. 656; 4 *Silv.* (N. Y.) 648.

The rule is the same as that stated in the text where the trustee is a corporation. *Greene Foundation v. Boston*, 12 Cush. (Mass.) 54.

A state has power to tax property, real and personal, held in trust therein for a non-resident. *Price v. Hunter*, 34 Fed. Rep. 355.

4. *Academy of Richmond County v. Augusta*, 90 Ga. 634; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277.

Where only two of three trustees of personal property reside in a state, only two-thirds of the trust property should be taxed in that state. *Appeal Tax Ct. v. Gill*, 50 Md. 377. To the same effect see *People v. Coleman*, 119 N. Y. 137; 21 *Abb. N. C.* (N. Y.) 168.

Resident and non-resident trustees cannot be jointly assessed. *Stinson v. Boston*, 125 Mass. 348.

5. *Hathaway v. Fish*, 13 Allen (Mass.) 267; *Davis v. Macy*, 124 Mass. 193.

In *Massachusetts*, the principal rule, as stated in the text, is substantially made the law by statutory provisions. *Dorr v. Boston*, 6 Gray (Mass.) 131.

But where the trustee is required by the terms of his trust to pay the income of the fund in his hands to another person, the tax must be assessed upon the trustee in the place in which such other person resides, if within the state, and if he resides out of the state, in the place where the trustee resides. *Davis v. Macy*, 124 Mass. 193. See also *Freetown v. Fish*, 123 Mass. 355; *Ricker v. American Loan, etc., Co.*, 140 Mass. 346.

In *Rhode Island*, property held in trust, the income of which is to be paid to any person, shall to that extent be assessed against the trustee in the town in which such beneficial owner resides. *Greene v. Mumford*, 4 R. I. 313. But a trustee resident in another state, who holds as trustee no property in this state, is not liable to taxation in the town, in this state, where the *cestui que trust* resides. *Antony v. Caswell*, 15 R. I. 159.

6. *Cooley on Taxation* (2d ed.), p. 376.

But the court of chancery is not a person having a residence in any partic-

(6) *Property in Hands of Guardians and Conservators.*—In the absence of statutory provision on the subject, the property of an infant or incapable is taxed at the same place as though no disability existed.<sup>1</sup> The statute, may, however, provide for the assessment of personal property at the domicile of the guardian or conservator.<sup>2</sup>

(7) *Property of Decedents.*—There is a conflict in the cases in regard to the place where the personal property belonging to the estate of a deceased person is to be taxed. Some courts, proceeding on the theory that the title is in the personal representative, hold that it is taxable at his domicile, even though it has not in fact reached his hands, or even though the deceased resided in another state.<sup>3</sup> If, however, the administrator or executor is not

ular town, within the meaning of the Revised Statutes, and cannot be taxed as trustee of its suitors, for the funds in the court. *Matter of Kellinger*, 9 Paige (N. Y.) 62.

1. *Louisville v. Sherley*, 80 Ky. 71; *Kirkland v. Whately*, 4 Allen (Mass.) 462; *School Directors v. James*, 2 W. & S. (Pa.) 568; 37 Am. Dec. 525; *West Chester School Dist. v. Darlington*, 38 Pa. St. 157, 159; *Mason v. Thurber*, 1 R. I. 481.

2. *Tousey v. Bell*, 23 Ind. 423; *Vogel v. Vogler*, 78 Ind. 353; *Baldwin v. First Parish*, 8 Pick. (Mass.) 494; *Payson v. Tufts*, 13 Mass. 493; *West Chester School Dist. v. Darlington*, 38 Pa. St. 157.

If the statute requires that one be assessed in the town or ward where he lives for "all personal estate in his possession, or under his control as agent, trustee, executor or administrator," a committee of the estate of a lunatic is not included. *People v. Tax Com'rs*, 100 N. Y. 215.

3. *Gallatin v. Alexander*, 10 Lea (Tenn.) 475; *Cameron v. Burlington*, 56 Iowa 320; *State v. Jones*, 39 N. J. L. 246; *State v. Holmdel Tp.*, 39 N. J. L. 79; *Johnson v. Oregon City*, 2 Oregon 327; *State v. St. Louis County Ct.*, 47 Mo. 594.

If there be several executors residing in different districts, the tax must be apportioned between them. *State v. Matthews*, 10 Ohio St. 431.

This case was followed in *Todd v. Hughes*, 3 Ohio L. J. 206.

But in *Brown v. Noble*, 42 Ohio St. 405, where the administration was committed to several persons residing in different counties, the court held that moneys, credits, and investments belonging to the estate, must be listed

for taxation in the county where the administrator having actual possession and control of the property to be listed, resided.

And in *New York*, where the statute provides that every person shall be assessed where he resides for his personal estate, including all personal property in his possession or under his control as executor or administrator, the court held that one of several co-executors could not be assessed for property belonging to the estate, but which was in the possession and under the control of the other executors. *People v. Tax Com'rs*, 17 Hun (N. Y.) 293. But this case was distinguished in *People v. Tax Com'rs*, 38 Hun (N. Y.) 536, in which it was held that the tax would be assessed to all of three executors, although the property assessed was in the possession and under the control of one acting executor. The court, in the language of Mr. Justice Savage, in *Murray v. Blatchford*, 1 Wend. (N. Y.) 616, said: "If a man appoints several executors, they are esteemed in law but as one person representing the testator, and, therefore, the acts done by any one of them, which relate either to the delivery, cost, sale, payment, possession or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority."

It has been held that if ancillary administration is granted, the state in which it is so granted may impose a tax on all tangible property situated in the state. *Alvany v. Powell*, 2 Jones Eq. (N. Car.) 51. But the property must have actually come to the estate; hence, where a member of a *California* firm, but a resident of *New York*, died in the latter state, his executors were held

appointed until after the assessment day, there can be no taxation to him at his residence.<sup>1</sup>

According to other decisions, the property must be assessed at the last domicile of the deceased,<sup>2</sup> and this has been distinctly claimed to be the rule where no statute prescribing the place exists.<sup>3</sup>

When the estate has been distributed, the property is taxable at the domicile of the several distributees.<sup>4</sup>

4. **Poll Taxes.**—Taxes on polls can be levied only at the domicile of the person taxed, not at a place where he is residing temporarily.<sup>5</sup>

5. **Miscellaneous Taxes.**—Occupation and franchise taxes are imposed at the place where the occupation is carried on, or the franchise exercised.<sup>6</sup> The subject of collateral inheritance taxation is considered elsewhere.<sup>7</sup>

not taxable in *New York* before anything was due them from the surviving members of the firm. *People v. Coleman*, 44 Hun (N. Y.) 20.

A state cannot impose a tax upon property belonging to the estate of a deceased inhabitant, where neither the property nor the executor is within the state; the mere fact that one or more of the beneficiaries resides within the state will not render the property taxable. See *Dallinger v. Rapello*, 14 Fed. Rep. 32; 15 Fed. Rep. 434, where property held by a non-resident executor, in trust to pay the income for life, to residents of the state, was decided not to be liable to taxation. In *Baldwin v. Shine*, 84 Ky. 502, under the statute requiring that property shall be listed for assessment by the owner, the court held that stocks and bonds held by an administrator residing within the state would be taxed, although the persons beneficially entitled were non-residents, the administrator being in law the "owner" of such property. So in *New Jersey* under the statute. *State v. Corson*, 50 N. J. L. 381.

In *Sommers v. Boyd*, 48 Ohio St. 648, the court held that under the provisions of the *Ohio* statute, the *situs* of moneys, credits, and investments for the purpose of taxation, is the residence of the person who is required to list them; and that an administrator would be required to list credits belonging to the estate of the decedent, in the place where he resided.

As to the rule in *Vermont*, see *Clark v. Powell*, 62 Vt. 442.

1. *Hayden v. Roe*, 66 Wis. 288.

2. *San Francisco v. Lux*, 64 Cal. 481;

*Cornwall v. Todd*, 38 Conn. 447; *McGregor v. Vanpel*, 24 Iowa 436. But see *Cameron v. Burlington*, 56 Iowa 320; *Smith v. Northampton Bank*, 4 Cush. (Mass.) 1.

In *Massachusetts*, by statute, the personal estate of a deceased person is taxable only in the town where he last dwelt. *Hardy v. Yarmouth*, 6 Allen (Mass.) 277; *Wood v. Torrey*, 97 Mass. 321. This is the rule applicable to shares of bank stock. *Revere v. Boston*, 123 Mass. 375.

3. In *Staunton v. Stout*, 86 Va. 321, the court said: "The fact that the executors resided in Staunton when the assessment was made does not affect the case. There being no statute in *Virginia* to the contrary, the *situs* of the property is at the last domicile of the testator, and there it is taxable, and not elsewhere." See also *Burroughs on Taxation*, p. 224; *San Francisco v. Lux*, 64 Cal. 481.

Notes belonging to the estate of a decedent will be assessed at the place where the decedent had his domicile. *Stephens v. Booneville*, 34 Mo. 323.

4. *Cornwall v. Todd*, 38 Conn. 447; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277; *Herrick v. Big Rapids*, 53 Mich. 554; *State v. Leggett*, 40 N. J. L. 308; *Alvany v. Powell*, 2 Jones Eq. (N. Car.) 51. Even if the administrator's account has not been settled. *Carlton v. Ashburnham*, 102 Mass. 348.

5. *State v. Ross*, 23 N. J. L. 517. And see *supra*, this title, *Things Taxable—Polls*.

6. See *supra*, this title, *Occupation, Business, and Privilege Taxes*.

7. *SUCCESSION TAXES*, vol. 24, p.

**IX. EXEMPTIONS—1. Power to Exempt.**—In absence of constitutional restrictions, the power of the legislature to exempt classes of property or persons from taxation is unquestionable.<sup>1</sup> It has generally been held that the constitutional provisions requiring equality and uniformity in taxation by the legislature do not prohibit the exemption of certain classes from the general law, the rule of equality and uniformity applying only to such objects as may have been selected by the legislature for taxation, and the fact that other species or classes of property are exempt, not violating the rule.<sup>2</sup>

1. *Butler's Appeal*, 73 Pa. St. 451; *Scotland County v. Missouri*, etc., R. Co., 65 Mo. 123; *Richmond v. Richmond*, etc., R. Co., 21 Gratt. (Va.) 604; *Williamson v. Massey*, 33 Gratt. (Va.) 240; *Probasco v. Moundsville*, 11 W. Va. 506; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Christ Church v. Philadelphia County*, 24 How. (U. S.) 300; *Wells v. Central Vt. R. Co.*, 14 Blatchf. (U. S.) 426; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 36. See also *Indianapolis v. Sturdevant*, 24 Ind. 391.

**Constitutional Restrictions.**—The *Louisiana* constitution of 1879, art. 207, provided, "the following property shall be exempt from taxation and no other: viz., all public property, places of religious worship," etc., etc. So it was provided by the constitution of *Kentucky* that "no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services." And under this provision, the exemption of the board of trade from taxation was held unconstitutional. *Barbour v. Louisville Board of Trade*, 82 Ky. 645.

Thus, in *Iowa* it was provided by the constitution that corporations should be subject to the same taxation as individuals. *Iowa Homestead Co. v. Webster County*, 21 Iowa 227; *Dubuque v. Chicago*, etc., R. Co., 47 Iowa 196.

In *Fletcher v. Oliver*, 25 Ark. 289, it was held that a constitutional provision that all real property, with a certain exception, should be subject to taxation, precluded the legislature from exempting other real property. See also *Hogg v. Mackey* (Oregon, 1893), 31 Pac. Rep. 779. As to the *Missouri* provision, see *State v. Hannibal*, etc., R. Co., 75 Mo. 208; *Life Assoc. v. Board of Assessors*, 49 Mo. 512.

Where the state constitutions provide the general classes of property

which may be exempted, such as charities, property devoted to educational and eleemosynary purposes, etc., the legislature can make no exemptions outside of such specified classes. *Chesapeake*, etc., R. Co. *v. Miller*, 19 W. Va. 408; *Hogg v. Mackey* (Oregon, 1893), 31 Pac. Rep. 779; *Croisan v. Hogg* (Oregon, 1893), 31 Pac. Rep. 782. And the provision that all property shall be taxed precludes exemption by the legislature. *Memphis*, etc., R. Co. *v. Gaines*, 3 Tenn. Ch. 604; *Ellis v. Louisville*, etc., R. Co., 8 Baxt. (Tenn.) 530; *Memphis*, etc., R. Co. *v. Gaines*, 97 U. S. 697; *State v. Hannibal*, etc., R. Co., 75 Mo. 208; *New Orleans v. Lafayette Ins. Co.*, 28 La. Ann. 756; *Chattanooga v. Nashville*, etc., R. Co., 7 Lea (Tenn.) 561.

2. *M. E. Church v. Ellis*, 38 Ind. 3; *State v. Mills*, 34 N. J. L. 177; *Hodgson v. New Orleans*, 21 La. Ann. 301; *State v. Fosdick*, 21 La. Ann. 434; *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440; *High v. Shoemaker*, 22 Cal. 363; *Yazoo*, etc., R. Co. *v. Levee Com'rs*, 37 Fed. Rep. 24; *Williams v. Rees*, 2 Fed. Rep. 882; *State v. Winnebago Lake*, etc., Co., 11 Wis. 42; *Green Bay*, etc., Canal Co. *v. Outagamie County*, 76 Wis. 587; *Athens v. Long*, 59 Ga. 330; *Waring v. Savannah*, 60 Ga. 93; *People v. Auditor Gen'l*, 7 Mich. 84; *People v. Coleman*, 4 Cal. 46; *State Bank v. New Albany*, 11 Ind. 139; *Connorsville v. State Bank*, 16 Ind. 105; *King v. Machsin*, 17 Ind. 48; *State v. Collins*, 43 N. J. L. 562; *Williams v. Cammack*, 27 Miss. 209; *Mississippi Mills v. Cook*, 56 Miss. 40; *New Orleans v. Davidson*, 30 La. Ann. 555; *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86; *New Orleans v. Fourchy*, 30 La. Ann. 910; *New Orleans v. Klein*, 26 La. Ann. 493; *Reynolds v. Police Jury*, 44 La. Ann. 863; *State v. Poydras*, 9 La. Ann. 165; *New Orleans v. Ken-*

The power of the legislature to make permanent exemptions, *i. e.*, to relinquish the right to impose taxes on corporations or individuals so as to bind future legislatures, has been questioned. The subject is discussed in another division of this article.<sup>1</sup>

This power to make exemptions is not, however, inherent in such inferior political organizations as counties, municipalities, etc.<sup>2</sup>

**2. Strictly Construed** — *a.* IN GENERAL. — Statutes or charters exempting property, persons, or corporations from the common burdens of taxation, are to be strictly construed.<sup>3</sup> The intention of the legislature to grant the immunity claimed must be clear beyond a reasonable doubt. It cannot be inferred from uncertain

nard, 34 La. Ann. 851; Louisiana Cotton Mfg. Co. v. New Orleans, 31 La. Ann. 440; Leicht v. Burlington, 73 Iowa 29; Mobile v. Stonewall Ins. Co., 53 Ala. 570; State v. Winnebago Lake, etc., R. Co., 11 Wis. 34; Northern Pac. R. Co. v. Barnes (N. Dak. 1892), 51 N. W. Rep. 386, 786; Northern Pac. R. Co. v. Brewer (N. Dak. 1892), 31 N. W. Rep. 787; Louisiana v. Pilsbury, 105 U. S. 278; Wells v. Central Vermont R. Co., 14 Blatchf. (U. S.) 426; Danville v. Shelton, 76 Va. 325; Ferns v. Vannier, 6 Dakota 186; State v. Hennepin County, 33 Minn. 235; Columbia, etc., R. Co. v. Chilberg (Wash. 1893), 34 Pac. Rep. 163.

1. See *supra*, this title, *Power to Tax*.

2. See *infra*, this title, *Municipal Taxation*.

3. State v. Crittenden County, 19 Ark. 360; McGehee v. Mathis, 21 Ark. 58; Hart v. Plum, 14 Cal. 148; Macon v. Central R., etc., Co., 50 Ga. 620; Wettig v. Bowman, 47 Ill. 17; Illinois Cent. R. Co. v. Irvin, 72 Ill. 452; Orr v. Baker, 4 Ind. 86; Indianapolis v. McLean, 8 Ind. 328; M. E. Church v. Ellis, 38 Ind. 3; South Bend v. University of Notre Dame Du Lac, 69 Ind. 344; Griswold College v. State, 46 Iowa 275; Sioux City v. Independent School Dist., 55 Iowa 150; Fort Des Moines Lodge v. Polk County, 56 Iowa 34; Washburn College v. Shawnee County, 8 Kan. 344; Miami County v. Brackenridge, 12 Kan. 114; Covington Gas Light Co. v. Covington, 84 Ky. 94; New Orleans v. Guth, 11 La. Ann. 405; Bishop v. Marks, 15 La. Ann. 147; Baton Rouge, etc., R. Co. v. Kirkland, 33 La. Ann. 622; Dennis v. Vicksburg, etc., R. Co., 34 La. Ann. 954; Ricks v. Board of Assessors, 43 La. Ann. 1075; Gast v. Board of Assessors, 43 La. Ann. 1104; Plaisted v. Lincoln, 62 Me. 91; Bangor v. Masonic Lodge, 73 Me. 428; 40 Am. Rep.

369; Buchanan v. Talbot County, 47 Md. 286; Frederick County v. Sisters of Charity, 48 Md. 34; Consolidated Gas Co. v. Baltimore, 62 Md. 588; 50 Am. Rep. 237; South Congregational Meeting House v. Lowell, 1 Met. (Mass.) 538; Detroit Young Men's Soc., etc. v. Detroit, 3 Mich. 172; Hendrie v. Kalhoff, 48 Mich. 306; Baldwin v. Hastings, 83 Mich. 639; State v. Northern Pac. R. Co., 32 Minn. 294; 17 Am. & Eng. R. Cas. 475; State v. Woodruff, 37 N. J. L. 139; State v. Middle Tp., 38 N. J. L. 270; State v. Fuller, 40 N. J. L. 328; Chegaray v. New York, 13 N. Y. 220; People v. Com'rs of Taxes, 76 N. Y. 65; People v. Com'rs of Taxes, 82 N. Y. 459; People v. Davenport, 91 N. Y. 586; 1 Am. & Eng. Corp. Cas. 475; Richmond, etc., R. Co. v. Alamance, 76 N. Car. 212; Cincinnati College v. State, 19 Ohio 110; Com. v. Arrott Steam Power Mills Co., 145 Pa. St. 69; Railroad Co. v. Berks County, 6 Pa. St. 70; New York, etc., R. Co. v. Sabin, 26 Pa. St. 242; Crawford v. Burrell Tp., 53 Pa. St. 219; Phoenix Iron Co. v. Com., 59 Pa. St. 104; Erie R. Co. v. Com., 66 Pa. St. 84; Chadwick v. Maginnes, 94 Pa. St. 117; Philadelphia v. Pennsylvania Hospital, 134 Pa. St. 171; Union Canal Co. v. Dauphin County, 3 Brew. (Pa.) 124; Hand v. Savannah, etc., R. Co., 12 S. Car. 315; Carolina, etc., R. Co. v. Tribble, 25 S. Car. 260; Winona, etc., R. Co. v. Watertown (S. Dak. 1890), 44 N. W. Rep. 1072; Westmore Lumber Co. v. Orne, 48 Vt. 90; Orange, etc., R. Co. v. Alexandria, 17 Gratt. (Va.) 176; Miller v. Com., 27 Gratt. (Va.) 110; Com. v. Chesapeake, etc., R. Co., 27 Gratt. (Va.) 348; Weston v. Shawano County, 44 Wis. 242; Memphis, etc., R. Co. v. Loftin, 105 U. S. 258; Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665; Yazoo, etc., R. Co., v. Thomas, 132 U. S. 174; Gold Hill v. Caledonia

phrases or ambiguous terms. The power of taxation being an essential attribute of sovereignty, every presumption is against its surrender by the state, and to the state must be given the benefit of every doubt arising as to the legislative intention.<sup>1</sup> Such a

Silver Min. Co., 5 Sawy. (U. S.) 575; Louisville, etc., R. Co. v. Gaines, 3 Fed. Rep. 266.

Thus, an exemption of mining claims does not cover the flumes of machinery necessary to work them. *Hart v. Plum*, 14 Cal. 148. See also *Gold Hill v. Caledonia Silver Min. Co.*, 5 Sawy. (U. S.) 575.

So, a provision in the charter of a corporation, exempting from taxation its "assets which now are liable" to taxation, cannot be construed to cover assets afterwards acquired by the corporation. *Union Canal Co. v. Dauphin County*, 3 Brew. (Pa.) 124.

A constitutional provision which declares that "the press shall be free," does not exempt capital invested in a newspaper from taxation. *New Orleans v. Crescent Newspaper*, 14 La. Ann. 816.

The exemption of "an endowment or fund of any religious society," etc., will not embrace lands. *State v. Krollman*, 38 N. J. L. 323, 574; *State v. Lyon*, 32 N. J. L. 360.

**Collateral Inheritance Tax.**—A general exemption of property from taxation will not exempt from a collateral inheritance tax. *Miller v. Com.*, 27 Gratt. (Va.) 110. See also *Barringer v. Cowan*, 2 Jones Eq. (N. Car.) 436; *Catlin v. Trinity College*, 113 N. Y. 133; *Wallace v. Myers*, 38 Fed. Rep. 185; *Strode v. Com.*, 52 Pa. St. 181. The tax is not upon the property, but upon the privilege of acquiring it by will or under the Intestate Acts.

#### Foreign Corporations and Institutions.

—In general, an exemption of corporations, charitable institutions, etc., will not apply to foreign corporations, etc. *In re Prime's Estate*, 64 Hun (N. Y.) 50; *People v. Western Seaman's Friend Soc.*, 87 Ill. 246.

1. *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Providence Bank v. Billings*, 4 Pet. (U. S.) 561; *Bailey v. Magwire*, 22 Wall. (U. S.) 226; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 666; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665; *Mem-*

*phis Gas Light Co. v. Shelby County Taxing Dist.*, 109 U. S. 398; *Chicago, etc., R. Co. v. Missouri*, 120 U. S. 569; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Jefferson Branch Bank v. Skelley*, 1 Black (U. S.) 436; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 376; *Washington University v. Rouse*, 8 Wall. (U. S.) 439; *New Orleans City, etc., R. Co. v. New Orleans*, 143 U. S. 192; *State v. Brewer*, 64 Ala. 287; *McIver v. Robinson*, 53 Ala. 456; *Biscoe v. Coulter*, 18 Ark. 423; *Waller v. Hughes* (Arizona, 1880), 11 Pac. Rep. 122; *Atlantic, etc., R. Co. v. Lesueur* (Arizona, 1888), 37 Am. & Eng. R. Cas. 368; *Hart v. Plum*, 14 Cal. 148; *People v. Whyler*, 41 Cal. 351; *County Com'rs v. Colorado Seminary*, 12 Colo. 497; *Winona, etc., R. Co. v. Watertown* (S. Dak. 1890), 44 N. W. Rep. 1072; *State v. Bank of Smyrna*, 2 Houst. (Del.) 99; 73 Am. Dec. 699; *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637; *Wright v. Southwestern R. Co.*, 64 Ga. 783; *Macon v. Central R., etc., Co.*, 50 Ga. 620; *Orr v. Baker*, 4 Ind. 86; *Indianapolis v. McLean*, 8 Ind. 328; *Madison v. Fitch*, 18 Ind. 33; *M. E. Church v. Ellis*, 38 Ind. 3; *In re Swigert*, 123 Ill. 267; *People v. Chicago*, 124 Ill. 636; *Illinois Cent. R. Co. v. Decatur*, 126 Ill. 92; 37 Am. & Eng. R. Cas. 395; *Griswold College v. State*, 46 Iowa 275; *Sioux City v. Independent School Dist.*, 55 Iowa 152; *Washburn College v. Shawnee County*, 8 Kan. 344; *Vail v. Beach*, 10 Kan. 214; *St. Mary's College v. Crowl*, 10 Kan. 442; *Miami County v. Brackenridge*, 12 Kan. 114; *Louisville, etc., Canal Co. v. Com.*, 7 B. Mon. (Ky.) 160; *Covington Gas Light Co. v. Covington*, 84 Ky. 94; *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497; *Gast v. Board of Assessors*, 43 La. Ann. 1104; *Dennis v. Vicksburg, etc., R. Co.*, 34 La. Ann. 954; *New Orleans v. People's Ins. Co.*, 27 La. Ann. 519; *Portland, etc., R. Co. v. Saco*, 60 Me. 196; *Stetson v. Bangor*, 56 Me. 274; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *Howell v. State*, 3 Gill (Md.) 14; *Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *Buchanan v. Talbot County*, 47 Md. 286; *Portland Bank v. Apthorp*, 12 Mass. 252; *Harvard College v. Boston*, 104 Mass. 470;

statute is not to be given a retroactive effect.<sup>1</sup> The burden of proof is upon the party claiming the exemption, to show that his case falls clearly within the exception to the general law.<sup>2</sup> But it has been said that, where the legislature exempts a company from general taxation in return for a certain percentage of its

Boston's Soc., etc. *v.* Boston, 129 Mass. 178; *St. Peter's Church v. Scott County*, 12 Minn. 395; *Hennepin County v. Bell*, 43 Minn. 344; *Anderson v. State*, 23 Miss. 459; *Greenville Ice, etc., Co. v. Greenville*, 69 Miss. 86; *Frantz v. Debson*, 64 Miss. 631; 60 Am. Rep. 68; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *Washington University v. Rowse*, 42 Mo. 308; *St. Louis v. Boatmen's Ins., etc., Co.*, 47 Mo. 150; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *St. Louis v. Marine Ins. Co.*, 47 Mo. 163; *Hope Min. Co. v. Kennon*, 3 Mont. 35; *Bellinger v. White*, 5 Neb. 401; *Brewster v. Hough*, 10 N. H. 146; *Franklin St. Soc. v. Manchester*, 60 N. H. 342; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309; *Phillips Exeter Academy v. Exeter*, 58 N. H. 306; 42 Am. Rep. 589; *Walker v. Walker*, 63 N. H. 321; 56 Am. Rep. 514; *State v. Newark*, 26 N. J. L. 519; *State v. Parker*, 32 N. J. L. 426; *State v. Woodruff*, 37 N. J. L. 139; *State v. Elizabeth*, 37 N. J. L. 330; *People v. Roper*, 35 N. Y. 620; *People v. Com'rs of Taxes*, 95 N. Y. 554; *People v. Com'rs of Taxes*, 82 N. Y. 459; *People v. Long Island City*, 76 N. Y. 20; *Stewart v. Davis*, 3 Murph. (N. Car.) 244; *State v. Matthews*, 3 Jones (N. Car.) 451; *Lima v. Lima Cemetery Assoc.*, 42 Ohio St. 128; 5 Am. & Eng. Corp. Cas. 547; 51 Am. Rep. 809; *Crawford v. Burrell Tp.*, 53 Pa. St. 219; *Platt v. Rice*, 10 Watts (Pa.) 352; *Bank of Pennsylvania v. Com.*, 19 Pa. St. 144; *Union Pass. R. Co. v. Philadelphia*, 83 Pa. St. 429; *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 139; *Easton Bank v. Com.*, 10 Pa. St. 442; *Appeal of Com. (Pa. 1889)*, 18 Atl. Rep. 133; *Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171; *Mott v. Pennsylvania R. Co.*, 30 Pa. St. 9; 72 Am. Dec. 664; *Carpenter v. School Trustees*, 12 R. I. 574; *State v. Newberry*, 12 Rich. (S. Car.) 339; *Martin v. Charleston*, 13 Rich. Eq. (S. Car.) 50; *Gilliland v. Citadel Square Baptist Church*, 33 S. Car. 164; *Nashville, etc., R. Co. v. White (Tenn. 1893)*, 22 S. W. Rep. 75; *Nashville, etc., R. Co. v. Marion County*, 7 Lea (Tenn.) 663;

*State v. Whitworth*, 8 Lea (Tenn.) 606; *State v. Union, etc., Bank (Tenn. 1892)*, 19 S. W. Rep. 758; *State v. Phoenix F. & M. Ins. Co. (Tenn. 1892)*, 19 S. W. Rep. 1044; *State v. Memphis City Bank (Tenn. 1892)*, 19 S. W. Rep. 1045; *Louisville, etc., R. Co. v. Bate*, 12 Lea (Tenn.) 573; *Morris v. Lone Star Chapter*, 68 Tex. 702; *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604; *Com. v. Richmond, etc., R. Co.*, 81 Va. 355; 24 Am. & Eng. R. Cas. 482; *Herrick v. Randolph*, 13 Vt. 525; *Baltimore, etc., R. Co. v. Marshall County*, 3 W. Va. 319; *Baltimore, etc., R. Co. v. Wheeling*, 3 W. Va. 372; *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 88; *Weston v. Shawano County*, 44 Wis. 257.

1. *First Church v. Linn County*, 70 Iowa 396; *State v. New Orleans*, 40 La. Ann. 697; *Louisiana, etc., Ice Co. v. Parker*, 42 La. Ann. 669; *Welton v. Merrick County*, 16 Neb. 83; *Baugh v. Ryan*, 51 Ala. 212; *State v. Ewing*, 11 Lea (Tenn.) 172.

The act of Congress, exempting from state taxation *United States securities*, does not apply to such securities held before the passage of the act. *People v. Com'rs of Taxes*, 26 N. Y. 163.

2. *People v. Ryan (Ill. 1891)*, 27 N. E. Rep. 694; *Boston Soc., etc., v. Boston*, 129 Mass. 178; *Burlington, etc., R. Co. v. Hayne*, 19 Iowa 143; *Appeal Tax Ct. v. Rice*, 50 Md. 302; *Buchanan v. Talbot County*, 47 Md. 286; *Greenville Ice, etc., Co. v. Greenville*, 69 Miss. 86; *Morris v. Lone Star Chapter*, 68 Tex. 702; *People v. Graceland Cemetery Co.*, 86 Ill. 336. See also *In re Swigert*, 119 Ill. 83; 59 Am. Rep. 789; 24 Am. & Eng. R. Cas. 494.

One who claims exemption from an income tax on the ground that his income consists of property not liable to taxation, must affirmatively show that his income does so exist. *New Orleans v. Fourchy*, 30 La. Ann. 910. See also *Ivens, etc., Machine Co. v. Parker*, 42 La. Ann. 1103.

**Pleadings.**—A party alleging exemption of his lands from taxation, must set out in his pleadings the facts that

income, or any other fair equivalent, the rule requiring statutes creating exemptions to be strictly construed, does not apply.<sup>1</sup>

b. LOCAL ASSESSMENTS.—A frequent illustration of the rule that exemption clauses are strictly construed, is where a local assessment is levied against property exempt generally from taxation—an exemption from general taxation not protecting property from special assessments for local improvements, such as for the repair of streets, laying of sewers, etc.<sup>2</sup> By some courts this con-

exempt them. *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131.

1. *Milwaukee, etc., R. Co. v. Crawford County*, 29 Wis. 116; *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271; *State v. Minton*, 23 N. J. L. 529; *St. Paul v. St. Paul, etc., R. Co.*, 23 Minn. 469. See also *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242.

2. *Davis v. Gaines*, 48 Ark. 370; *Board of Improvements v. School Dist.*, 56 Ark. 354; 37 Am. & Eng. Corp. Cas. 392; *Emery v. San Francisco Gas Co.*, 28 Cal. 346; *Taylor v. Palmer*, 31 Cal. 240; *People v. Austin*, 47 Cal. 353; *People v. Whyler*, 41 Cal. 351; *Williams v. Corcoran*, 46 Cal. 553; *Seymour v. Hartford*, 21 Conn. 481; *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255; 4 Am. Rep. 63; *New Haven v. Fair Haven, etc., R. Co.*, 38 Conn. 422; 9 Am. Rep. 399; *Southwestern R. Co. v. Wright*, 68 Ga. 311; *Atlanta v. First Presbyterian Church*, 86 Ga. 730, *overruling* *First M. E. Church v. Atlanta*, 76 Ga. 181; *Illinois, etc., Canal v. Chicago*, 12 Ill. 403; *Chicago v. Colby*, 20 Ill. 614; *Bank of the Republic v. Hamilton County*, 21 Ill. 53; *McBride v. Chicago*, 22 Ill. 574; *Peoria v. Kidder*, 26 Ill. 351; *Pleasant v. Kost*, 29 Ill. 494; *Illinois Cent. R. Co. v. Decatur*, 126 Ill. 92; 37 Am. & Eng. R. Cas. 395; *McLean County v. Bloomington*, 106 Ill. 209; *Chicago v. Baptist Theological Union*, 115 Ill. 245; *Adams County v. Quincy*, 130 Ill. 566; *Bloomington Cemetery Assoc. v. People*, 139 Ill. 16; *Illinois Cent. R. Co. v. Mattoon*, 141 Ill. 32; *Palmer v. Stumph*, 29 Ind. 329; *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338; 10 Am. Rep. 35; *M. E. Church v. Ellis*, 38 Ind. 5; *Sioux City v. Independent School Dist.*, 55 Iowa 150; *Paine v. Spratley*, 5 Kan. 525; *Broadway Baptist Church v. McAttee*, 8 Bush (Ky.) 508; 8 Am. Rep. 480; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89; *Kilgus v. Orphanage of the Good Shepherd*

(Ky. 1893), 22 S. W. Rep. 750; *Crowley v. Copley*, 2 La. Ann. 329; *Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1; *Rooney v. Brown*, 21 La. Ann. 51; *Dolan v. Baltimore*, 4 Gill (Md.) 394; *Alexander v. Baltimore*, 5 Gill (Md.) 396; *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Boston Seaman's Friend Soc. v. Boston*, 116 Mass. 181; 17 Am. Rep. 153; *Worcester Agricultural Soc. v. Worcester*, 116 Mass. 189; *Lefevre v. Detroit*, 2 Mich. 586; *Grand Gulf, etc., R. Co. v. Buck*, 53 Miss. 246; *Lockwood v. St. Louis*, 24 Mo. 20; *St. Louis Public Schools v. St. Louis*, 26 Mo. 468; *State v. Dulle*, 48 Mo. 282; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; 72 Am. Dec. 276; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; 11 Am. Rep. 412; *Brewster v. Hough*, 10 N. H. 138; *State v. Robertson*, 24 N. J. L. 504; *Paterson v. Society, etc.*, 24 N. J. L. 385; *State v. Newark*, 27 N. J. L. 185; *State v. Mills*, 34 N. J. L. 177; 10 Am. Rep. 223; *State v. Newark*, 35 N. J. L. 157; *State v. Jersey City*, 42 N. J. L. 97; *Chegary v. Jenkins*, 3 Sandf. (N. Y.) 409; *Bleecker v. Ballou*, 3 Wend. (N. Y.) 263; *In re New York*, 11 Johns. (N. Y.) 77; *People v. Roper*, 35 N. Y. 629; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *In re St. Joseph's Asylum*, 69 N. Y. 353; *Roosevelt Hospital v. New York*, 84 N. Y. 108; *Kendrick v. Farquhar*, 8 Ohio 197; *Armstrong v. Athens County*, 10 Ohio 235; *Cincinnati College v. State*, 19 Ohio 110; *Lima v. Lima Cemetery Assoc.*, 42 Ohio St. 128; 5 Am. & Eng. Corp. Cas. 547; 51 Am. Rep. 809; *Northern Liberties v. St. Johns' Church*, 13 Pa. St. 104; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Crawford v. Burrell Tp.*, 53 Pa. St. 220; *Harvey v. South Chester*, 99 Pa. St. 565; *Wilkinsburg v. Home for Aged Women*, 131 Pa. St. 109; *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367; *Second Universalist Soc. v. Providence*, 6 R. I. 235; *In re College St.*, 8 R. I. 474; *Beals v. Prov-*



idence Rubber Co., 11 R. I. 381; 23 Am. Rep. 472; Winona, etc., R. Co. v. Watertown (S. Dak. 1890), 44 N. W. Rep. 1072; Allen v. Galveston, 51 Tex. 302; Orange, etc., R. Co. v. Alexandria, 17 Gratt. (Va.) 176; Hale v. Kenosha, 29 Wis. 599; Johnson v. Milwaukee, 40 Wis. 315; Illinois Cent. R. Co. v. Decatur, 147 U. S. 190.

**Local Assessments Held Not to Be Included Within the Exemption.**—The terms of the exemption in some of these cases, have been very broad indeed. The following general exemptions have been held not to exempt property from local assessments: "Exemption from taxation of every kind," Sheehan v. Good Samaritan Hospital, 50 Mo. 155; 11 Am. Rep. 412; so when a statute laid a tax on railroads "in lieu of all other taxes," Bridgeport v. New York, etc., R. Co., 36 Conn. 255; 4 Am. Rep. 63; an exemption from "taxes or assessments," State v. Newark, 35 N. J. L. 157; an exemption from "all taxes, charges, and impositions," Paterson v. Society, etc., 24 N. J. L. 385; an exemption of "all taxes of every kind except as herein provided for," Illinois Cent. R. Co. v. Decatur, 126 Ill. 92; 36 Am. & Eng. R. Cas. 395; an exemption from "any tax or public imposition whatever," Baltimore v. Green Mount Cemetery, 7 Md. 517; exemption from "all taxation," Winona, etc., R. Co. v. Watertown (S. Dak. 1890), 44 N. W. Rep. 1072; from "being taxed by any law of the state." *In re New York*, 11 Johns. (N. Y.) 77. And in Buffalo City Cemetery v. Buffalo, 46 N. Y. 507, the exemption was in terms from "all public taxes, rates, and assessments," and yet this was held not to exempt from local assessment.

**General Exemptions Held to Exempt from Local Assessments.**—In other cases, general exemption clauses have been held broad enough to protect the property against a local assessment for improvements: thus, an exemption from "all civil imposition, taxes and rates," Harvard College v. Boston, 104 Mass. 407; Codman v. Johnson, 104 Mass. 491; "all public taxes," Mount Auburn Cemetery v. Cambridge, 150 Mass. 12; "taxes or assessments," State v. Newark, 36 N. J. L. 478; 13 Am. Rep. 464, *overruling* 35 N. J. L. 157 (*Compare* this case with the *New Jersey* cases cited *supra*, this note); "from taxation except for state purposes," Olive Cemetery Co. v. Philadelphia, 93 Pa. St. 129; 39 Am. Rep. 732. See

also Erie County v. First Universalist Church, 105 Pa. St. 278; Philadelphia v. Church of St. James, 134 Pa. St. 207; Wilkinsburg v. Home for Aged Women, 131 Pa. St. 109 (*Compare* the *Pennsylvania* cases cited *supra*, this note); "all taxation and assessment whatever," St. Paul, etc., R. Co. v. St. Paul, 21 Minn. 526; St. Paul v. St. Paul, etc., R. Co., 23 Minn. 469; State v. St. Paul, 36 Minn. 529; "from taxation for any purpose whatever," Brightman v. Kirner, 22 Wis. 54.

In *Georgia*, an exemption from taxation in favor of religious societies, was held to exempt from assessments for local improvements, on the ground that they were favored by the constitution and by the general policy of the state. First M. E. Church v. Atlanta, 76 Ga. 181. This, however, was *overruled* by Atlanta v. First Presbyterian Church, 86 Ga. 730.

In *Kentucky*, it has been held that cemeteries exempt from taxation can not be subjected to local assessments. Louisville v. Nevin, 10 Bush (Ky.) 549; 19 Am. Rep. 78; Colston v. Eastern Cemetery Co. (Ky. 1891), 15 S. W. Rep. 245.

In *Illinois*, school property held in trust has been held to be exempt from special assessments as well as general taxation. People v. Trustees of Schools, 118 Ill. 52. See also Adams County v. Quincy, 130 Ill. 566. But *compare* the *Illinois* cases cited *supra*, this note.

**Applicability of General Exemption Acts to Municipal Taxes.**—Some courts, strictly construing exemption statutes, have held that a general exemption of the property of persons or corporations is to be confined to state taxes, and does not apply to burdens laid upon the property by a municipality. People v. Davenport, 91 N. Y. 574; 1 Am. & Eng. Corp. Cas. 475; Orange, etc., R. Co. v. Alexandria, 17 Gratt. (Va.) 176; Dunlieth, etc., Bridge Co. v. Dubuque, 32 Iowa 427; Pacific R. Co. v. Cass County, 53 Mo. 17; Insurance Co. v. New Orleans, 1 Wood (U. S.) 85; State v. Robertson, 24 N. J. L. 504; Lexington v. Aull, 30 Mo. 486.

Thus, in *Bailey v. Maguire*, 22 Wall. (U. S.) 227, where a railroad company sought exemption from county and municipal taxation under a provision in its charter exempting it from state taxation, the court held the company subject to county and municipal taxation. See also *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497.

struction is placed upon the ground that such an assessment is not properly a tax, but a majority hold that no other reason is necessary for confining the exemption to other taxes than assessments for benefits, than the general principle that exemptions are to be construed strictly.<sup>1</sup>

c. RESTRICTED TO EXEMPT USES.—Where a statute exempts from taxation property devoted to religious, educational, or other purposes, or exempts the property of a corporation, the exemption will be confined in the former case to property used exclusively for such purposes; in the latter, to property necessary to the objects of the company's incorporation.<sup>2</sup> It has been held that when any part of the property is devoted to other than the

In *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 476, it was held that an exemption from county and state taxes, did not exempt from city taxes.

"In *Louisiana*, an unqualified exemption 'from taxation during the period of fifty years' was held to imply an immunity from municipal as well as state taxes. 'When the sovereign emancipates, he does so munificently.' Per *Bermudez, C. J.* *New Orleans v. Carondelet Canal, etc., Co.*, 36 La. Ann. 396. Yes, but to no greater extent than he plainly expresses." 2 Dill. Mun. Corp. (4th ed.), § 776, n.

But where the exemption was from "any charge or tax whatsoever," it was held to cover municipal as well as state taxes. *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604; *Gardner v. State*, 21 N. J. L. 557. And so of an exemption "from all taxation of any kind except as herein provided for." *Neustadt v. Illinois Cent. R. Co.*, 31 Ill. 484. See also *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291. And where the exemption was worded as follows: "in lieu of all taxes which may hereafter become due from said company in each year as aforesaid under any and all laws of this state," it was held to exempt from county taxes. *Neary v. Philadelphia, etc., R. Co.* (Del. 1887), 9 Atl. Rep. 405.

In *Elizabethtown, etc., R. Co. v. Elizabethtown*, 12 Bush (Ky.) 236, it was said: "The municipal officers of the town insist that the exemption relied on applies only to taxation by the state for the purpose of raising general revenue. The language quoted implies no exception. To 'exempt from taxation' means to exempt from all taxation imposed by the authority of the state government, whether for general or local purposes, and municipal tax-

ation comes clearly within the spirit and import of the act under which the exemption is claimed. *Johnson v. Com.*, 7 Dana (Ky.) 342." See also *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370. Compare *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497.

1. See cases cited in last note; see also *infra*, this title, *Local Assessments*.

2. *Kendrick v. Farquhar*, 8 Ohio 189; *Cincinnati College v. State*, 19 Ohio 110; *Pierce v. Cambridge*, 2 Cush. (Mass.) 611; *South Congregational Meeting House v. Lowell*, 1 Met. (Mass.) 538; *Old South Soc. v. Boston*, 127 Mass. 378; *Wyman v. St. Louis*, 17 Mo. 335; *Washburn College v. Shawnee County*, 8 Kan. 344; *St. Mary's College v. Crowl*, 10 Kan. 442; *Vail v. Beach*, 10 Kan. 214; *Orr v. Baker*, 4 Ind. 86; *M. E. Church v. Ellis*, 38 Ind. 3; *Louisville v. Louisville Board of Trade*, 90 Ky. 409; *St. Peter's Church v. Scott County*, 12 Minn. 395; *State v. Northern Pac. R. Co.*, 39 Minn. 25; *Ramsey County v. Chicago, etc., R. Co.*, 33 Minn. 537; *Todd County v. St. Paul, etc., R. Co.*, 38 Minn. 163; 31 Am. & Eng. R. Cas. 482; *St. Paul v. St. Paul, etc., R. Co.*, 39 Minn. 113; *Detroit, etc., R. Co. v. Detroit*, 81 Mich. 562; *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172; *Com. v. Mahoning, etc., Mill Co.*, 129 Pa. St. 360; *Appeal of Com. (Pa. 1889)*, 18 Atl. Rep. 133; *New Haven v. Sheffield*, 30 Conn. 160; *Connecticut Spiritualistic, etc., Assoc. v. East Lyme*, 54 Conn. 152; *State v. Georgia R., etc., Co.*, 54 Ga. 423; *Wright v. Southwestern R. Co.*, 64 Ga. 783; *State v. Ross*, 24 N. J. L. 497; *State v. Newark*, 26 N. J. L. 519; *State v. Haight*, 31 N. J. L. 400; *State v. Hancock*, 35 N. J. L. 537; *State v.*

exempt purposes, the whole becomes taxable.<sup>1</sup> But the weight of authority seems to be, that there may be a due apportionment of values in the assessment, confining the exemption to so much of the value as that part of the premises used for the privileged purposes represents.<sup>2</sup>

**3. Customary Exemptions—*a*. RELIGIOUS SOCIETIES.**—In many states, property of religious organizations is exempt, the exemption extending uniformly to the property of all religious sects and denominations.<sup>3</sup> The exemption is confined to property actually,

Woodruff, 36 N. J. L. 94; *State v. Love*, 37 N. J. L. 60; *State v. Cleaver*, 46 N. J. L. 467; *State v. Betts*, 24 N. J. L. 555; *De Soto Bank v. Memphis*, 6 Baxt. (Tenn.) 415; 32 Am. Rep. 530; *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193; *Bank of Commerce v. Tennessee*, 104 U. S. 493; *Frederick County v. Sisters of Charity*, 48 Md. 34; *Appeal Tax Ct. v. Grand Lodge*, etc., 50 Md. 421; *Appeal Tax Ct. v. Baltimore Academy*, 50 Md. 437; *State v. Board of Assessors*, 34 La. Ann. 574; *Armand v. Dumas*, 28 La. Ann. 403; *New Orleans v. Russ*, 27 La. Ann. 413; *Lee v. New Orleans*, 28 La. Ann. 426; *State v. Board of Assessors*, 35 La. Ann. 668; *Enaut v. McGuire*, 36 La. Ann. 804; 51 Am. Rep. 14; *Phillips Exeter Academy v. Exeter*, 58 N. H. 306; 42 Am. Rep. 589; *Morris v. Lone Star Chapter*, 68 Tex. 698; *First M. E. Church v. Chicago*, 26 Ill. 482. In addition to these cases, many instances illustrative of the principle will be found under the subsections of this article upon *Educational, Religious, Eleemosynary*, etc., *Exemptions*.

Thus, under an exemption of property devoted to religious purposes, buildings used partly for religious and partly for secular purposes are not exempt. *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172.

Nor would a residence belonging to a college, when rented to one of its professors, fall within an educational exemption, although it seems it would be otherwise if the right to occupy the building formed a part of the professor's emoluments. *Pierce v. Cambridge*, 2 Cush. (Mass.) 611. *Compare Kendrick v. Farquhar*, 8 Ohio 189.

But in *State v. Leester*, 29 N. J. L. 541, where the charter of a library association was very full and explicit, exempting in express terms all the stocks and estate, real or personal, which should become vested in the association, the court reluctantly held

that an entire building was exempt which was used only in part by the association, the remainder being leased for stores and other purposes.

**Permanent Improvements upon Land.**

—The exemption of lands from taxation necessarily embraces also an exemption of the permanent improvements thereon, used for the purposes contemplated in the charter of the corporation. *Appeal Tax Ct. v. Baltimore Cemetery Co.*, 50 Md. 432; *Osborne v. Humphrey*, 7 Conn. 335; *Landon v. Litchfield*, 11 Conn. 251; *Hardy v. Waltham*, 7 Pick. (Mass.) 108; *Matheny v. Golden*, 5 Ohio St. 361; *Kumler v. Traber*, 5 Ohio St. 442.

1. *Wyman v. St. Louis*, 17 Mo. 335; *Red v. Johnson*, 53 Tex. 284; *St. Mary's College v. Crowl*, 10 Kan. 451; *Morris v. Lone Star Chapter*, 68 Tex. 698.

2. *State v. Board of Assessors*, 34 La. Ann. 574; *Massenburg v. Grand Lodge*, 81 Ga. 212; *Appeal Tax Ct. v. Grand Lodge*, etc., 50 Md. 422; *Frederick County v. Sisters of Charity*, 48 Md. 34; *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19; 34 Am. Rep. 597; *County Com'rs v. Colorado Seminary*, 12 Colo. 497. And see instances given under the sub-heads, *Eleemosynary, Educational, Religious Exemptions*, etc.

3. *New Hampshire*.—In *Franklin St. Soc. v. Manchester*, 60 N. H. 342, it was held that the constitution of *New Hampshire* does not exempt church property from taxation.

In *Connecticut*, it has been held that society should be local in its nature. *Mauresa Institute v. Norwalk*, 61 Conn. 228.

**Leased Property.**—In *Hebrew Free School Assoc. v. New York*, 99 N. Y. 488, it was held that property used by a religious society, of which it was simply the lessee and not the owner, is not exempt from taxation. And so in *People v. Anderson*, 117 Ill. 50, where the property was owned by an individual.

exclusively, and directly used for religious purposes, and cannot be extended to that used for secular objects.<sup>1</sup> Thus, a general exemption of property devoted to religious purposes does not exempt a parsonage.<sup>2</sup> When a church ceases to be used as a place

See also *Salem Marine Soc. v. Salem*, 155 Mass. 329. But see *Howell v. City*, 1 Leg. Gaz. (Pa.) 242, where a leased church was held exempt.

In *New York*, it has been held that it is only an incorporated society that is entitled to exemption. *Church of St. Monica v. New York*, 119 N. Y. 91.

**Exemption of Church Property Purchased After Assessment.**—Property held not exempt for the current year. *First Congregational Church v. Linn County*, 70 Iowa 396.

A Jewish synagogue has been held entitled to the exemption. *Shaarai Berocho v. New York* (Supreme Ct.), 18 N. Y. Supp. 792.

1. *Trinity Church v. New York*, 10 How. Pr. (N. Y.) 138; *Congregation v. New York* (Supreme Ct.), 1 N. Y. Supp. 35; *Young Men's Christian Assoc. v. New York*, 113 N. Y. 187; *Gibbons v. District of Columbia*, 116 U. S. 404; 11 Am. & Eng. Corp. Cas. 492; *Lefevre v. Detroit*, 2 Mich. 586; *Mulroy v. Churchman*, 60 Iowa 717; *Kirk v. St. Thomas' Church*, 70 Iowa 287; *Frederick County v. Sisters of Charity*, 48 Md. 41; *Connecticut Spiritualist, etc., Assoc. v. East Lyme*, 54 Conn. 152; *Mauresa Institute v. Norwalk*, 61 Conn. 228; *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587; *Old South Soc. v. Boston*, 127 Mass. 379.

Thus, where part of a building is rented for other purposes, it is taxable, though the profits be applied to religious purposes. *First M. E. Church v. Chicago*, 26 Ill. 482; *Orr v. Baker*, 4 Ind. 86; *South Congregational Meeting House v. Lowell*, 1 Met. (Mass.) 538. So land separated from the lot upon which the church edifice stands and not necessary to the use of the church, is not exempt. *Boston Soc., etc., v. Boston*, 129 Mass. 178; *Gibbons v. District of Columbia*, 116 U. S. 404; 11 Am. & Eng. Corp. Cas. 492.

**Personal Property.**—Money invested in bonds is not exempt, though the income is applied to the support of the church. *Presbyterian Church v. Montgomery County*, 3 Grant's Cas. (Pa.) 245; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 345. But in *Atwater v. Woodbridge*, 6 Conn. 223; 16 Am.

Dec. 46, it was held that such money was exempt under the wording of the *Connecticut* statute. See, however, *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 278. And so in *New Jersey*, *State v. Silverthorn*, 52 N. J. L. 73, where a mortgage held by a church as security was held exempt.

An occasional secular use will not deprive the property of its exemption. *St. Mary's Church v. Tripp*, 14 R. I. 307; *Ramsey County v. Church of the Good Shepherd*, 45 Minn. 229.

**Land upon which a church is erecting,** or intends immediately to erect, a house of worship, is exempt. *Trinity Church v. Boston*, 118 Mass. 164; *Washington, etc., Church v. New York*, 20 Hun (N. Y.) 297; *St. James Church v. New York*, 41 Hun (N. Y.) 309. But in *Pennsylvania*, it has been held otherwise. *Erie County v. Bishop*, 13 Phila. (Pa.) 509; *Mullen v. Erie County*, 85 Pa. St. 288. And in *Massachusetts*, the work must have been begun upon the church edifice to entitle it to the exemption. *Boston Soc., etc., v. Boston*, 129 Mass. 182.

**Janitor Residing on Premises.**—Where a janitor resided on the premises, paying no rent, the property was still held entitled to the exemption under the *New York* statute. *Shaarai Berocho v. New York* (Supreme Ct.), 18 N. Y. Supp. 792. But where the basement of a synagogue was used for baths, the synagogue deriving profit from them, the property was held not exempt. *Congregation v. New York* (Supreme Ct.), 1 N. Y. Supp. 35.

2. *St. Peter's Church v. Scott County*, 12 Minn. 395; *Hennepin County v. Grace*, 27 Minn. 503; *St. Mark's Church v. Brunswick*, 78 Ga. 541; *Gerke v. Purcell*, 25 Ohio St. 229; *State v. Axtell*, 41 N. J. L. 117; *State v. Lyon*, 32 N. J. L. 360; *State v. Krollman*, 38 N. J. L. 574; *M. E. Church v. Ellis*, 38 Ind. 3; *First Presbyterian Church v. New Orleans*, 30 La. Ann. 259; 31 Am. Rep. 224. And this is true though religious services are held in the parsonage. *Ramsey County v. Church of the Good Shepherd*, 45 Minn. 229; *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19; 34 Am. Rep. 597.

of religious worship, its exemption from taxation *ipso facto* ceases.<sup>1</sup> Sometimes the salaries of ministers of the gospel are exempt in whole or in part from taxation.<sup>2</sup>

*b. EDUCATIONAL INSTITUTIONS.*—In general, an exemption of educational institutions from taxation will not be extended to school property used for private gain merely, and entirely devoid of a public or charitable character.<sup>3</sup> And in some states the exemption applies only to those schools which are established, maintained, and regulated by the state.<sup>4</sup> Ordinarily, however, the property of schools or colleges which are not established or maintained with the object of private or corporate gain, is exempt.<sup>5</sup> The mere use or occupancy for school or educational purposes of the property of a private owner, sustaining merely the relation of lessor to a school or seminary, does not create an exemption in his favor.<sup>6</sup> Unless the terms of the statute

**Bishop's Residence.**—In *Vail v. Beach*, 10 Kan. 214, a bishop's residence owned by the diocese was held not exempt. But in *Bishop's Residence v. Hudson*, 91 Mo. 671, the bishop's house was held exempt as used for purposes purely charitable.

**Parsonage Held Exempt.**—If, however the legislative intent to include parsonages within the exemption can be clearly shown, they will, of course, be exempt. See *Gray v. La Fayette County*, 65 Wis. 567.

1. *Moore v. Taylor*, 147 Pa. St. 481; *New Haven v. Sheffield*, 30 Conn. 160; *Lord v. Litchfield*, 36 Conn. 116; 4 Am. Rep. 41; *Old South Soc. v. Boston*, 127 Mass. 378. See also *Black v. Brooklyn*, 51 Hun (N. Y.) 581.

2. As to what ministers are entitled to these exemptions, see *Prosser v. Secor*, 5 Barb. (N. Y.) 607; *People v. Peterson*, 31 Hun (N. Y.) 421; *Com. v. Cuyler*, 5 W. & S. (Pa.) 275; *Miller v. Kirkpatrick*, 29 Pa. St. 226; *Ruggles v. Kimball*, 12 Mass. 337; *Gridley v. Clark*, 2 Pick. (Mass.) 403; *Plumer v. Com.*, 3 Gratt. (Va.) 615.

3. *Henderson v. McCullagh*, 89 Ky. 448; *Chicago University v. People*, 118 Ill. 565; *Nashville v. Ward*, 16 Lea (Tenn.) 27; *Gerke v. Purcell*, 25 Ohio St. 229; *Indianapolis v. McLean*, 8 Ind. 328; *Chegaray v. New York*, 13 N. Y. 220; *Montgomery v. Wyman*, 130 Ill. 17. But in *Minnesota* a private institution has been held exempt under a general exemption of institutions of learning. *Nelson v. Stryker Seminary* (Minn. 1893), 53 N. W. Rep. 1133. In *State v. Ross*, 24 N. J. L. 497, it was held that under the *New Jersey*

statute as it was then, a private institution was entitled to exemption; but under the present statute, unless school buildings are rented by the owner they are exempt. *State v. Chamberlain* (N. J. 1893), 26 Atl. Rep. 913.

So in *Indianapolis v. Sturdevant*, 24 Ind. 391, it was held that a school conducted as a private enterprise was exempt under the general exemption of institutions of learning. Compare the earlier case of *Indianapolis v. McLean*, 8 Ind. 328.

4. *Association of Colored Orphans v. New York*, 104 N. Y. 581; 18 Am. & Eng. Corp. Cas. 186. See also *People v. Ryan* (Ill. 1891), 27 N. E. Rep. 694. So where the exemption was of "buildings for free public schools," it was held not to include parochial schools furnishing gratuitous instruction. *St. Joseph's Church v. Assessor of Taxes*, 12 R. I. 19; 34 Am. Rep. 597.

5. *Protestant Episcopal Church v. Taylor*, 15 Pa. St. 565; *Dickinson College v. Cumberland County*, 2 Pa. Dist. Rep. 70; *Northampton County v. Lafayette College* (Pa. 1889), 18 Atl. Rep. 516; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Griswold College v. State*, 46 Iowa 275; *Detroit Home, etc., School v. Detroit*, 76 Mich. 521; *Hennepin County v. Grace*, 27 Minn. 503; *Willard v. Pike*, 59 Vt. 216.

**Medical Colleges.**—In *Omaha Medical College v. Rush*, 22 Neb. 449, a medical college was held a school, and as such, entitled to the *Nebraska* exemption. Compare *People v. Campbell*, 93 N. Y. 196.

6. *People v. Board of Assessors*, 32

are explicit to the contrary,<sup>1</sup> a general exemption of the property of educational institutions will be confined to property actually and exclusively used by the institution for its legitimate purposes.<sup>2</sup> If the property is used for other purposes, the fact

Hun (N. Y.) 457; *aff'd*, 97 N. Y. 648; Hennepin County *v.* Bell, 43 Minn. 344; *Montgomery v. Wyman*, 130 Ill. 17; *Armand v. Dumas*, 28 La. Ann. 403. Compare *Nazareth Literary, etc., Institute v. Com.*, 14 B. Mon. (Ky.) 266.

In *Laurent v. Muscatine*, 59 Iowa 404, it is held that where the legal title is in a private individual, the property is not exempt from taxation as a school.

**Personal Property.**—In *Williston Seminary v. Hampshire County*, 147 Mass. 427, it was held that the exemption of the personal property of the seminary of learning from taxation, included all personal property belonging to state institutions, whether in or out of possession; and that, where property is bequeathed to a seminary of learning to be held in trust as an accumulating fund, the right of interest of the seminary therein is properly described as its property, and is exempt from taxation.

The *Missouri* exemption has been held not to extend to personal property not fixtures. *Kansas v. Kansas City Medical College*, 111 Mo. 141.

1. *Willard v. Pike*, 59 Vt. 202; *University of the South v. Skidmore*, 87 Tenn. 155. The charter of a university provided that "all corporate property belonging to the institution, both real and personal, is, and shall be, free from taxation." It was held that this exempted all property which the university might lawfully acquire, whether actually used and occupied by it or not. *State v. Hamline University* (Minn. 1891), 48 N. W. Rep. 1119.

The property, situated in Nashville, of the Davidson Academy, incorporated in 1785, and exempted for ninety-nine years from taxation, is exempt in the hands of those holding by purchase from the trustees. *State v. Whitworth*, 8 Lea (Tenn.) 594.

2. *Cincinnati College v. State*, 19 Ohio 110; *St. James Educational Institute v. Salem*, 153 Mass. 185; *Wyman v. St. Louis*, 17 Mo. 335; *Washburn College v. Shawnee County*, 8 Kan. 344; *Ottawa University v. Franklin County* (Kan. 1892), 29 Pac. Rep. 599; *County Com'rs v. Colorado Seminary*, 12 Colo. 497; *State v. Ross*, 24 N. J. L.

497; *State v. Board of Assessors*, 36 La. Ann. 347. Compare *Northwestern University v. People*, 99 U. S. 309; *State v. New Brunswick* (N. J. 1892), 25 Atl. Rep. 853; *Ramsey County v. Macalester College*, 51 Minn. 437; *St. Edward's College v. Morris*, 82 Tex. 1; *Stewart v. Davis*, 3 Murph. (N. Car.) 244; *Presbyterian Theological Seminary v. People*, 101 Ill. 578.

Where buildings are exempt, the land upon which they stand is also exempt. *Cassiano v. Ursuline Academy*, 64 Tex. 673.

**Lease of School Building.**—A lease of the school building during vacation will not subject it to taxation. *Temple Grove Seminary v. Cramer*, 26 Hun (N. Y.) 309; *aff'd* 98 N. Y. 121.

**Farms.**—Farms, the products of which are used for the support of the school, have been held not exempt in the following cases: *St. Edward's College v. Morris*, 82 Tex. 1; *Thiel College v. Mercer County*, 101 Pa. St. 530; *St. Mary's College v. Crowl*, 10 Kan. 442. In the latter case, some of the products were sold, and the court intimated that but for that, the farm might have been exempt.

In *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *People v. Barber*, 42 Hun (N. Y.) 27; *Monticello Female Seminary v. People*, 106 Ill. 398; 46 Am. Rep. 702; and *State v. Fisk University*, 87 Tenn. 233, a different conclusion was arrived at in view of the exemption statutes under consideration, and farms used by schools and colleges for the support of the institution, and the pleasure and improvement of the pupils, were held exempt.

**Use or Ownership the Test.**—The use to which the property is put, not the ownership, is the test by which to determine whether it is exempt. *Washburn College v. Shawnee County*, 8 Kan. 344; *St. Mary's College v. Crowl*, 10 Kan. 442; *Phillips Exeter Academy v. Exeter*, 58 N. H. 306; 42 Am. Rep. 589. But in *Willard v. Pike*, 59 Vt. 202, it was held that ownership, not use, was the test under the *Vermont* statute.

**Professors' Residences.**—In *Hendrick v. Farquhar*, 8 Ohio 189, and *Pierce v. Cambridge*, 2 Cush. (Mass.) 611, a pro-

that the proceeds of such use are devoted to carrying out the objects of the institution is immaterial.<sup>1</sup>

c. **ELEEMOSYNARY INSTITUTIONS.**—The property of charitable associations is generally exempt from taxation; but only so far as actually used for charitable purposes.<sup>2</sup> That the rents and revenues of property are devoted to charitable purposes does not render the property itself exempt; it is only when the property

professor's residence erected on the land of the institution of learning was held not exempt. In the latter case it was intimated that if the college had not rented the house to the professor, but had permitted him to occupy it in part return for his services, it would have been exempt; and it was held in *Northampton County v. Lafayette College* (Pa. 1889), 18 Atl. Rep. 516; *Griswold College v. State*, 46 Iowa 275; and so in *State v. Ross*, 24 N. J. L. 497; *Ramsey State v. Macalester College*, 51 Minn. 437, that professors' residences owned by the college were exempt.

**Use of Part of the Building as a Residence for Teachers.**—A building used by the owner as a family residence, was held not exempt as one used exclusively for school purposes, although the main building was a school, and the owner and family were all engaged in the school as teachers or pupils. *Red v. Johnson*, 53 Tex. 284. But see *Red v. Morris*, 72 Tex. 554, where the same property, under slightly different circumstances, was held exempt.

And the occupation of the top floor of a building, otherwise entirely devoted to furnishing instruction to scholars, by teachers having immediate charge of the school, will not deprive it of the exemption. *St. Monica v. New York*, 55 N. Y. Super. Ct. 160. See also *Willard v. Pike*, 59 Vt. 202.

In *Blackman v. Houston*, 39 La. Ann. 592, it was held that the fact that the owner and principal of a school lives upon the premises with his family, does not forfeit the property's right to exemption.

**Dormitories and Boarding Houses.**—In *Northampton County v. Lafayette College* (Pa. 1889), 18 Atl. Rep. 516, the college dormitories were held exempt. And see *Willard v. Pike*, 59 Vt. 202, where certain buildings occupied as a students' boarding-house, professor's residence, and students' club-house were held exempt.

1. *Cooley on Taxation* (2d ed.) 202; *Cincinnati College v. State*, 19 Ohio

110; *Cleveland Library Assoc. v. Pelton*, 36 Ohio St. 253; *Wagner's Free Inst., etc., Appeal*, 116 Pa. St. 555; 18 Am. & Eng. Corp. Cas. 193; *Ottawa University v. Franklin County* (Kan. 1892), 29 Pac. Rep. 599; *Brodie v. Fitzgerald*, 57 Ark. 445; *State v. Board of Assessors*, 35 La. Ann. 668; *State v. Ross*, 24 N. J. L. 497; *County Com'rs v. Colorado Seminary*, 12 Colo. 497; *Salem Lyceum v. Salem*, 154 Mass. 15.

But in *North St. Louis Gymnastic Soc. v. Hudson*, 12 Mo. App. 342; *aff'd* 85 Mo. 32, a school building exempted from taxation "so long as it is used only for the purposes of education," was held not to be made taxable by the renting of a room therein for other purposes, where the proceeds thereof were used exclusively for the benefit of the school.

The charter of a school provided that it might "receive, hold, or convey any estate, real or personal, that may be conveyed to it, or that it now possesses, and said property while so used for the promotion of science, shall be free from taxation." This was held to include property, the income of which alone was used by the school. *New Haven v. Sheffield Scientific School*, 59 Conn. 163.

2. *Massenburg v. Grand Lodge*, 81 Ga. 212; *People v. Board of Assessors*, 27 Hun (N. Y.) 559; *Young Men's Christian Assoc. v. Donohugh*, 13 Phila. (Pa.) 12; *Baltimore v. Grand Lodge*, 60 Md. 280; *Frederick County v. Sisters of Charity*, 48 Md. 34; *Morris v. Lone Star Chapter*, 68 Tex. 698; *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172; *Philadelphia v. Ladies, etc., Soc.*, 12 Pa. Co. Ct. Rep. 346.

An intention at some future time to occupy the land is not sufficient. *Boston Soc., etc., v. Boston*, 129 Mass. 178. See also *Enaut v. McGuire*, 36 La. Ann. 804; 51 Am. Rep. 14. So disused property is subject to taxation. *Philadelphia v. Jewish Hospital Assoc.* (Pa. 1892), 23 Atl. Rep. 1135.

itself is actually and directly used for charitable purposes that the law exempts it from taxation.<sup>1</sup>

The terms of the exemption vary in the different states. In some it extends only to institutions of "purely public charity,"<sup>2</sup> in others, to "property used exclusively for charitable purposes;" while in some the exemption is broader, extending

1. *New Orleans v. St. Anna's Asylum*, 31 La. Ann. 292; *New Orleans v. Congregation, etc., of Judah*, 15 La. Ann. 390; *State v. Board of Assessors*, 34 La. Ann. 574; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321; *Appeal Tax Ct. v. Grand Lodge, etc.*, 50 Md. 421; *Appeal Tax Ct. v. Baltimore Academy*, 50 Md. 437; *Redemptorists v. Howard County*, 50 Md. 449; *Appeal Tax Ct. v. Regents of University of Maryland*, 50 Md. 457; *Fort Des Moines Lodge v. Polk County*, 56 Iowa 34; *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212; *Indianapolis v. Grand Master*, 25 Ind. 518; *Cleveland Library Assoc. v. Pelton*, 36 Ohio St. 258; *Morris v. Lone Star Chapter*, 68 Tex. 698. Compare *New Orleans Female Orphan Asylum v. Houston*, 37 La. Ann. 68. But see *People v. Purdy*, (Supreme Ct.), 12 N. Y. Supp. 307, and *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139, where farms, the products of which were used in the charitable institutions, were held exempt. And see also *State v. Chat-ham Tp.*, 52 N. J. L. 373.

2. **What Institutions are Purely of Public Charity.**—A hospital maintained by voluntary gifts, and not conducted for profit, though some of the patients pay, was held an institution of purely public charity, in *Philadelphia v. Pennsylvania Hospital*, 8 Pa. Co. Ct. Rep. 72; *aff'd* 154 Pa. St. 9; *Hennepin County v. Gethsemane Brotherhood*, 27 Minn. 460; 38 Am. Rep. 298; *Hennepin County v. Grace*, 27 Minn. 503; *State v. Powers*, 10 Mo. App. 263; *Applications Against Certain Lots* (Minn. 1881), 8 N. W. Rep. 595. See also *Philadelphia v. Women's Christian Assoc.*, 125 Pa. St. 572; and compare *In re Vanderbilt's Estate* (Surrogate's Ct.), 10 N. Y. Supp. 239. But a hospital long disused is not exempt. *Philadelphia v. Jewish Hospital Assoc.* (Pa. 1892), 23 Atl. Rep. 1135. An orphan asylum, *Burd Orphan Asylum v. School Dist.*, 90 Pa. St. 21; an asylum for destitute men and women, *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201; *Gerke v. Purcell*, 25

Ohio St. 229; *Cincinnati College v. State*, 19 Ohio 111; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362; a parochial school, *Hennepin County v. Grace*, 27 Minn. 503; and a church publishing house, *Book Agents, etc. v. Hinton* (Tenn. 1893), 21 S. W. Rep. 321, have been held institutions of purely public charity; and so a public library, *Donohugh's Appeal*, 86 Pa. St. 306; *Cleveland Library Assoc. v. Pelton*, 36 Ohio St. 253; though it is otherwise where the benefits are confined to its members. *Delaware County Inst. v. Delaware County*, 94 Pa. St. 163.

**What are Not Institutions of Purely Public Charity.**—In *Illinois*, it has been held that the statute of that state exempting such institutions, applies only to corporations created under the laws of *Illinois*. *People v. Western Seaman's Friend Soc.*, 87 Ill. 246.

Lands devised to trustees to appropriate the annual products to the erection of a poorhouse and the support of its inmates, are not exempt. *Academy of Richmond v. Bohler* (Ga. 1887), 7 S. E. Rep. 633.

An academy supported by tuition fees, though free scholarships are established with part of its surplus income, *Philadelphia's Appeal* (Pa. 1888), 15 Atl. Rep. 683; and an incorporated college, whose chief object is to furnish education at a reasonable rate, but without granting absolutely free tuition, and into which neither the public nor any class has an absolute right of admission, are not exempt. *Thiel College v. Mercer County*, 101 Pa. St. 530; *Northampton County v. Lafayette College* (Pa. 1889), 18 Atl. Rep. 516.

**Charities Confined to a Class—Mutual Benefit Associations.**—The question whether an association which confines its benefits only to its own members or a particular class, is a purely public charity, is a subject of conflict. In *Ohio*, in *Morning Star Lodge v. Hayslip*, 23 Ohio St. 144, it was held not to be. So in *Pennsylvania*, in *Delaware County Inst. v. Delaware County*, 94 Pa. St. 163, an institute of science which con-



to all the property of "charitable" or "benevolent" associations. A number of cases construing statutes will be found in the notes.<sup>1</sup>

*d.* CEMETERIES—(See also CEMETERIES, vol. 3, p. 56).—Cemetery property is very generally exempt from taxation by charter

fining its benefits to its own members, was held not a purely public charity. See also *Donohugh's Appeal*, 86 Pa. St. 306, where it is said: "The essential features of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it its public character." But in *Burd Orphan Asylum v. School Dist.*, 90 Pa. St. 21, a divided court held an orphan asylum, which preferred children of a certain denomination, though admitting all, to be a purely public charity. Compare *Babb v. Reed*, 5 Rawle (Pa.) 151; 28 Am. Dec. 650.

A masonic lodge was said not to be a purely public charity in *Bangor v. Masonic Lodge*, 73 Me. 428; 40 Am. Rep. 369. And see *Massenburg v. Grand Lodge*, 81 Ga. 212.

1. **Masonic lodges** have been held entitled to exemption from taxation as charities, under the statutes of several of the states. *Savannah v. Solomon's Lodge*, 53 Ga. 93; *Indianapolis v. Grand Master*, 25 Ind. 518; *State v. Board of Assessors*, 34 La. Ann. 574; *State v. Addison*, 2 S. Car. 499.

But it was held otherwise in *Bangor v. Masonic Lodge*, 73 Me. 428; 40 Am. Rep. 369. And see *Massenburg v. Grand Lodge*, 81 Ga. 212.

**Mutual benefit insurance associations** have been held not entitled to exemption as charitable organizations in *Matter of Jones' Estate*, 50 Hun (N. Y.) 603; *Lee Mut. F. Ins. Co. v. State*, 60 Miss. 395. But the *Virginia* court arrived at a different conclusion in *Petersburg v. Petersburg Ben., etc., Assoc.*, 78 Va. 431; 8 Am. & Eng. Corp. Cas. 484. As to whether they are "purely public charities," see the preceding note.

**"Charitable" and Benevolent Institutions.**—"It may be difficult to say what a 'benevolent institution' is if it differs from one that is merely charitable." *Maine Baptist, etc., Convention v. Portland*, 65 Me. 92. See also *Saltonstall v. Sanders*, 11 Allen (Mass.) 446; *Chamberlain v. Stearns*, 111 Mass. 267. Compare *Thomson v. Norris*, 20 N. J. Eq. 524.

A society for the prevention of cruelty to animals is a benevolent and charitable institution within the *Massachusetts* statutes exempting such institutions from taxation. *Massachusetts Soc. v. Boston*, 142 Mass. 24.

A biblical institute supported entirely by donations, is a benevolent institution, and is exempt under the statute. *Appeal Tax Ct. v. Grand Lodge, etc.*, 50 Md. 442.

Vacant lots bought by the authorities of a church and held in private ownership in anticipation of the increase of the city and with the intention of possibly erecting thereon a church, school, or hospital when needed, were not exempt from taxation as a place of "public worship" or a "charitable institution." *Enaut v. McGuire*, 36 La. Ann. 804; 51 Am. Rep. 14. See also *Boston Soc., etc. v. Boston*, 129 Mass. 178.

**Missionary Societies.**—It has been repeatedly decided that missionary societies, foreign or domestic, are, in a legal sense, charitable institutions. *Maine Baptist, etc., Convention v. Portland*, 65 Me. 92; *Tappan v. Dubois*, 45 Me. 122; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Everett v. Carr*, 59 Me. 325; *Bartlet v. King*, 12 Mass. 537; 7 Am. Dec. 99; *Sohier v. St. Paul's Church*, 12 Met. (Mass.) 250; *First Universalist Soc. v. Fitch*, 8 Gray (Mass.) 421; *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Fairbanks v. Lamson*, 99 Mass. 533; *Going v. Emery*, 16 Pick. (Mass.) 107; 26 Am. Dec. 645.

**Almshouses.**—In *Association for Colored Orphans v. New York*, 104 N. Y. 581; 18 Am. & Eng. Corp. Cas. 146, it was held that the *New York* statute exempting almshouses, was not confined to almshouses owned by the public. And in *Western Dispensary v. New York (Super. Ct.)*, 4 N. Y. Supp. 547, the building of an association extending gratuitous medical and surgical aid, and used as a hospital for the indigent sick, was held an almshouse. And see also *New York Infant Asylum v. Westchester County*, 31 Hun (N. Y.) 116; *People v. Com'rs of Taxes*, 36 Hun (N. Y.) 311. Compare *In re Van*

or general law. It has been held that the exemption of a cemetery includes land within its boundaries acquired for burial purposes, though not actually used therefor;<sup>1</sup> and also the improvements on land held for cemetery purposes.<sup>2</sup>

*e.* RAILROADS.—It has been said that the property necessary to the operation of a railroad is not subject to taxation, even though there is no express exemption of such property in the charter of the corporation or in any general law; this upon the ground that a railroad is a public work and is exempt upon general principles applicable to all public property.<sup>3</sup> But this implied exemption has been denied, and cannot be said to be sustained either by reason or authority.<sup>4</sup>

The exemption, whether express or implied, is confined to prop-

derbilt's Estate (Surr. Ct.), 10 N. Y. Supp. 242.

A social club was held entitled to the exemption under the *Missouri* statute. *State v. Lesueur* (Mo. 1890), 13 S. W. Rep. 237.

**Property Held in Trust.**—Where a statute exempted the property of a charitable or scientific institution from taxation, it was held that the exemption did not apply to property held in trust by such an institution for an object foreign to the purposes of its incorporation. *Salem Marine Soc. v. Salem*, 155 Mass. 329.

**Leased ground occupied by a charitable corporation**, although for its charitable purposes, is not exempt, even though the lease provides that the lessees (the corporation) shall pay the taxes. *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201.

**An Exemption from Local Taxation will not Exempt Property from State Taxes.**—By a special act the Christian Home for Intemperate Men is exempted from local taxation or other purposes. This has been held not to exempt it from state taxation; and, therefore, a bequest to the institution is subject to the succession tax. *In re Vanderbilt's Estate* (Surr. Ct.), 10 N. Y. Supp. 240.

1. *State v. North Bergen*, 43 N. J. L. 146. But in *People v. Graceland Cemetery Co.*, 86 Ill. 337, property not used for burial purposes was held not entitled to exemption. And so ground rented to a sexton to use as a residence and garden, was held not exempt. *State v. Lange*, 16 Mo. App. 468.

In *Mulroy v. Churchman*, 60 Iowa 717, it was held that an appropriation of one acre in forty to burial purposes, would not give exemption to the whole tract. But in *Pennsylvania*, where

the cemetery is used as a source of profit, it is not exempt. *Brown v. Pittsburgh* (Pa. 1888), 16 Atl. Rep. 43. So a mere dedication or appropriation on paper is not enough. *Woodlawn Cemetery v. Everett*, 118 Mass. 354.

Where a city had authorized land to be used as a cemetery, but before any interments were made the ordinance was revoked, the land was still held exempt under the *New York* statute, it being of such a character that it could not be used for other purposes. *People v. Pratt*, 129 N. Y. 68.

2. *Appeal Tax Ct. v. Baltimore Cemetery Co.*, 50 Md. 432, where a corporation, in addition to its cemetery lands proper, had acquired old burial grounds with the intention of selling them to increase its funds, it was held that such grounds were exempt from taxation under the general exemption of "all property." *Swan Point Cemetery v. Tripp*, 14 R. I. 199.

3. See *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564; *Boston, etc., R. Co. v. Cambridge*, 8 Cush. (Mass.) 237; *Charlestown v. Middlesex County*, 1 Allen (Mass.) 199; *Worcester County v. Worcester*, 116 Mass. 193; 17 Am. Rep. 159; *Boston, etc., R. Co. v. Lowell, etc., R. Co.*, 124 Mass. 368; *Railroad v. Berks County*, 6 Pa. St. 70; *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242; *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465; 86 Am. Dec. 552; *Schuylkill Bridge Co. v. Frailey*, 13 S. & R. (Pa.) 422; *State v. Middle Tp.*, 38 N. J. L. 270; *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193.

4. *People v. Com'rs of Taxes*, 82 N. Y. 460; *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 296; *Louisville, etc., Canal Co. v. Com.*, 7 B.

erty reasonably necessary for the purposes of the corporation,<sup>1</sup>

Mon. (Ky.) 160; *Ludlow v. Cincinnati Southern R. Co.*, 78 Ky. 357; 7 Am. & Eng. R. Cas. 231; *Cumberland Marine R. Co. v. Portland*, 37 Me. 444; *overruling Bangor, etc., R. Co. v. Harris*, 21 Me. 533; *Providence, etc., R. Co. v. Wright*, 2 R. I. 459; *Philadelphia, etc., R. Co. v. Bayless*, 2 Gill (Md.) 355; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 160; 2 *Redfield on the Law of Railways*, 394. See also *Cooley on Taxation* (2d ed.) 89.

1. *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564; *Boston, etc., R. Co. v. Cambridge*, 8 Cush. (Mass.) 237; *McCulloch v. Stone*, 64 Miss. 378; *Mobile, etc., R. Co. v. Moseley*, 52 Miss. 127; *Vicksburg, etc., R. Co. v. Lewis*, 68 Miss. 29; *Railroad v. Berks County*, 6 Pa. St. 70; *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465; 86 Am. Dec. 552; *Erie County v. Erie, etc., Transp. Co.*, 87 Pa. St. 437; *Eldridge v. Smith*, 34 Vt. 484; *State v. Fuller*, 40 N. J. L. 328; *State v. Mansfield*, 23 N. J. L. 510; *Philadelphia, etc., R. Co. v. Neary* (Del. 1886), 8 Atl. Rep. 363; *Wright v. Southwestern R. Co.*, 64 Ga. 783; *Bibb County v. Central R. Co.*, 40 Ga. 646; *St. Louis, etc., R. Co. v. Loftin*, 30 Ark. 693; *Day v. Joiner*, 6 Baxt. (Tenn.) 441; *Ford v. Delta, etc., Land Co.*, 43 Fed. Rep. 181; *Richmond, etc., R. Co. v. Alamance County*, 76 N. Car. 212; 84 N. Car. 504; 7 Am. & Eng. R. Cas. 339; *Belo v. Forsyth County*, 82 N. Car. 415; 33 Am. Rep. 688; *Milwaukee, etc., R. Co. v. Crawford County*, 29 Wis. 116; *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271; *State v. Baltimore, etc., R. Co.*, 48 Md. 49; *Toledo, etc., R. Co. v. Lafayette*, 22 Ind. 262; *St. Louis County v. St. Paul, etc., R. Co.*, 45 Minn. 510; *Ramsey County v. Chicago, etc., R. Co.*, 33 Minn. 537; *Todd County v. St. Paul, etc., R. Co.*, 38 Minn. 163; 31 Am. & Eng. R. Cas. 482; *St. Paul, etc., R. Co. v. St. Paul (Minn. 1888)*, 38 N. W. Rep. 925.

**Distinction Between Essential Property and that of Mere Convenience.**—It has been held that property to be exempt must be essential to the corporation in the conduct of its business, and not a mere convenience. *State v. Mansfield*, 23 N. J. L. 510; *Gardner v. State*, 21 N. J. L. 557; *Worcester v.*

*Western R. Co.*, 4 Met. (Mass.) 564; *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193; *Lehigh Coal, etc., Co. v. Northampton County*, 8 W. & S. (Pa.) 334; *Railroad v. Berks County*, 6 Pa. St. 70; *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452; *Todd County v. St. Paul, etc., R. Co.*, 38 Minn. 163; 31 Am. & Eng. R. Cas. 482.

In *State v. Newark*, 26 N. J. L. 520, it is said: "The necessary appendages of a railroad and transportation company are one thing, and their appendages which may be convenient means of increasing the advantages and profits of the company, are another thing." But *compare State v. Hancock*, 35 N. J. L. 545, *disapproving State v. Mansfield*, 23 N. J. L. 510. See also *State v. Leggett*, 41 N. J. L. 319; *Milwaukee, etc., R. Co. v. Crawford County*, 29 Wis. 116.

In determining whether particular property of a railroad company is "necessarily used in operating the road" so as to be exempt under the statute, the question is whether its use is requisite for the full performance of the duty which the company owes to the public as a common carrier. *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271.

**Canal Property.**—As to what canal property has been held necessary to the operation of the canal, see *Wayne County v. Delaware, etc., Canal Co.*, 15 Pa. St. 351.

**Steamboats.**—In *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452, steamboats were held not essential to the operation of the road, and, therefore, not exempt. *Compare Osborn v. Hartford, etc., R. Co.*, 40 Conn. 498. In *State v. Haight*, 34 N. J. L. 319, boats used by the company were held essential.

**Hotels** owned by the railroad and used as a summer resort, are not exempt. *State v. Baltimore, etc., R. Co.*, 48 Md. 49; *State v. St. Paul, etc., R. Co.* (Minn. 1889), 44 N. W. Rep. 63. In *Chicago, etc., R. Co. v. Crawford County*, 48 Wis. 666, it was held that a building used principally for the accommodation of the company's travelers, was exempt under the statute. In *Milwaukee, etc., R. Co. v. Crawford County*, 29 Wis. 116, an inn was held not exempt, although it was intimated that if it had been kept exclusively for the accommodation of travelers on the road it would have been.

and sometimes to such as is actually used therefor.<sup>1</sup> And it

**Short spurs and steam shovels** were held exempt in Louisville, etc., R. Co. v. Taylor, 68 Miss. 361. And in State v. Hancock, 35 N. J. L. 537, reversing 33 N. J. L. 315, it was held that a short spur and the gravel land to which it led were exempt.

**Branch Roads.**—The charter of a railroad provided that the road and its appurtenances should be taxed at a certain rate, and that it would be exempt from other taxation. This was held to extend to a branch road. Atlanta, etc., R. Co. v. Allen, 15 Fla. 637. But in Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 279; 53 Am. & Eng. R. Cas. 687, it was held that the exemption of the main line was not extended to branch roads. Both of these cases turned, however, upon the peculiar wording of the charters and the exemption clauses.

**Section Houses.**—These were held exempt in Mississippi. Vicksburg, etc., R. Co. v. Bradley, 66 Miss. 518.

**Elevators.**—In Detroit Union Depot, etc., Co. v. Detroit, 88 Mich. 347, and State v. Nashville, etc., R. Co., 86 Tenn. 438, elevators were held necessary to the operation of the railroad. But in *Re Swigert*, 119 Ill. 83; 59 Am. Rep. 789; Illinois Cent. R. Co. v. People, 119 Ill. 137, and Milwaukee, etc., R. Co. v. Milwaukee, 34 Wis. 271, a different conclusion was arrived at.

A warehouse used principally for the storage of freight, has been held exempt. Milwaukee, etc., R. Co. v. Milwaukee, 34 Wis. 273. Compare Berks County v. Railroad Co., 6 Pa. St. 70.

**Freight and passenger depots** have been held exempt as necessary to the enjoyment of the franchise of the company. Northampton Co. v. Lehigh Coal, etc., Co., 75 Pa. St. 461; Berks County v. Railroad Co., 6 Pa. St. 70. But in Portland, etc., R. Co. v. Saco, 60 Me. 196, it was held that where the exemption was limited to "the track of the road and the land on which it is constructed," railroad depots were not within the exemption.

**Right of Way.**—An exemption of the "right of way" of a railroad, has been held to include roadbeds, stations, workshops, etc., constructed thereon. Northern Pac. R. Co. v. Carland, 5 Mont. 146. But in Atlantic, etc., R. Co. v. Lesueur (Arizona, 1888), 37 Am. & Eng. R. Cas. 368, this exemption was

held not to include the superstructure or improvements. See also Atlantic, etc., R. Co. v. Yavapia County (Arizona, 1889), 39 Am. & Eng. R. Cas. 543. In Republican Valley, etc., R. Co. v. Chase County, 33 Neb. 759; 48 Am. & Eng. R. Cas. 641, a right of way upon which there was no superstructure, was held subject to assessments under the Nebraska statute. For the construction of an exemption of a "right of way," see Richmond, etc., R. Co. v. Almanac, 84 N. Car. 504. See also Chicago, etc., R. Co. v. People, 98 Ill. 351; 5 Am. & Eng. R. Cas. 94.

**Timber Lands.**—In Todd County v. St. Paul, etc., R. Co., 38 Minn. 168; 31 Am. & Eng. R. Cas. 482, timber lands owned by the company, and furnishing ties and timber for the road, were held not exempt.

**Logs Cut For Sale Upon Exempt Lands.**—In State v. Northern Pac. R. Co., 39 Minn. 25, it was held that logs cut from the exempt land of a railroad company, were not themselves exempt.

**Water stations** have been held exempt. Berks County v. Railroad Co., 6 Pa. St. 70.

"Road, rolling and live stock," will not include the shops, stables, etc., of a street railway company. Atlanta St. R. Co. v. Atlanta, 66 Ga. 104.

"Wood yards and machine shops" were held not exempt in Berks County v. Railroad Co., 6 Pa. St. 70.

**Real Estate.**—Under a general exemption of all the property of a railroad, the real estate of a railroad was held exempt. Richmond v. Richmond, etc., R. Co., 21 Gratt. (Va.) 604; Com. v. Richmond, etc., R. Co., 81 Va. 355; 24 Am. & Eng. R. Cas. 482.

**Franchises of the Corporation Held to be Exempt under a General Exemption of the Property of the Railroad.**—Wilmington, etc., R. Co. v. Reid, 13 Wall. (U. S.) 264; Raleigh, etc., R. Co. v. Reid, 13 Wall. (U. S.) 269; Pacific R. Co. v. Maguire, 20 Wall. (U. S.) 44; State v. Berry, 17 N. J. L. 80; Camden, etc., R. Co. v. Hillegas, 18 N. J. L. 11; Camden, etc., R. Co. v. Com'rs of Appeal, 18 N. J. L. 71. See also Nichols v. New Haven, etc., Co., 42 Conn. 103. But an exemption of the roadbed, etc., does not exempt the franchise. Atlantic, etc., R. Co. v. Commissioners, 87 N. Car. 129.

1. Milwaukee, etc., R. Co. v. Mil-

has been held that the property of a railroad, which is entitled to exemption, is only such as is within the limit of the land which the corporation is authorized to take by proceedings *in invitum* under the power of eminent domain.<sup>1</sup>

If property is designed for the appropriate business of a railroad company, and is primarily and mainly so used, it does not become subject to taxation by reason of incidental and occasional use for other purposes.<sup>2</sup> But it has been held, where the language of the exempting clause was very broad, that all property of the corporation was exempt from taxation, whether used for railroad purposes or not.<sup>3</sup>

Sometimes, public lands granted to railroads are exempted from taxation until "sold and conveyed," and a contract to con-

waukee, 34 Wis. 271; *State v. Leggett*, 41 N. J. L. 319; *Pierce on Railroads* 484.

In *Ramsey County v. Chicago*, etc., R. Co., 33 Minn. 539, land not occupied by the railroad, but by private parties with its consent, was held not exempt, though likely to become necessary in the future for railroad purposes.

The doctrine in *New Jersey* has been thus summed up: Lands held by a corporation for future, but already contemplated, use, but which are, in the meantime, let to individuals for use, are taxable; lands held for future use, such use being, however, at present actually contemplated, are taxable, although vacant and unoccupied; lands acquired and held for future use, which are in the course of being devoted to such use, as by the necessary filling of submerged land, are not taxable; and, perhaps, lands not in use, but in good faith held for future use, the need for which is apparent and not remote, are exempt. *State v. Newark*, 25 N. J. L. 315; 26 N. J. L. 519; *State v. Middle Tp.*, 38 N. J. L. 278; *Cook v. State*, 33 N. J. L. 474; *State v. Haight*, 35 N. J. L. 40; *State v. Jersey City*, 41 N. J. L. 471; *State v. Binninger*, 42 N. J. L. 528; *State v. Fuller*, 40 N. J. L. 328.

But the test of actual use cannot be applied during the period of construction. See the *New Jersey* cases just cited. *State v. Wetherill*, 41 N. J. L. 147; *Ramsey County v. Chicago*, etc., R. Co., 33 Minn. 537.

1. *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193; *Eldridge v. Smith*, 34 Vt. 484; *Milwaukee*, etc., R. Co. v. *Milwaukee*, 34 Wis. 271. See also *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564; *Western*, etc., R. Co. v.

*State*, 54 Ga. 428; 66 Ga. 563; *State v. Baltimore*, etc., R. Co., 48 Md. 49; *State v. Nashville*, etc., R. Co., 86 Tenn. 438.

This test was disapproved in *State v. Hancock*, 35 N. J. L. 537, on the ground that the power to condemn all property necessary to the operation of a railroad, is not given by all charters.

2. *Osborn v. Hartford*, etc., R. Co., 40 Conn. 498; *Wright v. Southwestern R. Co.*, 64 Ga. 783; *Chicago*, etc., R. Co. v. *Crawford County*, 48 Wis. 666. See also *Milwaukee*, etc., R. Co. v. *Milwaukee*, 34 Wis. 271; *Milwaukee*, etc., R. Co. v. *Crawford County*, 29 Wis. 116.

3. *Osborn v. New York*, etc., R. Co., 40 Conn. 491.

**County Taxes.**—The charter of a railroad exempted its stock from county taxes. It was held that a tax levied to pay the bonds of a county given in payment of a subscription to railroad stock, is a county tax, although the bond can be paid only out of a tax levied for the special purpose. *State v. Hannibal*, etc., R. Co. (Mo. 1889), 39 Am. & Eng. R. Cas. 547.

**Street Railway.**—An ordinance of a city granted a company the exclusive privilege of operating a street railway upon certain streets, on payment by the company of a certain sum for each car run by it. This payment was held not to be a tax exempting the company from an *ad valorem* tax levied by the city on property within the city limits, but exempting merchants and others paying a license or specified tax on their business or calling. *Newport v. South Covington*, etc., R. Co., 89 Ky. 29.

vey has been held equivalent to an actual conveyance, so as to render the land liable to taxation.<sup>1</sup>

Where two companies consolidate, and one was entitled by its charter to hold its property exempt from taxation, that property remains exempt from taxation after the consolidation; but the exemption does not extend to any other property acquired by the consolidated company, either at the time of the consolidation or subsequently.<sup>2</sup>

*f. MANUFACTURERS.*—In several of the states, "manufacturing corporations," "property engaged in the manufacture" of certain articles, or "manufacturers," are exempt from taxation; and the question frequently arises what corporations or property are within the statutes. The determination of the question depends largely in each case upon the wording of the particular statute under which the exemption is claimed; illustrative cases will be found in the note.<sup>3</sup>

1. *State v. Winona, etc., R. Co.*, 21 Minn. 472; *State v. Southern Minn. R. Co.*, 21 Minn. 344. Compare *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *Ordway v. Smith*, 53 Iowa 589; *Brown County v. Winona, etc., Land Co.*, 38 Minn. 397.

A retention by the railroad of a mere legal title, is not sufficient. *Brown County v. Winona, etc., Land Co.*, 38 Minn. 397; *St. Paul, etc., R. Co. v. McDonald*, 34 Minn. 182.

The real character of the transaction is to be regarded in determining the question whether a sale or conveyance of the land has been made. *St. Paul, etc., R. Co. v. McDonald*, 34 Minn. 195; *St. Paul, etc., R. Co. v. Robinson*, 40 Minn. 360; *Chippewa County v. St. Paul, etc., R. Co.*, 42 Minn. 295. See *Sioux City, etc., R. Co. v. Robinson*, 41 Minn. 452; 39 Am. & Eng. R. Cas. 510, for a transaction which was held not to defeat the exemption.

In *Champaign County v. Reed*, 100 Ill. 304, it was held that the lands were liable to taxation when sold by the company and paid for, although no conveyance may have been made. Compare *Illinois Cent. R. Co. v. Goodwin*, 94 Ill. 262; *Stevens County v. St. Paul, etc., R. Co.*, 36 Minn. 467; 29 Am. & Eng. R. Cas. 225.

In *Minnesota*, May 1st, is the day for determining the taxability of property. If conveyed before May 1st, the land is taxable for the current year; if after that date, it is not. *Martin County v. Drake*, 40 Minn. 137; 37 Am. & Eng. R. Cas. 389.

2. *Tennessee v. Whitworth*, 117 U.

S. 129; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 376; *Charleston v. Branch*, 15 Wall. (U. S.) 470; *Green County v. Connes*, 109 U. S. 104; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361; *Charlotte, etc., R. Co. v. Gibbs*, 27 S. Car. 385; 31 Am. & Eng. R. Cas. 464.

But the new corporation is subject to the laws existing at the date of the consolidation, and, if at that time there is a constitutional provision subjecting all corporations to taxation, the prior exemption of one or both of the old companies will not avail them. *St. Louis, etc., R. Co. v. Berry*, 41 Ark. 509; *aff'd* in 113 U. S. 465; *Atlantic, etc., R. Co. v. Georgia*, 98 U. S. 359; *Petersburg v. Petersburg R. Co.*, 29 Gratt. (Va.) 773; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17; *Atlanta, etc., R. Co. v. State*, 63 Ga. 483.

And where the exemption is dependent upon some act to be performed by one of the corporations, and the new corporation is neither required nor able to perform such acts, it will not be exempt. *State v. Maine Cent. R. Co.*, 66 Me. 488.

3. *Who are Manufacturing Corporations*—(See also *MANUFACTURE*, vol. 14, p. 257, *MANUFACTURER*, vol. 14, p. 264; *MANUFACTURING CORPORATIONS*, vol. 14, p. 312).—In *New Jersey*, it has been held that the business

in which the capital is invested and used, and not the purposes for which the company was formed, as expressed in its certificate of incorporation, determines its liability. *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75; *State v. State Board*, 47 N. J. L. 36. See also *Com. v. Arrott Steam Power Mills Co.*, 145 Pa. St. 69.

**Newspaper Publishing and Printing Business.**—In *State v. Dupre*, 42 La. Ann. 561, a newspaper publisher was held within the exemption of "all manufacturers." But in *Nicholson v. Parker*, 44 La. Ann. 76, he was held not entitled to the benefit of a provision exempting "manufacturers of stationery." And in *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75, a newspaper publisher was held taxable as to the business of publishing the paper, but exempt as to his job printing business.

**Louisiana.**—In *Jones v. Raines*, 35 La. Ann. 996, a sawmill was held not exempt under article 207 of the *Louisiana* constitution. So a manufacturer of wire furniture, *Gast v. Board of Assessors*, 43 La. Ann. 1104; and a manufacturer of shoe-uppers, *Ricks v. Board of Assessors*, 43 La. Ann. 1075.

The production of rice flour does not bring the producer within the exemption allowed to property "employed in the manufacture of flour." *State v. Board of Assessors*, 34 La. Ann. 574. So the exemption of property employed in the manufacture of articles of wood, does not apply to articles of wood which are not ready for immediate use without further manipulation, such as cabins and planks; but does apply to doors, sashes, blinds, etc. *Carrie v. New Orleans*, 41 La. Ann. 996. A cooper is exempt under this provision. *New Orleans v. Le Blanc*, 34 La. Ann. 596. But vessels used to convey timber for sawmill purposes are not exempt. *Martin v. New Orleans*, 38 La. Ann. 397; 58 Am. Rep. 194. See also *Carpenter v. Brusle* (La. 1893), 12 So. Rep. 483; *Whitecastle Lumber, etc., Co. v. Browne* (La. 1893), 12 So. Rep. 485; *Plaquemine, etc., Imp. Co. v. Browne* (La. 1893), 12 So. Rep. 485; *Robertson v. New Orleans* (La. 1893), 12 So. Rep. 753.

Under the exemption of "property employed in the manufacture of textile products," property used in the manufacture of cordage, ropes, etc., is exempt, *Waterbury v. Atlas Steam Cordage*

*Co.*, 42 La. Ann. 725; *Hernsheim v. Atlas Steam Cordage Co.*, 42 La. Ann. 726; but this does not exempt one engaged in the manufacture of clothing and jeans. *Cohn v. Parker*, 41 La. Ann. 894.

And see upon the construction of this article 207, *Benedict v. New Orleans*, 44 La. Ann. 793; *Taylor Bros. Iron Works Co. v. New Orleans*, 44 La. Ann. 554; *Smith v. Board of Assessors*, 44 La. Ann. 91.

**Ship Building and Repairing.**—A corporation incorporated "for the purpose of constructing and using docks for the repairing, building, etc., of vessels," is not exempt under the *New York* statutes. *People v. New York Floating Dry Dock*, 92 N. Y. 487.

**Gas Companies.**—A gas company has been held to be a manufacturing corporation within the *New York* statute. *Nassau Gas Light Co. v. Brooklyn*, 25 Hun (N. Y.) 567; *aff'd* 89 N. Y. 409. But in *Covington Gas Light Co. v. Covington*, 84 Ky. 94, it was held otherwise. See also *Newport Light Co. v. Newport*, 89 Ky. 454.

In *Pennsylvania*, gas companies have been held exempt in *West Chester Gas Co. v. Chester County*, 30 Pa. St. 232, and *Coatesville Gas Co. v. Chester County*, 97 Pa. St. 476, upon the ground that they were public corporations, and therefore not subject to taxation. See *supra*, this title, *Railroads*. Compare *Com. v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75. But see section 20 of *Pennsylvania* Acts of 1875, expressly excluding gas companies from the benefit of the exemption of manufacturing corporations. Held constitutional in *Com. v. German Brewing Co.* (Pa. 1891), 34 Am. & Eng. Corp. Cas. 262.

In *Williams v. Rees*, 2 Fed. Rep. 882, a gas company was held not a manufacturing corporation.

**Electric Light Companies.**—An electric light company was held exempt as a manufacturing corporation in *People v. Wemple*, 129 N. Y. 543, 664. See also *Beggs v. Edison Electric Light Co.* (Ala. 1892), 11 So. Rep. 381.

In *Com. v. Northern Electric Light, etc., Co.*, 145 Pa. St. 105, such a company was held not exempt under the *Pennsylvania* statute. *Com. v. Edison Electric Light Co.*, 145 Pa. St. 131.

**A mining company** was held not a manufacturing corporation within the *New York* statute in *Horn Silver Min. Co. v. New York*, 143 U. S. 305;

The exemption is confined to corporations doing a substantial part of their manufacturing within the state.<sup>1</sup>

The exemption extends only to capital and property actually employed in manufacturing.<sup>2</sup>

But the manufacturer does not forfeit his claim to exemption, where the property is used principally in the manufacture of exempt articles, although it may be incidentally employed in the

*aff'd* 105 N. Y. 76. See also *Byers v. Franklin Coal Co.*, 106 Mass. 131, and *Greenville Ice, etc., Co. v. Greenville*, 69 Miss. 86.

**Produce of the State.**—An exemption of articles manufactured from the produce of a state is held not to preclude a privilege tax upon the sale of liquors. *Kurth v. State*, 86 Tenn. 134.

**Organized Exclusively for Manufacturing Purposes.**—The *Pennsylvania* statute of 1889 exempts corporations "organized exclusively, for manufacturing purposes and actually carrying on manufacturing within the state." This was held not to include a corporation having powers to engage in coal mining, quarrying and manufacturing; *Com. v. Lackawanna Iron, etc., Co.*, 129 Pa. St. 346; *Com. v. Thomas Iron Co.*, 12 Pa. Co. Ct. Rep. 654; nor a corporation authorized to speculate in the securities of other companies. *Com. v. Westinghouse Electric, etc., Co.*, 151 Pa. St. 265.

But where a company has invested a part of its capital stock in property not used for manufacturing purposes, an apportionment may be made. *Com. v. Westinghouse Air Brake Co.*, 151 Pa. St. 276.

In *Com. v. Mann*, 150 Pa. St. 64, reversing 11 Pa. Co. Ct. Rep. 290, it was held that where a corporation was partly engaged in other business, it was not wholly exempt, but that a tax would be apportioned.

An iron corporation leasing a mine in another state was held not exempt. *Com. v. Copley Iron Co.*, 11 Pa. Co. Ct. Rep. 295. And in *Com. v. East Bangor, etc., Co.*, 10 Pa. Co. Ct. Rep. 363, it was held that a quarrying company which has invested part of its capital stock in quarry lands, is not exempt.

The corporation must be *bona fide* engaged in manufacturing, and where it appeared that, though organized as a manufacturing corporation, it merely supplied steam to its tenants in order to rent its rooms more readily, it was held not exempt. *Com. v.*

*Arrott Steam Power Mills Co.*, 145 Pa. St. 69.

1. *People v. Horn Silver Min. Co.*, 105 N. Y. 76; *aff'd* 143 U. S. 305; *State v. American Glucose Co.* (N. J. 1886), 15 Am. & Eng. Corp. Cas. 112; *Norton Naval Constr. Co. v. State Board* (N. J.), 53 N. J. L. 564; 24 Am. & Eng. Corp. Cas. 268; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394; *State v. State Board of Assessors*, 54 N. J. L. 430.

But in *People v. Wemple*, 133 N. Y. 323; 37 Am. & Eng. Corp. Cas. 626, it was held that a foreign corporation doing business in *New York*, although the greater portion is done in another state, was within the exemption. By chapter 353 of the *New York* Laws of 1889, the exemption was restricted to corporations "wholly engaged in carrying on manufacturing within the state." See also *People v. Wemple*, 138 N. Y. 582.

2. Appeal of *Com.* (Pa. 1889), 18 Atl. Rep. 133. Buildings erected by manufacturing companies for their employes are not exempt. *Com. v. Mahoney, etc., Mill Co.*, 129 Pa. St. 360. See also *West Chester Gas Co. v. Chester County*, 30 Pa. St. 232.

In *Franklin Needle Co. v. Franklin*, 65 N. H. 177, realty bought for the purpose of erecting a manufactory was held to be exempt within *New Hampshire* Gen. Laws, ch. 53, § 10.

A manufacturing company which withdraws from business with the intention of abandonment, is not doing business within the state. *State v. State Board of Assessors* (N. J. 1892), 25 Atl. Rep. 329.

An exemption of corporations having fifty per cent. of their capital stock employed in the manufacturing business, cannot be objected to on the ground that part of the capital stock is employed in disposing of the manufactured product of the plant. *In re Consolidated Electric Storage Co.* (N. J. 1893), 26 Atl. Rep. 983.



manufacture of other articles, intimately connected with the principal business.<sup>1</sup>

As long as the factory exists and the property and machinery are dedicated to the exempt purposes, the exemption continues, though there may be temporary interruptions in the operation of the factory. But where a lease is made of the property for the purpose of closing the factory, in order to limit production and prevent competition, the right to exemption is forfeited.<sup>2</sup>

*g.* STOCK—(See also CORPORATIONS, vol. 4, p. 272*d*).—Upon the question whether an exemption of the corporate property, franchises, or capital stock from taxation, exempts also the shares of stock in the hands of the stockholders, there has been some conflict. The determination of the question depends, in each case, largely upon the words used by the legislature in the charter or statute granting the exemption.<sup>3</sup>

On the other hand, it is very generally held that an exemption

1. *State v. Board of Assessors*, 41 La. Ann. 534.

In case a manufacturer of harness and saddlery, who carries with his stock of manufactured goods a small assortment of other articles, not manufactured by him, but which constitute a necessary accessory to his business, has been once assessed, and has paid the tax on such property, an additional assessment will be annulled, as one made on property which is nontaxable, under *Louisiana Const.*, art. 207, exempting from taxation the product of materials employed in the manufacture of harness and saddlery. *Smith v. Board of Assessors*, 44 La. Ann. 91.

2. *Waterbury v. Atlas Steam Cordage Co.*, 42 La. Ann. 723; *Hernsheim v. Atlas Steam Cordage Co.*, 42 La. Ann. 726.

**Duration.**—The statute authorizing towns to exempt manufacturing property from taxation for a term not exceeding ten years, does not confer authority to exempt the same property for a second period of ten years. *Boody v. Watson*, 63 N. H. 320; *Academy v. Exeter*, 58 N. H. 306; *People v. Davenport*, 91 N. Y. 574; *State v. Bank of Smyrna*, 2 Houst. (Del.) 99; *Cook on Stock and Stockholders* (2d ed.), § 568.

3. **Cases in which the Exemption was Held to Extend to the Shares.**—Where the property of an incorporated company, or the company itself, is by its charter exempted from taxation, the shares of the company in the hands of the stockholders are also exempted from the same taxation. *State v. Powers*, 24 N. J. L. 400; *State v. Branin*, 23 N. J.

L. 484; *State v. Bentley*, 23 N. J. L. 532; *State v. Jones*, 38 N. J. L. 83.

A bank charter provided that the corporation should pay "to the treasury of this commonwealth, twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus." This was held to exempt the stockholders from a tax upon the shares. *Johnson v. Com.*, 7 Dana (Ky.) 338.

In *Gordon v. Appeal Tax Ct.*, 3 How. (U. S.) 147, it was held that the exemption of a bank from "any further tax or burden" exempted the shares of stock.

The charter of a railroad company provided that, "all machines, wagons, vehicles, and carriages purchased with the funds of the company, and all their works constructed under the authority of this act, and all profits which shall accrue from the same, shall be vested in the respective shareholders of the company forever in proportion to their respective shares, and the same shall be deemed personal estate and shall be exempt from any public charge or tax whatsoever." This was held to exempt the shares of stock of the respective shareholders. *Com. v. Richmond, etc.*, R. Co., 81 Va. 355; 24 Am. & Eng. R. Cas. 482. See also *Richmond v. Richmond, etc.*, R. Co., 21 Gratt. (Va.) 604.

In *Tennessee v. Whitworth*, 22 Fed. Rep. 75, *aff'd* 117 U. S. 139, it was held that a provision that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances," exempted the shares, the court saying,

of the shares of stock from taxation, exempts the corporate property, franchises, and capital stock.<sup>1</sup>

"Each share is a part of the whole, and as the whole is exempt from taxation it follows that each part or share must be exempt." See also *New Orleans v. Houston*, 119 U. S. 265.

In *Farrington v. Tennessee*, 95 U. S. 679, the bank charter provided that the bank "shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes." It was held that the words "in lieu of all other taxes," as thus used, meant, in lieu of all other taxes that might be imposed on that subject of taxation, viz., the shares of the capital stock; and that, accordingly, it excluded a tax on those shares assessed upon them against the individual shareholder as his property. See also *New Orleans v. Carondelet Canal, etc., Co.*, 36 La. Ann. 396; *Bibb County v. Central R. Co.*, 40 Ga. 646; *Smith v. Burley*, 9 N. H. 423.

**Cases Holding that the Exemption Does not Extend to the Shares.**—In *Union Bank v. State*, 9 Yerg. (Tenn.) 490, it was held that a provision in the charter of a bank, "that in consideration of the privileges granted by the charter, the bank agrees to pay the state annually one-half of one per cent. on the amount of the capital stock paid in by the stockholders other than the state," operated by way of contract to restrict the state in taxing the corporation in respect of its capital stock to the rate mentioned, but not to prohibit the state from a separate and additional taxation of each stockholder upon his individual interest as a stockholder. And see *Memphis v. Farrington*, 8 Baxt. (Tenn.) 539, where it was said, "Capital stock and shares of stock are two distinct properties, and an exemption of the one does not thereby necessarily exempt the other, nor the taxation of the latter operate as a tax on the former, so as to interfere with its exemption from such burdens." In *Belo v. Forsyth County*, 82 N. Car. 415; 33 Am. Rep. 688, it was held that an exemption of the corporate realty does not exempt the shares of stock. And see *Appeal Tax Ct. v. Rice*, 50 Md. 302; *Tax Cases*, 12 Gill & J. (Md.) 117; *Anne Arundel County v. Annapolis, etc., R. Co.*, 47 Md. 592; cited in *Cook on Stock and Stockholders* (2d ed.), § 568, as holding that an exemption of the corporate property, franchises or

capital stock, from taxation, does not exempt the shares of stock from any tax.

In *State v. Memphis City Bank* (Tenn. 1892), 19 S. W. Rep. 1045, a provision in the company's charter, that there should be a state tax "on the amount of capital stock actually paid in . . . in lieu of all other taxes and assessments," was held not to exempt the shares.

1. *Cook on Stock and Stockholders* (2d ed.), § 568; *Cooley on Taxation* (2d ed.) 213; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; 48 Am. Dec. 531; *State v. Wilson*, 52 Md. 638; *Frederick County v. Farmers, etc., Nat. Bank*, 48 Ind. 117; *Anne Arundel County v. Annapolis, etc., R. Co.*, 47 Md. 592; *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604; *Scotland County v. Missouri, etc., R. Co.*, 65 Mo. 123; *Bank of Cape Fear v. Edwards*, 5 Ired. (N. Car.) 516. See also *Middlesex R. Co. v. Charleston*, 8 Allen (Mass.) 330.

In *Foster v. Stevens*, 63 Vt. 175, it was held that a statute providing for a direct tax upon the capital of a bank, is a tax upon the shares of stock held by its stockholders. See also *Bugbee v. Stevens*, 63 Vt. 185.

In *State v. Union, etc., Bank* (Tenn. 1892), 19 S. W. Rep. 758, a charter provision that the payment of a certain per cent. on each share of stock subscribed shall be in lieu of all other taxes, was held to protect from any other taxation, the capital stock as well as the shares held by the stockholders; and, also, to protect them from any privilege or license tax.

In the case, however, of *Wilmington, etc., R. Co. v. Reid*, 64 N. Car. 226, it was held that an exemption of shares of stock does not exempt the corporate franchise from taxation. *Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155. And in *State v. Petway*, 2 Jones Eq. (N. Car.) 396, it was held that a charter provision that the shares of stock should be taxed a certain amount, did not prevent a tax on dividends.

**Non-resident Stockholder — Foreign Corporation.**—Under a statute which, like the *Ohio* statute, exempts from taxation shares of stock in corporations, "the capital stock of which is taxed in the name of the company," shares of

Ordinarily an exemption of the capital stock is equivalent to the exemption of the property into which the capital stock has been converted, unless a contrary intention is in some way manifested.<sup>1</sup> But the mere exemption of the capital stock will not exempt the company and tangible property where the grant by its terms discriminates between the capital stock and such property.<sup>2</sup>

h. MISCELLANEOUS.—For the construction of various statutes conferring exemption from taxation upon certain classes of property and persons, see note 3.

stock in a foreign corporation, which pays taxes in the state only on that portion of its property therein situated, are not exempt. *Sturges v. Carter*, 114 U. S. 511. See also *Worth v. Ashe County*, 90 N. Car. 409; *San Francisco v. Fry*, 63 Cal. 470; 1 Am. & Eng. Corp. Cas. 431.

A non-resident stockholder, who is taxed on his stock in the state where he resides, cannot defeat that tax by reason of exemptions enjoyed within the state creating the corporation. *Cook on Stock and Stockholders* (2d ed.), § 568; *citing* *Appeal Tax Ct. v. Patterson*, 50 Md. 354; *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Cleveland, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 300.

**An Exemption May be Waived.**—An exemption of stock may be waived by the company accepting a subsequent statute imposing a tax. *Cook on Stock and Stockholders* (2d ed.), § 568; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 551; *Macon, etc., R. Co. v. Goldsmith*, 62 Ga. 463; but a corporation cannot waive its exemption as against its bonds previously issued. *Hand v. Savannah, etc., R. Co.*, 17 S. Car. 219; 12 Am. & Eng. R. Cas. 495; *Cooley on Taxation* (2d ed.) 213.

**Income.**—An exemption of stock is an exemption of the gross income of a corporation. *State v. Hood*, 15 Rich. (S. Car.) 177.

**National Bank Shares.**—The purpose of the revenue law of 1868, in exempting "all shares of the capital stock of corporations which are required to list their property for taxation," was, to avoid the double taxation which would result from the taxation both of the property of which the capital stock consists, and the shares of stock which represent the same property. This exemption has no application to shares of the stock of a national bank, whose capital consists mainly, if not entirely, of

*United States* bonds, which the corporation is not required to list for taxation. *McIver v. Robinson*, 53 Ala. 456.

**Privilege Tax — License Tax.**—In *Grand Gulf, etc., R. Co. v. Buck*, 53 Miss. 246, it was held that the exemption of the stock and property of a corporation precluded a privilege tax. See also *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Mobile, etc., R. Co. v. Moseley*, 52 Miss. 127.

But in *New Orleans v. New Orleans Canal, etc., Co.*, 32 La. Ann. 105, an exemption of bank stock from taxation was held not to preclude a license tax.

1. *Memphis, etc., R. Co. v. Gaines*, 97 U. S. 697; *Scotland County v. Missouri, etc., R. Co.*, 65 Mo. 129; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *New Haven v. City Bank*, 31 Conn. 106; *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604; *Bibb County v. Central, etc., R. Co.*, 40 Ga. 646; *Rome R. Co. v. Rome*, 14 Ga. 275; *Lackawanna County v. First Nat. Bank*, 94 Pa. St. 221.

2. *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637.

Thus, where the railroad with its fixtures and appurtenances was exempted from taxation for only twenty years, and the capital stock was exempted forever, it is clear that the road and fixtures could not represent the capital stock for the purpose of taxation, and they are subject to taxation at the expiration of the twenty years. *Memphis, etc., R. Co. v. Gaines*, 97 U. S. 697; 3 Tenn. Ch. 604; *St. Louis, etc., R. Co. v. Loftin*, 98 U. S. 563; 105 U. S. 158.

3. **Banks.**—See also *NATIONAL BANKS*, vol. 16, p. 143; *SAVINGS BANKS*, vol. 21, p. 516; *supra*, this title, *Stock*.

*Kentucky* Gen. St., ch. 92, art. 2, § 1, providing that state and national banks, and "other institutions of loan and discount," shall be taxed in a certain manner in full of all state, county and

municipal taxes, has reference only to incorporated "institutions," and does not apply to a private unincorporated bank, which is taxable under the general law. *Bowling Green v. Barclay*, 91 Ky. 66.

**Property of Insane Person.**—Where land, owned by an insane person, and exempted, under *Iowa* Code, § 711, from taxation, was sold by his guardian under an order of court, it was held that the land continued to be exempt until the sale and conveyance had been approved by the court. *Ordway v. Smith*, 53 Iowa 589.

**Judge's Salary.**—The article of the *Louisiana* Const. which declares that the judges, both of the supreme and inferior courts, shall at stated times receive a salary which shall not be diminished during their continuance in office, exempts the salary of a judge from taxation. *New Orleans v. Lea*, 14 La Ann. 194.

**Road Tax.**—*Missouri* Rev. St., § 5012, exempting from road tax the property of all persons residing within the limits of an incorporated village or town, embraces the property of non-residents. *State v. Wabash, etc., R. Co.*, 90 Mo. 166.

**Growing Crops.**—(See also CROPS, vol. 4, p. 887.)

Fruit-trees are not exempt from taxation as "growing crops," under *California* Const., art. 13, § 1. *Cottle v. Spitzer*, 65 Cal. 456; 52 Am. Rep. 305.

**Mechanics' Tools.**—A printer is a mechanic within the meaning of the term as used in the *Iowa* Code exempting the tools of any mechanic from taxation, and his press materials, etc., constitute his tools, and as such are exempt. *Smith v. Osburn*, 53 Iowa 474. But it has been held in *Mississippi* that, a printing press owned by a practical printer, editor and publisher of a newspaper, and necessary to his business as such printer and publisher, is not exempt under *Mississippi* Code, § 468, which provides that "the tools of any mechanic necessary for carrying on his trade" shall be exempt. *Frantz v. Dobson*, 63 Miss. 631; 60 Am. Rep. 68. See also TOOLS.

**Mines and Mining Claims.**—The constitution of *Colorado* provided that mines and mining claims should be exempt from taxation for the period of ten years from the date of the adoption of the constitution, "and thereafter may be taxed as provided by law." It was held that legislation was required to render such property taxable at the expiration of

the ten years. *In re* House Resolution (Colo. 1886), 21 Pac. Rep. 471.

A parcel of land was entered and paid for as a placer mining claim, and entered in the *United States* land office as a mineral entry. But within a few months after the issuance of the patent, the land was made a subdivision of the city of Leadville, a map of such subdivision, showing its division into blocks and lots, being filed in the recorder's office of the proper county. There was no evidence that the lot was in fact a mine or mining claim. It was held that the land was not exempt from taxation under the *Colorado* statute exempting mines or mining claims bearing gold or silver or other precious metals. *Dyke v. White*, 17 Colo. 296.

An exemption of mines and mining claims does not cover the flumes or machinery necessary to work them. *Hart v. Plum*, 14 Cal. 148; *Gold Hill v. Caledonia Silver Min. Co.*, 5 Sawy. (U. S.) 575.

**Mortgages.**—An exemption of mortgages from taxation will not be held to include so-called building association mortgages, of which the sum to be paid eventually is uncertain. *Appeal Tax Ct. v. Rice*, 50 Md. 302.

A *New Jersey* statute provided that "hereafter no mortgage or debt secured thereby shall be assessed for taxation, unless a deduction therefor shall have been claimed by the owner of the land and allowed by the assessors." This was held not to apply to a mortgage upon exempt lands. *State v. Lantz*, 53 N. J. L. 578.

Under the *Vermont* statute exempting from taxation personal estate owned by an inhabitant of that state, which is situated and taxed in another state, a debt evidenced by a promissory note owned by an inhabitant of *Vermont* was held to be taxable there, although secured on land in another state, where the mortgagee's interest is taxed as real estate, the note and mortgage being in the possession of their owner's agent, who lived where the land was situated. *Bullock v. Guilford*, 59 Vt. 516.

**Capital of Non-residents.**—Under the *New York* statute exempting agents of moneyed corporations, or capitalists, from taxation "for any moneys in their possession, or under their control, transmitted to them for the purpose of investment, or otherwise, and exempting demands belonging to the non-residents of the state sent to or deposited in this state for collection," it was held that

**X. THE LEVY—1. Meaning of Term.**—The term "levy" is here used to indicate the legislative act, whether state or local, which determines that a tax shall be laid,<sup>1</sup> and is to be distinguished from the levy on property incident to the enforcement of the collection of the tax, in which sense the term is also used.<sup>2</sup>

**2. How Made—*a*. GENERALLY.**—In rare instances the constitution provides for the levy of a tax without the assistance of the legislature;<sup>3</sup> but, as a general rule, a levy can be made only by legislative enactment,<sup>4</sup> within the limits and in the form prescribed

foreign capital sent within the state for investment is protected from taxation, whether invested or uninvested, and whether the securities received therefor are taken out of, or remain in the state for collection. *Williams v. Wayne County*, 78 N. Y. 561. Under the above statute, money sent into the state for investment is exempt from taxation as well after the death of such non-resident as before. *People v. Com'r's of Taxes*, 42 Hun (N. Y.) 560, *aff'g* 105 N. Y. 629; *People v. Coleman* (Supreme Ct.), 14 N. Y. Supp. 565.

1. *State v. Maginnis*, 26 La. Ann. 558; *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; *Maguire v. Mobile County*, 71 Ala. 401.

In *Morton v. Comptroller Gen'l*, 4 S. Car. 430, it is said that three things are essential to the levy of a tax: first, the ascertainment of a sum certain, or that can be made certain, to be imposed upon the collective body of taxpayers; second, a legal imposition of that sum as an obligation on the collective body of taxpayers; and third, an apportionment of such sum among individual taxpayers so as to ascertain the part or share that each should bear. And see *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 256; *Brewster v. Syracuse*, 19 N. Y. 116; *Woodbridge v. Detroit*, 8 Mich. 274.

In *Moore v. Foote*, 32 Miss. 469, the term "levy," when used in relation to county taxes, was held to include not only the ascertainment of the amount necessary to be raised, but also the performance of all such acts as would authorize the tax collector to proceed to collect it.

Where the levy is by a subordinate political division, it commonly consists of two distinct acts of legislation: first, that of the state giving the power to tax; and second, that of the local authority laying the tax under the power so given. *Doe v. McQuilkin*, 8 Blackf. (Ind.) 335; *Hawkins v. Jonesboro*, 63

Ga. 527; *Cruikshanks v. Charleston*, 1 McCord (S. Car.) 360. And see *Burlington*, etc., R. Co. v. *Cass County*, 16 Neb. 136.

A law authorizing or directing a city council to levy a tax does not execute itself. It merely enjoins a duty upon the city council, and the tax cannot be enforced in the absence of an actual levy by the council. *State v. Humphreys*, 25 Ohio St. 520.

Where corporate authorities are required to levy and collect a sufficient tax to pay interest annually, and to liquidate the principal of a specified debt within the time specified for its payment, it is a standing and continuing levy so long as the bonds remain unpaid. *Davis v. Brace*, 82 Ill. 542.

2. *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Waterman v. Harkness*, 2 Mo. App. 494. In *Valle v. Fargo*, 1 Mo. App. 344, the word "levy" was said to be synonymous with "collect," or "raised by execution."

3. *Walcott v. People*, 17 Mich. 68; *San Francisco*, etc., R. Co. v. *Board of Equalization*, 60 Cal. 12; *State v. McEvery*, 75 Mo. 530.

The *Louisiana* Constitution confers authority to levy a tax for levee purposes directly upon levee commissioners within their respective districts, requiring no action of the legislature, except the division of the state into levee districts, and a provision for the election or appointment of commissioners. *Davis v. Green*, 40 La. Ann. 281.

4. *New Orleans Cotton Exch. v. Board of Assessors*, 35 La. Ann. 1154; *Forman v. Board of Assessors*, 35 La. Ann. 825; *Lott v. Ross*, 38 Ala. 156; *State v. Mobile County*, 73 Ala. 65; *Bettison v. Budd*, 21 Ark. 578; *Cairo*, etc., R. Co. v. *Parks*, 32 Ark. 142; *Vanover v. Davis*, 27 Ga. 354; *Norris v. Russell*, 5 Cal. 249; *Houghton v. Austin*, 47 Cal. 646; *State v. St. Louis*, etc., R. Co., 74 Mo. 163; *Ellis v. Peck*, 45 Iowa 114; *Early v. Whittingham*, 43

by the constitution,<sup>1</sup> and by a duly authorized and properly constituted legislative body.<sup>2</sup> The computation of the amount to be raised, however, and the determination of the rate per cent. necessary to raise it, may be assigned to other than legislative officers.<sup>3</sup>

Iowa 162; *Ryerson v. Laketon Tp.*, 52 Mich. 510; *Folkerts v. Power*, 42 Mich. 283; *McCready v. Sexton*, 29 Iowa 356; 4 Am. Rep. 214; *State v. Hagood*, 13 S. Car. 46; *State v. Platt*, 2 S. Car. 150; 16 Am. Rep. 647; *Cruikshanks v. Charleston*, 1 McCord (S. Car.) 360; *State v. Charleston*, 2 Spears (S. Car.) 623; *Morris v. Tinker*, 60 Ga. 466; *Allen v. Peoria, etc.*, R. Co., 44 Ill. 85; *Webster v. People*, 98 Ill. 343; *Doe v. McQuilkin*, 8 Blackf. (Ind.) 335; *Bright v. McCullough*, 27 Ind. 223; *Daily v. Swope*, 47 Miss. 367; *Meriwether v. Garrett*, 102 U. S. 472; *Zanesville v. Richards*, 5 Ohio St. 590; *Bangs v. Snow*, 1 Mass. 181; *Bullock v. Curry*, 2 Metc. (Ky.) 171. And see *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Litchfield v. Vernon*, 41 N. Y. 123; *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 471; *Richmond v. Daniel*, 14 Gratt. (Va.) 385; *Lisbon v. Bath*, 21 N. H. 319; *Simmons v. Wilson*, 66 N. Car. 336; *Columbia v. Guest*, 3 Head (Tenn.) 413.

1. *People v. Kings County*, 52 N. Y. 556; *Cruger v. Dougherty*, 43 N. Y. 107; *Steckert v. East Saginaw*, 22 Mich. 110; *State v. St. Louis, etc., R. Co.*, 74 Mo. 166; *Brodie v. McCabe*, 33 Ark. 690; *Dean v. Lufkin*, 54 Tex. 265. And see *Parker v. Wayne County*, 104 N. Car. 166.

A tax levied before a constitutional provision limiting the amount to be raised by tax takes effect, is not affected by it. *Burlington, etc., R. Co. v. York County*, 7 Neb. 487. And in *State v. Maginnis*, 26 La. Ann. 558, it was held to be no ground for resisting a tax that the state debt had reached the amount limited by the constitution, unless the object for which the tax was levied, or the law authorizing it, was unconstitutional.

In *Spring v. Olney*, 78 Ill. 101, a proviso in a clause of a statute that "no tax shall be levied under this section unless two-thirds of all the aldermen elected shall vote in favor of the same," was held not to apply to the whole section, but only to the tax mentioned in that particular clause.

2. See *Lamoreaux v. O'Rourke*, 3

Abb. App. Dec. (N. Y.) 15; *Gilbert v. Huston*, Litt. Sel. Cas. (Ky.) 223; *State v. Woodside*, 8 Ired. (N. Car.) 104; *Wells v. Austin*, 59 Vt. 157.

The levy of a tax being a legislative and not a judicial function, a court can neither make, nor cause to be made, a new assessment, if the one complained of is erroneous. *State Railroad Tax Cases*, 92 U. S. 575.

Where a city is authorized to levy a tax upon such wards or lots as a jury of six, selected by the council, shall determine according to the benefit received, such proceeding is not a jury trial, but a special proceeding in the nature of a commission for a public purpose, and the voice of a majority will prevail in making the assessment. *Soens v. Racine*, 10 Wis. 271. See also *Steele v. Blanton*, 1 Lea (Tenn.) 514; *People v. Bennett*, 54 Barb. (N. Y.) 480.

The action of the legislature should be such that no further legislation will be necessary to authorize the collection of the tax. *Morton v. Comptroller Gen'l*, 4 S. Car. 430.

3. *Edwards v. People*, 88 Ill. 340; *Mustard v. Hoppess*, 69 Ind. 324; *State v. Maginnis*, 26 La. Ann. 558; *Wells v. Burbank*, 17 N. H. 393; *People v. Queens County*, 1 Hill (N. Y.) 195. And see *State v. Hagood*, 13 S. Car. 46; *Morton v. Comptroller Gen'l*, 4 S. Car. 430; *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12.

A levy imposed by the justices of the county courts, who are not elected, but appointed, is not contrary to a provision in the bill of rights that men cannot be taxed for public uses without their own consent or that of their representatives. *Case of County Levy*, 5 Call (Va.) 139; *Lockhart v. Harrington*, 1 Hawks (N. Car.) 408.

Authority given by the legislature to certain commissioners, to ascertain and determine the amount of a particular indebtedness, is not an exercise of judicial power by the legislature. *Shaw v. Dennis*, 10 Ill. 405. And in *Salem Turnpike, etc., Corp. v. Essex County*, 100 Mass. 282, it was held that a statute, providing for laying out the road and bridges of a turnpike, as a public highway, and for the appointment of com-

b. THE APPORTIONMENT.—The apportionment of a tax is the determination of the proportion to be borne by each person or thing or political subdivision, and the assignment to each of its share of the burden.<sup>1</sup> Taxes cannot be laid without apportionment, and the power to tax necessarily involves the right to apportion the tax.<sup>2</sup>

The levy may be apportioned among all the people of the state, or among those residing within a particular district only;<sup>3</sup> the legislature being the final judge upon all questions of policy, as well as of fact, involved in the determination of a taxing district.<sup>4</sup> Taxing districts may be as numerous as the purposes for

missioners by the court, to determine what cities and towns are benefited thereby, and in what portions and manner they shall pay the expense thereof, was not unconstitutional as imposing on the judiciary the exercise of legislative or executive power, or assuming to the legislature the exercise of judicial power.

In *Morton v. Comptroller Gen'l*, 4 S. Car. 430, it was held that a statutory direction to an officer, to give notice annually to each county auditor of the rates authorized by law to be levied for the various state purposes, delegates to such officer the duty of fixing the rate per cent. in all cases in which the legislature has furnished the data for making the commutation, but has not fixed the rates.

1. *Woodbridge v. Detroit*, 8 Mich. 274.

The apportionment of a tax includes the determination of the proportion thereof, which shall be borne by each subordinate political division. See *Boyce v. Sebring*, 66 Mich. 210; *People v. Jackson County*, 24 Mich. 237.

Where the statute does not require any particular form to be adopted, or the word "apportion" to be used in the record, the mathematical computation by which is ascertained the amount of state and county tax to be raised by each township, need not appear of record, but simply the result reached by such computation. *Boyce v. Sebring*, 66 Mich. 210.

2. *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 256; *Gordon v. Cornes*, 47 N. Y. 608; *Litchfield v. Vernon*, 41 N. Y. 123; *People v. New York*, etc., Dock Co., 63 How. Pr. (N. Y.) 451; *Bowles v. State*, 37 Ohio St. 35; *Bonsall v. Lebanon*, 19 Ohio 418; *Scovill v. Cleveland*, 1 Ohio St. 126; *Cincinnati v. Gwynne*, 10 Ohio 192; *Allen v. Drew*, 44 Vt. 174.

**Delegation of the Power.**—A power to tax, conferred upon a municipal divi-

sion of a state, includes the power to apportion the tax; but the apportionment must be made according to the strict terms of the power. See *Boyce v. Sebring*, 66 Mich. 210.

3. *Oliver v. Washington Mills*, 11 Allen (Mass.) 274; *Turner v. Althaus*, 6 Neb. 54; *Blanding v. Burr*, 13 Cal. 343; *Stewart v. Polk County*, 30 Iowa 9; *Augusta Bank v. Augusta*, 49 Me. 507; *Guilford v. Chenango County*, 13 N. Y. 143; *Chicago*, etc., R. Co. v. *Otoe County*, 16 Wall. (U. S.) 667.

4. *Litchfield v. Vernon*, 41 N. Y. 123. And see *Shaw v. Dennis*, 10 Ill. 405; *Spright v. People*, 87 Ill. 595; *Sedgwick County v. Bunker*, 16 Kan. 498; *Wallace v. Shelton*, 14 La. Ann. 503; *Sheley v. Detroit*, 45 Mich. 431; *Warren v. Grand Haven*, 30 Mich. 24; *Case v. Dean*, 16 Mich. 12; *State v. Fuller*, 34 N. J. L. 327; *Wells v. Burbank*, 17 N. H. 393; *Gordon v. Cornes*, 47 N. Y. 608; *People v. New York*, etc., Dock Co., 63 How. Pr. (N. Y.) 451; *U. S. v. Memphis*, 97 U. S. 284; *Walston v. Nevin*, 128 U. S. 578; *Spencer v. Merchant*, 125 U. S. 345; *Stanley v. Albany County*, 121 U. S. 550; *Mobile County v. Kimball*, 102 U. S. 691; *Laramie County v. Albany County*, 92 U. S. 307.

**Delegation of Power to Form Districts.**

—The authority to form taxing districts may be exercised directly by the legislature, or, in case of local taxes, it may be left to local boards or bodies; but in such case, the determination must be made by a body possessing, for the purpose, legislative power, and whose action must be as conclusive as if taken by the legislature itself. *Tee-garden v. Racine*, 56 Wis. 545; *Hoyt v. East Saginaw*, 19 Mich. 39; *Blake v. People*, 109 Ill. 504; *In re Sackett*, etc., Sts., 74 N. Y. 95; *In re Church*, 92 N. Y. 1; *Genet v. Brooklyn*, 99 N. Y. 296; *Spencer v. Merchant*, 100 N. Y. 585.

which taxes are levied,<sup>1</sup> and need not be coextensive with the political divisions of the state,<sup>2</sup> though they should conform as nearly as possible to the section to which the benefit of the collection and expenditure of the tax will inure.<sup>3</sup>

The tax must be apportioned in a uniform manner upon the property selected,<sup>4</sup> and the legislature cannot impose the whole

But see *State v. Elizabeth*, 44 N. J. L. 571.

The people affected by the formation of a taxing district need not be consulted as to its extent. *Prince George's County v. Bladensburg*, 51 Md. 465; *Kuhn v. Board of Education*, 4 W. Va. 499. But where assent to union into one taxing district is required of several municipalities, it must consist of the assent of a majority in each of the municipalities to be affected. *People v. Salomon*, 51 Ill. 37.

The courts cannot interfere with the operation of statutes levying and apportioning taxes, when no question of legislative power is involved. *Blanding v. Burr*, 13 Cal. 343; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; 8 Am. Dec. 480; *Abergust v. Louisville*, 2 Bush (Ky.) 271; *Layton v. New Orleans*, 12 La. Ann. 515; *Alcorn v. Hamer*, 38 Miss. 652; *Virginia City v. Chollar-Potosi*, etc., Min. Co., 2 Nev. 86; *State v. Fuller*, 34 N. J. L. 227; *Hingham*, etc., *Bridge*, etc., *Corp. v. Norfolk County*, 6 Allen (Mass.) 353.

In *Re Flower*, 55 Hun (N. Y.) 158, it was held that in the levy and apportionment of the burden of a tax, the legislature may refer to a void assessment, for the purpose of fixing the amount and the property selected.

1. *Shelby Co. Judge v. Shelby R. Co.*, 5 Bush (Ky.) 225; *Atty. Gen'l v. Cambridge*, 16 Gray (Mass.) 247; *Salem Turnpike*, etc., *Corp. v. Essex County*, 100 Mass. 282.

In *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Dec. 159, it was held that each square, so far as its streets and sidewalks are concerned, may be considered as a distinct municipality or local public.

2. *Woodbridge v. Detroit*, 8 Mich. 274; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; *People v. Central Pac. R. Co.*, 43 Cal. 398; *Updyke v. Wright*, 81 Ill. 49; *Shaw v. Dennis*, 10 Ill. 405; *Connell v. Connorsville*, 8 Ind. 358; *Shelby County Judge v. Shelby R. Co.*, 5 Bush (Ky.) 225; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Dec. 159; *Malchus v. Highlands*, 4

*Bush (Ky.)* 547; *Waterville v. Kennebec County*, 59 Me. 80; *State v. Englewood*, 41 N. J. L. 154; *Brown v. Hertford*, 100 N. Car. 92; *St. Louis v. Speck*, 67 Mo. 403; *People v. Lawrence*, 36 Barb. (N. Y.) 177; *People v. Haws*, 34 Barb. (N. Y.) 69; *People v. Draper*, 15 N. Y. 532; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 256; *Bowles v. State*, 37 Ohio St. 35; *State v. Fayette County*, 37 Ohio St. 526; *Philadelphia v. Field*, 58 Pa. St. 320; *Luehrman v. Shelby County Taxing Dist.*, 2 Lea (Tenn.) 425; *Langhorne v. Robinson*, 20 Gratt. (Va.) 661. But see *State v. Chamberlain*, 37 N. J. L. 388; *State v. Fuller*, 39 N. J. L. 576; *Morgan v. Elizabeth*, 44 N. J. L. 571.

The legislature has the right to impose local taxation for local purposes upon any district or extent of territory less than the whole state, whether the people to be affected are citizens of the same county, or members of the same corporation, or residents of the same political division of the state, or not. *Alcorn v. Hamer*, 38 Miss. 652. And see *Daily v. Swope*, 47 Miss. 367.

In *Northampton v. Hampshire County*, 145 Mass. 108, a statute providing that the funds of a corporation organized for charitable purposes should, for the purposes of taxation, be equally apportioned among eight different towns, was upheld.

3. See *Merrick v. Amherst*, 12 Allen (Mass.) 500; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Bright v. McCullough*, 27 Ind. 223; *Chandler v. Reynolds*, 19 Kan. 249; *Exchange Bank v. Hines*, 3 Ohio St. 1; *St. Louis v. Speck*, 67 Mo. 403; *State v. U. S.*, etc., *Express Co.*, 60 N. H. 219; *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Hagar v. Reclamation District*, 111 U. S. 701; *Louisiana v. Pilsbury*, 105 U. S. 295.

A tax levy made outside the state limits is without authority of law, and void. *Marion County v. Barker*, 25 Kan. 258.

4. There may be a discrimination in the subjects of taxation, but there must be uniformity in the tax upon the selected subjects; no individual's property



burden upon a single taxing district, or that of a single district upon a portion only of the property owners of the district;<sup>1</sup> though different methods and rates of apportionment may be adopted in different districts,<sup>2</sup> and the legislature may vary the rule or method of taxation in respect to different descriptions of property,<sup>3</sup> or, as frequently is done, may exempt one class of

can be subjected to a heavier tax than others are required to pay on property of the same description. *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Dec. 159. And see *Sutton v. Louisville*, 5 Dana (Ky.) 28; *Woodbridge v. Detroit*, 8 Mich. 274; *People v. Salem*, 20 Mich. 474; 4 Am. Rep. 400; *Merrick v. Amherst*, 12 Allen (Mass.) 504; *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 298; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518; 90 Am. Dec. 634; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Albany City Nat. Bank v. Maher*, 9 Fed. Rep. 884; *Blanding v. Burr*, 13 Cal. 342; *Booth v. Woodbury*, 32 Conn. 118; *Macon v. Patty*, 57 Miss. 378; *Wells v. Burbank*, 17 N. H. 393; *State v. U. S., etc., Express Co.*, 60 N. H. 219; *State v. Cox*, 38 N. J. L. 302; *Henry v. Chester*, 15 Vt. 460.

The apportionment to cities and towns, and to counties, is not required to be one act; and each item of a tax levy need not be separately apportioned. *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12.

The distribution is usually required to be so made that the burden shall be shared according to the estate, real and personal, which each person may possess. See *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *State v. U. S., etc., Express Co.*, 60 N. H. 219; *Holtzclaw v. Russ*, 49 Ga. 115.

In *State v. Kansas, etc., R. Co.* (Mo. 1893), 22 S. W. Rep. 611, it was held that property which never goes upon the assessors' books is not to be considered in determining the amount of taxable property in the county upon which a levy is to be made.

1. *Albany City Nat. Bank v. Maher*, 9 Fed. Rep. 884; *O'Kane v. Treat*, 25 Ill. 458; *Palmer v. Stumph*, 29 Ind. 329; *Ryerson v. Utley*, 16 Mich. 276; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Gordon v. Cornes*, 47 N. Y. 608; *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; 19 Am. Dec. 243; *Talbot County v. Queen Anne's County*, 50 Md. 260; *State v. U. S., etc., Express Co.*, 60 N. H. 219; *Washington Avenue*, 69 Pa. St. 352; 8 Am. Rep. 255; *Sharpless v. Phil-*

*adelphia*, 21 Pa. St. 147; 59 Am. Dec. 759. And see *Fletcher v. Oliver*, 25 Ark. 289; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Parham v. Decatur County*, 9 Ga. 341; *Doe v. Deavors*, 8 Ga. 479.

A levy upon property, in excess of the proportionate amount necessary to be levied upon it to produce the sum required to be raised, is unauthorized by law, and its collection will be enjoined. *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561.

A tax cannot be imposed upon a body of individuals selected out of a general class, without apportionment or equalization as between them and the general class, or as between themselves. *Wilson v. Sutter County*, 47 Cal. 91; *Primm v. Belleville*, 59 Ill. 142; *Hale v. Kenosha*, 29 Wis. 599. And see *Brown v. Hoadley*, 12 Vt. 472; *McCormack v. Patchin*, 53 Mo. 33; *State v. Tax Collector*, 2 Bailey (S. Car.) 654; *Dyar v. Farmington*, 70 Me. 527; *Hunt v. Brewer*, 68 Me. 262; *Farnsworth Co. v. Lisbon*, 62 Me. 451; *Railroad Tax Cases*, 13 Fed. Rep. 735.

2. See *People v. Central Pac. R. Co.*, 43 Cal. 398; *Ottawa County v. Nelson*, 19 Kan. 234; *Firemen's Ins. Co. v. Baltimore*, 23 Md. 296; *Woodbridge v. Detroit*, 8 Mich. 274; *Fulgum v. Nashville*, 8 Lea (Tenn.) 635. But see *McGavisk v. State*, 34 N. J. L. 509.

Those who are chief partakers of the benefits of local public works, should bear proportionately a larger share of the cost. *Daily v. Swope*, 47 Miss. 367.

3. *Davenport v. Mississippi, etc., R. Co.*, 16 Iowa 348; *Sacramento v. Crocker*, 16 Cal. 119; *State v. Tax Collector*, 2 Bailey (S. Car.) 654; *Ould v. Richmond*, 23 Gratt. (Va.) 464; 14 Am. Rep. 139. And see *Wallace v. Shelton*, 14 La. Ann. 503; *Pleuler v. State*, 11 Neb. 547; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Lexington v. McQuillan*, 9 Dana (Ky.) 516; 35 Am. Dec. 159; *New Orleans v. Kaufman*, 29 La. Ann. 283; 29 Am. Rep. 328; *State v. Rolle*, 30 La. Ann. 991; 31 Am. Rep. 234.

It is sufficient if the rule of apportion-

property from the burden of taxation altogether and tax other classes of property.<sup>1</sup>

c. LEVY BY SUBORDINATE POLITICAL DIVISION.—Municipal corporations and other subordinate political divisions of the state can levy taxes only when clearly authorized by the legislature.<sup>2</sup> The power thus conferred by the statute cannot be delegated to any other officer; board, or body,<sup>3</sup> and must be strictly

ment is uniform throughout the district, or with reference to all of a class. See *East Portland v. Multnomah County*, 6 Oregon 62; *Bowles v. State*, 37 Ohio St. 35; *Fletcher v. Oliver*, 25 Ark. 289; *Durach's Appeal*, 62 Pa. St. 491; *Ottawa County v. Nelson*, 19 Kan. 233; *U. S. v. Riley*, 5 Blatchf. (U. S.) 204. But there can be but one mode of apportionment in a single district. *Tide-water Co. v. Coster*, 18 N. J. Eq. 518; 90 Am. Dec. 634.

1. *Davenport v. Mississippi, etc., R. Co.*, 16 Iowa 348; *Durach's Appeal*, 62 Pa. St. 491. See also *infra*, this title, *Power to Tax; Exemptions*.

2. *Caldwell v. Rupert*, 10 Bush (Ky.) 179; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Vance v. Little Rock*, 30 Ark. 435; *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *State v. Van Every*, 75 Mo. 530; *Henry v. Bell*, 75 Mo. 194; *Asheville v. Means*, 7 Ired. (N. Car.) 406; *In re Second Avenue M. E. Church*, 66 N. Y. 395; *State v. Saalmann*, 37 N. J. L. 156; *Ryerson v. Laketon Tp.*, 52 Mich. 509; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Daily v. Swope*, 47 Miss. 367; *Corpus Christi v. Woessner*, 58 Tex. 462; *Jodon v. Brenham*, 57 Tex. 655; *Fort Worth v. Davis*, 57 Tex. 225; *Savannah v. Hartridge*, 8 Ga. 23; *State v. Shreveport*, 33 La. Ann. 1179; *Plaquemine v. Roth*, 29 La. Ann. 261; *Allen v. Peoria, etc., R. Co.*, 44 Ill. 85; *Alton v. Ætna Ins. Co.*, 82 Ill. 45; *Chicago, etc., R. Co. v. Davenport*, 51 Iowa 454; *Iowa Homestead Co. v. Webster County*, 21 Iowa 221; *Tallman v. Butler County*, 12 Iowa 531; *Faxton v. McCosh*, 12 Iowa 527; *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 471; *Bull v. Read*, 13 Gratt. (Va.) 87. And see *Watts v. McCleave*, 16 Ill. App. 272; *Sherman v. Benford*, 10 R. I. 559; *Lisbon v. Bath*, 21 N. H. 319; *Clapp v. Cedar County*, 5 Iowa 15; *Rice v. Walker*, 44 Iowa 458; *Weeks v. Milwaukee*, 10 Wis. 242.

Where an ordinance of a municipality levying a tax is in conflict with an ex-

isting statute, it is void. *New Orleans v. Southern Bank*, 15 La. Ann. 89.

The authority to levy cannot be collected by doubtful inferences from other powers or powers relating to other subjects, nor deduced from any consideration of convenience or advantage. *Basnett v. Jacksonville*, 19 Fla. 664.

In *Fort Worth v. Davis*, 57 Tex. 225, it was held that a city, in its capacity as a school district, has no other power to levy the school taxes than such as can be found expressly authorized in the constitution.

The amount and subject of the levy, and the method of raising it, ought to be so plainly pointed out as to avoid all danger of oppression by erroneous interpretation. *State v. Bank of Newbern*, 1 Dev. & B. Eq. (N. Car.) 218; *Camden, etc., R. Co. v. Hillegas*, 18 N. J. L. 11; *Iowa R. Land Co. v. Sac County*, 39 Iowa 129. And see *Cardigan v. Page*, 6 N. H. 182.

But a county board of police, levying a tax for special purposes, need not specify the particular special purposes for which the levy is made. *Coulson v. Harris*, 43 Miss. 728. And instead of fixing a specific sum to be raised by taxation, a percentage on the assessed value of property may be directed. The designation of a percentage on a definite sum, is just as certain as though it were calculated; nothing remaining to be done except a simple computation. *Hubbard v. Winsor*, 15 Mich. 146; *Peed v. Millikan*, 79 Ind. 86. And see *Wilson v. Hamilton County*, 68 Ind. 507; *Williams v. Hall*, 65 Ind. 129.

3. *Robinson v. Dodge*, 18 Johns. (N. Y.) 351; *Trumbull v. White*, 5 Hill (N. Y.) 46; *Scofield v. Lansing*, 17 Mich. 437; *State v. Koster*, 38 N. J. L. 308; *Mercer County Ct. v. Kentucky Riv. Nav. Co.*, 8 Bush (Ky.) 300; *Oakland v. Carpentier*, 13 Cal. 540.

A resolution, at a town meeting, to raise as much as the township committee shall direct, is illegal and will be set aside. *State v. Sickles*, 24 N. J. L. 125.

Where the duty of levying taxes is imposed on the county court, its clerk

pursued;<sup>1</sup> conditions precedent, requiring the submission of the proposition to the voters or taxpayers,<sup>2</sup> or the sanction or peti-

cannot certify the amount due from any taxpayer, simply from a certificate from the city clerk as to the city rate of taxation, and without an order from the court. *Kansas v. Hannibal, etc.*, R. Co., 81 Mo. 285.

1. *Montgomery v. State*, 38 Ala. 162; *Mix v. People*, 72 Ill. 241; *Chicago v. Wright*, 32 Ill. 192; *Scammon v. Chicago*, 40 Ill. 146; *Kyle v. Malin*, 8 Ind. 34; *Sharp v. Johnson*, 4 Hill (N. Y.) 92; 40 Am. Dec. 259; *Matter of Turfler*, 44 Barb. (N. Y.) 46; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *State v. Jersey City*, 26 N. J. L. 444; *Henderson v. Baltimore*, 8 Md. 352; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Huse v. Merriam*, 2 Me. 375; *Joyner v. School Dist. No. 3*, 3 Cush. (Mass.) 567; *Hamlin v. Meadville*, 6 Neb. 227; *Merritt v. Port Chester*, 71 N. Y. 309; 27 Am. Rep. 47; *Douglass' Petition*, 46 N. Y. 42; *New Orleans v. Southern Bank*, 15 La. Ann. 89. And see *Smith v. Davis*, 30 Cal. 536; *Smith v. Cofran*, 34 Cal. 310; *Taylor v. Donner*, 31 Cal. 480; *McComb v. Bell*, 2 Minn. 295; *St. Joseph v. Anthony*, 30 Mo. 537; *State v. Hagerty*, 5 Ohio Cir. Ct. Rep. 22; *Gamble v. Witty*, 55 Miss. 26; *Wells v. Board of Education*, 20 W. Va. 157; *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604; *State v. Reeves*, 28 N. J. L. 520; *State v. Hagood*, 13 S. Car. 46.

A tax extended by the proper officer, without any levy having been made, is void. *St. Louis, etc., R. Co. v. Epper-son*, 97 Mo. 300.

The grant to a municipal corporation, of power to provide for the levy and collection of special taxes for the improvement of streets, upon real estate adjacent to such improvement, does not include the power to provide for the sale and conveyance of such real estate in case of non-payment. *Paine v. Spratley*, 5 Kan. 317. And where a tax is ordered for a specific purpose, it must appear that it was levied for that purpose. *Louisville, etc., R. Co. v. Com.*, 89 Ky. 531. And where a levy is void because its purpose is not specified, no subsequent specification can cure the illegality. *Dean v. Lufkin*, 54 Tex. 265.

But when a statute requires taxes to be laid specifically for each separate purpose, it is not illegal to assess a tax

of a certain per cent. in gross, and then define in detail the percentage for each specific purpose. *Brunswick v. Finney*, 54 Ga. 317.

**Publication of Ordinance.**—The publication of an ordinance levying a tax, with the other proceedings of the body adopting it, is a sufficient publication. *Law v. People*, 87 Ill. 385.

In *Mix v. People*, 106 Ill. 425, it was held that under the general incorporation law of *Illinois*, it is not necessary to publish ordinances levying city taxes; ordinances making appropriations for money only, need be published.

2. **Submission of Question to Popular Vote.**—Where the question of a levy is authorized or required to be submitted to a popular vote, the submission must be in strict conformity to the requirements of the statute, and the levy be by the board or body authorized by law to make it in pursuance of the vote. *Iowa R. Land Co. v. Woodbury County*, 39 Iowa 172; *Spann v. Webster County*, 64 Ga. 498; *Stein v. Mobile*, 24 Ala. 591; *School Directors v. Fogleman*, 76 Ill. 189; *Thatcher v. People*, 93 Ill. 240; *Watts v. McCleave*, 16 Ill. App. 272; *People v. Castro*, 39 Cal. 65; *Bullock v. Curry*, 2 Metc. (Ky.) 172; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *Worthen v. Badgett*, 32 Ark. 496; *Cole v. Blackwell*, 38 Ark. 271; *Starin v. Genoa*, 23 N. Y. 439; *People v. Fort Edward*, 70 N. Y. 28; *Hawkins v. Carroll County*, 50 Miss. 735; *Bowen v. King*, 34 Vt. 156; *Henry v. Chester*, 15 Vt. 460; *Lemoille Valley R. Co. v. Fairfield*, 51 Vt. 257; *Lisbon v. Bath*, 21 N. H. 319; *U. S. v. New Orleans*, 2 Woods (U. S.) 230. See also *Wilson v. Charlotte*, 74 N. Car. 748; *Tucker v. Raleigh*, 75 N. Car. 267; *Fort Worth v. Davis*, 57 Tex. 225; *Bartemeyer v. Rohlfs*, 71 Iowa 582.

See *infra*, this title, *Municipal Taxation*—*Submission to the People*.

The word "assent," when used with reference to the levy of a tax with the assent of the electors, or of some board or body, must be given its usual and ordinary signification, that is, agreeing or consenting to; and this can be manifested only in an election by actual vote. *Hawkins v. Carroll County*, 50 Miss. 735.

A township tax exceeding the amount voted by the township, may be sus-

tion of a designated number of the taxpayers to be thereby affected,<sup>1</sup> or the consent or recommendation of a designated officer, person, or body,<sup>2</sup> or a certificate or estimate of the amount necessary, must be strictly complied with;<sup>3</sup> and a tax levied and

tained on the presumption that the township board has exercised its statutory right to increase the amount, if there is no showing to the contrary. *Silsbee v. Stockle*, 44 Mich. 561; *Stockle v. Silsbee*, 41 Mich. 615.

Where electors at a town meeting have legal authority to vote taxes in advance, in order to meet the prompt payment of existing obligations, the question as to how far in advance they may be voted, is to be determined by a vote of the electors of the town. *Wright v. People*, 87 Ill. 582.

In *Arkansas*, the electors of a school district have sole authority to fix the amount of a school tax, and the only limit upon them is that they shall not levy a less sum than is sufficient to carry on a school for three months in each scholastic year. *Union County Ct. v. Robinson*, 27 Ark. 116.

1. See *Cain v. Davie County*, 86 N. Car. 8; *People v. Oldtown*, 88 Ill. 202; *Steckert v. East Saginaw*, 22 Mich. 104; *West v. Whitaker*, 37 Iowa 598; *Henderson v. Baltimore*, 8 Md. 352; *Covington v. Casey*, 3 Bush (Ky.) 698; *Couper v. Rowe*, 42 Ga. 229; *Robinson v. Logan*, 31 Ohio St. 466; *State v. Portage*, 12 Wis. 562; *Dean v. Madison*, 9 Wis. 402; *Jenkins v. Rock County*, 15 Wis. 11.

Where commissioners are appointed for the purpose of procuring the assent of a designated number of electors, their certificate, executed and recorded as required by law, is conclusive as to all matters committed to them, and concludes all questions as to the assenting of the required majority. *First Nat. Bank v. Concord*, 50 Vt. 257.

Mere ambiguity or uncertainty in the phraseology of a petition for an appropriation, will not vitiate the levy of the tax, when it is apparent that no interested party was, or could be, misled or deceived thereby, or could misapprehend the intention and purpose of the petitioners. *Scott v. Hansher*, 94 Ind. 1; *Jussen v. Lake County*, 95 Ind. 567.

2. *Kitchin v. Smith*, 101 Pa. St. 452; *Solomon v. Tarver*, 52 Ga. 405; *Reynolds v. Lofton*, 18 Ga. 47; *Barlow v. Sumter County*, 47 Ga. 639; *State v. Wash*, etc., R. Co., 97 Mo. 296.

Under statutes requiring certain taxes

to be levied only upon a recommendation of some designated board or body, if such board or body fails or refuses to recommend a tax sufficient to pay the necessary current expenses, and any debts that may be in judgment against the municipality, it may, as a general rule, levy a tax of its own motion sufficient to meet such expenses and liabilities. See *Walker v. Perkins*, 52 Ga. 233; *Couper v. Rowe*, 42 Ga. 229; *Arnett v. Griffin*, 60 Ga. 349.

3. **Prerequisite of Appropriation, Certificate, etc.**—The prerequisite of an appropriation ordinance, or certificate, or estimate of the amount necessary to meet current expenses, is, when required, regarded as a limitation on the power of a municipality, or other subdivision, to levy a tax, and a levy not based on such ordinance or certificate, is void. *Riverside Co. v. Hall*, 113 Ill. 256; *Misner v. Bullard*, 43 Ill. 470; *Weber v. Ohio*, etc., R. Co., 108 Ill. 451; *State v. Gadsden County*, 17 Fla. 418; *Smith v. Crittenden*, 16 Mich. 152; *Hogleskamp v. Weeks*, 37 Mich. 422; *Burlington*, etc., R. Co. v. Lancaster County, 12 Neb. 324; *State v. Harvey*, 12 Neb. 31; *Burlington*, etc., R. Co. v. Saunders County, 16 Neb. 123; *Arnold v. Juneau County*, 43 Wis. 627.

But see *Raley v. Guinn*, 76 Mo. 263, where the failure of the county court to ascertain and enter of record the sum necessary for county purposes, before levying a tax, was held but an irregularity not invalidating the entire county levy. Where the form is not prescribed, a certificate which shows definitely the amount required, is sufficient. *Gage v. Bailey*, 102 Ill. 11; *Burlington*, etc., R. Co. v. Lancaster County, 12 Neb. 324; *Dent v. Bryce*, 16 S. Car. 1. And see *Harding v. Bader*, 75 Mich. 316.

The information may be given by stating the rate per cent. on the taxable property of the town, as well as by giving the aggregate amount of town taxes to be levied. *Gage v. Bailey*, 102 Ill. 11. But in *Florida*, the itemized estimate of moneys required to be raised by county tax for school purposes, should contain not only a statement of the whole amount of money necessary for the support of schools for the school year, but

collected at any other time,<sup>1</sup> or in any other manner than that

also the estimated income from the state school tax and other probable sources, so that the county commissioners may be notified of the amount required to be raised by county taxation; and if it contains sums other than for the expenses of maintaining schools, such items should be struck out by the county commissioners. *State v. Gadsden County*, 17 Fla. 418.

In *Nebraska*, a levy made in excess of the published estimate is not void; but the county commissioners are rendered liable for the penalty prescribed, for including such excess in their levy. *State v. Wise*, 12 Neb. 313.

A city, in certifying the amount of taxes to be levied for any one year, is limited to the amount in the appropriation ordinance, but it is not required that the entire sum be levied and collected. *McIntosh v. People*, 93 Ill. 540.

Where a certificate directing the levy of a tax is specifically required to be signed by the president and secretary of the body or board by which it is made, a levy based upon such a certificate signed only by the secretary, is void. *Hogleskamp v. Weeks*, 37 Mich. 422.

In *Smith v. Crittenden*, 16 Mich. 152, a statute directing a certificate to the supervisors of the township of town indebtedness, to be filed on or before the first Monday of October in each year, was held to be directory, and a tax levied upon a certificate filed after the first but before the second Monday, was held valid. See also *Chiniquy v. People*, 78 Ill. 570; *Thatcher v. People*, 79 Ill. 597.

In *Illinois*, if the certificate is not filed in season, the levy cannot be made in any succeeding year for back taxes. *Weber v. Ohio*, etc., R. Co., 108 Ill. 451. And see *First Nat. Bank v. Cook*, 77 Ill. 622; *Mix v. People*, 72 Ill. 241.

**Certificate by State to County or Municipal Officers.**—Where state taxes are required to be certified to the proper officers of counties or other municipal divisions, to be levied and collected by them for the use of the state, the general rule is that where the certificate is regular on its face, it is conclusive upon the body to which it is directed, making it its duty to levy and provide for the collection of the tax. *Smith v. Crittenden*, 16 Mich. 152; *Robbins v. Barron*, 33 Mich. 126; *Boyce v. Seb-*

*ring*, 66 Mich. 210; *People v. Jackson County*, 24 Mich. 237; *People v. St. Clair County*, 30 Mich. 388; *State v. Milburn*, 9 Gill (Md.) 97; *State v. Gadsden County*, 17 Fla. 418; *State v. Smith*, 11 Wis. 65. And see *State v. Madison*, 15 Wis. 30; *State v. Beloit*, 20 Wis. 79; *State v. Racine*, 22 Wis. 258; *State v. Milwaukee*, 25 Wis. 122; *State v. Portage*, 12 Wis. 562; *State v. Wilson*, 17 Wis. 687; *Murphy v. Harbison*, 29 Ark. 340.

The certificate is presumed to have been filed at the date of the file mark. *Gage v. Nichols*, 135 Ill. 128.

1. *Gamble v. Witty*, 55 Miss. 27; *Beard v. Lee County*, 51 Miss. 542; *Harris v. Stockett*, 58 Miss. 825; *Briggins v. Chandler*, 60 Miss. 862; *Wolfe v. Murphy*, 60 Miss. 1; *Smith v. Nelson*, 57 Miss. 138; *Mix v. People*, 72 Ill. 241; *Cowgill v. Long*, 15 Ill. 202; *McLaughlin v. Thompson*, 55 Ill. 249; *Webster v. French*, 12 Ill. 302; *People v. Cooper*, 10 Ill. App. 384; *State v. Shreveport*, 33 La. Ann. 1179; *Wells v. Hyattsville* (Md. 1893), 26 Atl. Rep. 357; *Doe v. McQuilkin*, 8 Blackf. (Ind.) 335; *Wilson v. Hamilton County*, 68 Ind. 507; *Scott v. Union County*, 63 Iowa 583; *Henry v. Chester*, 15 Vt. 460; *Free v. Scarborough*, 76 Tex. 672; *Martin v. McDiarmid*, 55 Ark. 213. And see *Smith v. Nelson*, 57 Miss. 138; *Kratli v. Larrew*, 104 Ind. 363. But see *Perry County v. Selma*, etc., R. Co., 65 Ala. 391; *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; *Perrin v. Benson*, 49 Iowa 325; *Hill v. Wolfe*, 28 Iowa 577; *Easton v. Savery*, 44 Iowa 654; *Wells v. Burbank*, 17 N. H. 393; *State v. Harris*, 17 Ohio St. 608; *Gearhart v. Dixon*, 1 Pa. St. 224. The latter case held that a direction to levy a tax within a certain time, was directory only as to the time, and that a tax thereafter assessed was not thereby invalidated. See also *Ohio*, etc., R. Co. v. *People*, 119 Ill. 207.

In *Easton v. Savery*, 44 Iowa 654, it was held that a levy was not invalidated by the fact that it was made before the time specified in the law authorizing it.

In *McCready v. Lansdale*, 58 Miss. 878, where a levy of county taxes was made at the proper time, but at a subsequent meeting an order was made purporting to set aside the former levy, and make a new one reducing the rate, it was held that, as the order changing the levy did not impose any taxes, but

specified, is void.<sup>1</sup> But a mere irregularity or informality does not vitiate the levy, when the purpose to levy a tax and have it collected is plainly manifested substantially in the manner provided by law.<sup>2</sup> When ambiguous in terms, such statutes should

was a mere reduction of the levy made at the proper time, it would be considered to be an amendment to the former levy; and that the levy was good. See also *Fairfield v. People*, 94 Ill. 244.

In *Hubbard v. Winsor*, 15 Mich. 146, where the law required supervisors to act at their session in October, and they met in pursuance thereof, but fixed the amount of taxes for the ensuing year at a subsequent adjourned meeting, it was held that the session in October embraced all adjournments, although they might run into another month, and that the law merely referred to it by way of designation. See also *State v. Hannibal*, etc., R. Co., 101 Mo. 136.

In *Peed v. Millikan*, 79 Ind. 86, it was held that where the law requires a levy to be made by a particular session of the board authorized to make it, the duty to make the levy is absolute, and if for any reason, there is a failure to make it at the prescribed time, the power to make it is not thereby lost, but may be afterwards exercised. See also *Sackett v. State*, 74 Ind. 486; *Gearhart v. Dixon*, 1 Pa. St. 224.

1. *Warren County v. Klein*, 51 Miss. 807; *State v. Shreveport*, 33 La. Ann. 1179; *Kaye v. Hall*, 13 B. Mon. (Ky.) 455; *Mix v. People*, 72 Ill. 241; *Gustin v. School Dist. No. 5*, 10 Gray (Mass.) 83; *Holmes v. Baker*, 16 Gray (Mass.) 259; *Iowa R. Land Co. v. Sac County*, 39 Iowa 124; *Marion County v. Barker*, 25 Kan. 258; *Sloan v. Beebe*, 24 Kan. 343; *Tull v. Royston*, 30 Kan. 619; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Ryerson v. Laketon Tp.*, 52 Mich. 509; *Pontiac v. Axford*, 49 Mich. 69; *State v. Harris*, 17 Ohio St. 608; *Walker v. Burlington*, 56 Vt. 131. But see *Wolfe v. Murphy*, 60 Miss. 1.

An order made by a board of commissioners at a special session not legally convened, levying a special tax, is illegal and void, and the collection thereof may be enjoined at the suit of a taxpayer. *Fahlor v. Wells County*, 101 Ind. 167.

A city tax, voted without observing a requirement that the votes of all the members relating to the act in question be entered at large upon the minutes, is invalid. *Steckert v. East Saginaw*, 22 Mich. 304. But this requirement does

not apply to city taxes, where the action of the council is formal and compulsory, as where it is called upon to raise a school tax on a vote of the district, and has no discretion concerning it. *Pontiac v. Axford*, 49 Mich. 69.

**Place of Levy.**—A levy of taxes made by a board of supervisors while holding its session at a place where it was not authorized by law to hold a session, is void. *Capital State Bank v. Lewis*, 64 Miss. 727. And see *Johnson v. Futch*, 57 Miss. 73; *Gamble v. Witty*, 55 Miss. 26.

The *Arkansas* constitution authorizes the justices of the peace to sit with the county judge in levying taxes and making appropriations for the expense of the county. *Worthen v. Badgett*, 32 Ark. 496.

2. *Burlington*, etc., R. Co. v. Lancaster County, 12 Neb. 324; *Hull v. Kearney County*, 13 Neb. 539; *State v. Wise*, 12 Neb. 313; *Lake County v. Sulphur Bank*, etc., Min. Co., 66 Cal. 17; *Law v. People*, 87 Ill. 385; *State v. Allen*, 43 Ill. 456; *Edwards v. People*, 88 Ill. 340; *Thatcher v. People*, 79 Ill. 597; *Clayton v. Chicago*, 44 Ill. 280; *Mix v. People*, 72 Ill. 241; *Davis v. Brace*, 82 Ill. 542; *Buck v. People*, 78 Ill. 560; *West v. Whitaker*, 37 Iowa 598; *Sioux City*, etc., R. Co. v. Osceola County, 45 Iowa 176; *Snell v. Fort Dodge*, 45 Iowa 564; *Milwaukee*, etc., R. Co. v. Kossuth County, 41 Iowa 57; *Cassady v. Lowry*, 49 Iowa 523; *Bartemeyer v. Rohlfis*, 71 Iowa 582; *Mustard v. Hoppess*, 69 Ind. 324; *Bittinger v. Bell*, 65 Ind. 445; *Peed v. Millikan*, 79 Ind. 86; *Jefferson County v. Johnson*, 23 Kan. 717; *Torrington v. Rickershauser*, 41 Kan. 486; *Wattles v. Lapeer*, 40 Mich. 624; *Silsbee v. Stockle*, 44 Mich. 561; *Boyce v. Auditor Gen'l*, 90 Mich. 314; *Case v. Dean*, 16 Mich. 12; *Henry v. Chester*, 15 Vt. 460; *Texas*, etc., R. Co. v. Harrison County, 54 Tex. 119; *Labadie v. Dean*, 47 Tex. 90. And see *O'Grady v. Barnhisel*, 23 Cal. 287; *St. Louis County v. Nettleton*, 22 Minn. 356; *State v. Hannibal*, etc., R. Co., 101 Mo. 136.

A levy is legal if made for a proper purpose without reference to the name by which the tax is designated. *Burlington*, etc., R. Co. v. Cass County, 16 Neb. 136.

be construed more strongly in favor of the citizen and against the state.<sup>1</sup>

A tax levy containing illegal items will not be invalid if so made that the part which is legal can be separated from that which is illegal,<sup>2</sup> but if this cannot be done the whole is void.<sup>3</sup>

Where there is a law authorizing a levy, the levy is valid, even though it was intended to be made under a different law. *Davis v. Brace*, 82 Ill. 542. And where the record of the county commissioners levying a tax, may be construed as basing the levy equally well on either of two statutes, but as applied to one the levy is excessive, and to the other, not excessive, it will be *prima facie* regarded as based on the latter act, though the tax therein mentioned can only be levied to provide for a particular condition of the roads, while the other act is general, and the levy actually made is in general terms. *Lima v. McBride*, 34 Ohio St. 338.

Where the record discloses that a board authorized to levy taxes met for that purpose, and decided what should be the rate for various purposes, their order was held to constitute a levy. *Tallman v. Cooke*, 43 Iowa 330. And the failure of the board of supervisors to direct the levy of a sum lawfully voted to be raised by taxation for township purposes, will not invalidate the action of the supervisor in spreading it on his roll. *Upton v. Kennedy*, 36 Mich. 215.

In *Shontz v. Evans*, 40 Iowa 139, it was held that the levying of a tax described as "railroad tax, five mills," is sufficiently explicit, when the purpose and object of the tax and the beneficiary corporation can be ascertained *aliunde*.

In *Dawson v. Ward*, 71 Tex. 72, it was held that an order that the assessor "be and is hereby instructed to assess all taxes that he is authorized to assess for the county, at one-half the amount he assesses for the state," does not levy a general county tax.

1. *Savannah v. Hartridge*, 8 Ga. 23; *Bank of Georgia v. Savannah*, Dudley (Ga.) 130; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400. And see *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186; *Worthen v. Badgett*, 32 Ark. 496.

When an ordinance levying a tax will admit of two constructions, it should receive that which is consistent with the power given, not that which is in violation of it. *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; 19 Am. Dec. 243.

Where a municipality fails to levy and collect a tax for a particular purpose, it cannot have the amount thereof levied and collected under an authority to levy a different tax, so as to make the latter exceed the limit prescribed by law. *Webster v. People*, 98 Ill. 343.

2. *DeFremery v. Austin*, 53 Cal. 380; *Stokes v. Geddes*, 46 Cal. 17; *Jones v. Gilles*, 45 Cal. 541; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Vance v. Little Rock*, 30 Ark. 435; *Allen v. Peoria, etc., R. Co.*, 44 Ill. 85; *Fuller v. Heath*, 89 Ill. 296; *Mix v. People*, 72 Ill. 241; *People v. Nichols*, 49 Ill. 517; *State v. Allen*, 43 Ill. 456; *Lafin v. Chicago*, 48 Ill. 449; *Sully v. Kuehl*, 30 Iowa 275; *Eldridge v. Kuehl*, 27 Iowa 160; *Rhodes v. Sexton*, 33 Iowa 540; *Parker v. Sexton*, 29 Iowa 421; *Hurley v. Powell*, 31 Iowa 64; *Cummings v. Fitch*, 40 Ohio St. 56; *Dutrick v. Mason*, 57 Pa. St. 40; *Press Printing Co. v. State Board*, 51 N. J. L. 75; *Taft v. Barrett*, 58 N. H. 447; *Bright v. Halloman*, 7 Lea (Tenn.) 309.

Where an act of the legislature is intended to accomplish a single object, although a part of it may be good, if the other part is unconstitutional, the whole must fall together; but if it attempts to accomplish two or more objects, and is void as to one, it may be in every respect valid as to the other. *Cornell v. People*, 107 Ill. 372; *People v. Cooper*, 83 Ill. 585.

In *Mix v. People*, 72 Ill. 241, it was held that a levy of taxes in excess of the per cent. allowed by law, does not render the whole tax void, but only so much of it as is in excess of the constitutional limit, if the tax within the limit can be separated from that portion which is in excess thereof. See also *State v. McClurg*, 27 N. J. L. 253. And in *Law v. People*, 87 Ill. 385, it was held that where a city ordinance for the levy of a tax, specified the purposes for which the levy was to be made, and the sum required to be raised for each purpose, a part of which were illegal, judgment should be rendered for the amount legally levied after deducting the illegal portion.

3. *Hubbard v. Brainard*, 35 Conn. 563; *First Ecclesiastical Soc. v. Hart-*

And some courts hold that a portion of a levy cannot be held legal if another part is illegal.<sup>1</sup>

**3. Conclusiveness and Effect.**—The determination of the legislature in levying a tax is, within constitutional restrictions, conclusive and not subject to judicial review.<sup>2</sup> The presumption is that taxes are properly and legally levied.<sup>3</sup> The legislature may repeal a statute under which taxes have been imposed, or prohibit the collection of taxes after they have been duly levied and as-

ford, 38 Conn. 274; *Worthen v. Badgett*, 32 Ark. 496; *State v. Humphreys*, 25 Ohio St. 520. And see *Bailey v. Haywood*, 70 Mich. 188.

Where a levy is made of an amount less than the limit, and afterwards another is made in excess of the balance, the former levy is valid, but the latter is void in whole, both as to the excess and as to that within the limits. *Cummings v. Fitch*, 40 Ohio St. 56.

1. See *Basnett v. Jacksonville*, 19 Fla. 664; *Case v. Dean*, 16 Mich. 12; *Hall v. Kellogg*, 16 Mich. 135; *Hewitt v. White*, 78 Mich. 117; *Rogers v. White*, 68 Mich. 10; *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Gamble v. Witty*, 55 Miss. 26; *Capital State Bank v. Lewis*, 64 Miss. 727; *Gerry v. Stoneham*, 1 Allen (Mass.) 319; *State v. Hagood*, 13 S. Car. 46; *Wells v. Burbank*, 17 N. H. 393; *Elwell v. Shaw*, 1 Me. 339; *Johnson v. Colburn*, 36 Vt. 693; *Drew v. Davis*, 10 Vt. 506.

In *Dean v. Lufkin*, 54 Tex. 265, it was held that where the limit allowed by law is exhausted, the levy of an additional tax is unauthorized, and such a levy being illegal, the entire levy is thereby infected and made void.

2. *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 256; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Home Ins. Co.*, 92 N. Y. 328; *Gordon v. Carnes*, 47 N. Y. 608; *State v. Maginnis*, 26 La. Ann. 559; *Woodbridge v. Detroit*, 8 Mich. 274; *Glasgow v. Rowse*, 43 Mo. 479; *Scovill v. Cleveland*, 1 Ohio St. 126; *Cincinnati v. Gwynne*, 10 Ohio 192; *Bonsall v. Lebanon*, 19 Ohio 418; *Dean v. Lufkin*, 54 Tex. 265; *Blanding v. Burr*, 13 Cal. 342; *Beals v. Amador County*, 35 Cal. 632; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Stewart v. Polk County*, 30 Iowa 9; *Louisiana v. Pilsbury*, 105 U. S. 278; *Chicago, etc., R. Co. v. Otoe County*, 16 Wall. (U. S.) 677; *Wharton v. School Directors*, 42 Pa. St. 358.

**Determination of Local Body.**—The determination of a local legislative body

is, in its turn, likewise conclusive within the scope of its local authority. *Wharton v. School Directors*, 42 Pa. St. 358; *Williams v. School District No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *Jenkins v. Andover*, 103 Mass. 94; *Case v. Dean*, 16 Mich. 12; *People v. East Saginaw*, 33 Mich. 164; *In re Powers*, 52 Mo. 218; *Marr v. Enloe*, 1 Yerg. (Tenn.) 452; *Obion County Ct. v. Marr*, 8 Humph. (Tenn.) 634; *Eddy v. Wilson*, 43 Vt. 362. And see *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Tee-garden v. Racine*, 56 Wis. 545.

Where certain facts are to be ascertained, and the question is not whether the board shall act at all, but whether it has acted correctly, it acts in a judicial capacity, and an appeal from its determinations will lie. *White County v. Karp*, 90 Ind. 236.

The question as to what expenditures are proper and necessary for municipal administration, is not judicial; it is confined by law to the discretion of the municipal authorities, and no court has the right to control, usurp, or supersede that discretion. *East St. Louis v. U. S.*, 110 U. S. 321.

3. See *School Dist. No. 8 v. Garvey*, 80 Ky. 159; *Ohio, etc., R. Co. v. People*, 119 Ill. 207; *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; 19 Am. Dec. 243; *Worthen v. Badgett*, 32 Ark. 496; *Buck v. People*, 78 Ill. 560; *Gage v. Bailey*, 102 Ill. 11; *Silsbee v. Stockle*, 44 Mich. 561; *Wells v. Austin*, 59 Vt. 157; *Hintrager v. Kiene*, 62 Iowa 605; *State v. Hannibal, etc., R. Co.*, 101 Mo. 136; *Arnold v. Juneau County*, 43 Wis. 627.

It will be presumed, in the absence of evidence to the contrary, that at least a quorum of the board or body authorized to vote a tax was present. *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524. Where it appears that county taxes were levied at a special meeting of the board of supervisors, it will be presumed, in the absence of proof to the



sessed;<sup>1</sup> in the latter case, the intent must clearly appear.<sup>2</sup> A state or county, having levied a tax upon land in the name of a party, is estopped to deny his title thereto in an action to enforce the collection of the tax.<sup>3</sup>

**4. Exhaustion of Power.**—In general the power to tax is permanent and continuing, to be exercised whenever the public good

contrary, that the meeting was rightfully held, such meetings being authorized by law. *Brigins v. Chandler*, 60 Miss. 862. But an unmutated record of the proper board or body containing no record of such levy, is sufficient to rebut the presumption. *Hintrager v. Kiene*, 62 Iowa 605. See also *infra*, this title, *Record of the Levy*.

1. *Augusta v. North*, 57 Me. 392; 2 Am. Rep. 52; *U. S. v. New Orleans*, 103 U. S. 358. And see *Swift v. Newport*, 7 Bush (Ky.) 37.

2. *Clegg v. State*, 42 Tex. 605; *Gardenhire v. Mitchell*, 21 Kan. 83. And see *Ensign v. Barse*, 107 N. Y. 329; *Bank of Newberry v. Stigall*, 41 Miss. 142.

The repeal of the statute under which a tax is assessed does not affect it, if the assessment was completed at the time the repeal took effect. *Appeal Tax Court v. Union R. Co.*, 50 Md. 274; *Appeal Tax Court v. Patterson*, 50 Md. 354; *Appeal Tax Court v. Baltimore Academy*, 50 Md. 437; *Appeal Tax Court v. University of Maryland*, 50 Md. 457; *Warren R. Co. v. Belvidere*, 35 N. J. L. 584.

But inferior boards and bodies deriving their power from statutes, have no authority to reconsider and reverse their own official action, unless the statute so provides. *People v. Schenectady County*, 35 Barb. (N. Y.) 408. And see *infra*, this title, *The Assessment*.

**Change of Constitution.**—Taxes legally levied but not collected before a change in the constitution takes effect, are not invalidated, although they are not imposed upon the basis directed by the new constitution. *Burlington, etc., R. Co. v. Saunders County*, 9 Neb. 507.

3. *Brandriff v. Harrison County*, 50 Iowa 164; *Adams County v. Burlington, etc., R. Co.*, 39 Iowa 507; *Iowa R. Land Co. v. Story County*, 36 Iowa 48; *Audubon County v. American Emigrant Co.*, 40 Iowa 460; *Austin v. Bremer County*, 44 Iowa 155; *Burlington, etc., R. Co. v. Stewart*, 39 Iowa 267; *Lamb v. Burlington, etc., R. Co.*, 39 Iowa 333. And see *Gibson v. Howe*, 37 Iowa 168; *Sully v. Poorbaugh*, 45 Iowa

453; *Calhoun County v. American Emigrant Co.*, 93 U. S. 124.

But the mere collection of taxes upon lands of which a municipality still claims to be the owner, does not estop it to assert its ownership against the party paying the taxes, if he was not thereby induced to pay them and did not rely thereon in making the payment, but did so believing he had title, and relying upon his own judgment. *Buena Vista County v. Iowa Falls, etc., R. Co.*, 46 Iowa 226.

The assessment of a tax, without enforcing its collection, will not estop a county from setting up a claim that the land was its own property at the time of the levy. *Page County v. Burlington, etc., R. Co.*, 40 Iowa 520.

In *American Emigrant Co. v. Iowa R. Land Co.*, 52 Iowa 323, it was held that the bringing of an action by a county, to set aside a conveyance of land made by it, will not estop the county to levy taxes upon property during the pendency of the action.

But estoppels against the state are not favored, and though they may arise from its express grants, they cannot grow out of laches of its officers. *State v. Brewer*, 64 Ala. 287; *Rossire v. Boston*, 4 Allen (Mass.) 57; *Lake Shore, etc., R. Co. v. People*, 46 Mich. 193; *Lee v. Sturges*, 46 Ohio St. 153. And see *U. S. v. Hazard*, 3 Cent. L. J. 653; *U. S. v. Halloran*, 14 Alb. L. J. 279.

A municipality that has collected taxes under an unconstitutional statute, is not thereby estopped to dispute the correctness of the valuation, and make a reassessment. *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. Rep. 395. Nor does an unconstitutional act admitting a tax, bar its subsequent assertion. *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546.

It has been held that a negligent assessment and sale of public lands as private property does not estop the state from setting up its title. *St. Louis v. Gorman*, 29 Mo. 593; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Crane v. Reeder*, 25 Mich. 303. And

may require it;<sup>1</sup> though a single levy is sometimes deemed to exhaust the power for the time being, as where the custom is to tax but once within a certain period of time.<sup>2</sup> A levy of the full amount limited by law precludes an additional tax,<sup>3</sup> but an unsuc-

see *Buena Vista County v. Iowa Falls*, etc., R. Co., 46 Iowa 226.

1. *Municipality No. 2 v. Dunn*, 10 La. Ann. 57; *People v. Dutchess County*, 1 Hill (N. Y.) 50; *Davis v. Brace*, 82 Ill. 542; *Williams v. Detroit*, 2 Mich. 561; *Reithmiller v. People*, 44 Mich. 280; *Wells v. Board of Education*, 20 W. Va. 157. And see *Benoist v. St. Louis*, 19 Mo. 179; *Sheridan v. Fleming*, 93 Mo. 321; *Rice v. Walker*, 44 Iowa 458; *Calhoun County v. Galbraith*, 99 U. S. 214; *Oliver v. Carsner*, 39 Tex. 396; *Mason County v. Huidekoper*, 134 U. S. 332.

2. *St. Louis Bridge, etc., Co. v. People*, 127 Ill. 627; *State v. Van Every*, 75 Mo. 530; *Vance v. Little Rock*, 30 Ark. 435; *Cope v. Collins*, 37 Ark. 649; *Graham v. Parham*, 32 Ark. 685; *Brodie v. McCabe*, 33 Ark. 696; *Oliver v. Carsner*, 39 Tex. 396; *Dean v. Lufkin*, 54 Tex. 265; *Wells v. Board of Education*, 20 W. Va. 157; *Cummings v. Fitch*, 40 Ohio St. 56.

In *People v. Waynesville*, 88 Ill. 469, it is said that, as a general rule, where the law confers a power, and the persons upon whom it is conferred act under it, the power is exhausted, unless the same authority authorizes its subsequent exercise.

When once a levy for general purposes has been made, whether of less than the maximum rate or not, no special levy, even for a part that might be classed properly under the head of general purposes, can be made, in the absence of a provision of law authorizing it. *State v. Van Every*, 75 Mo. 530. But the omission to levy a tax on licenses, in making a general levy, may be subsequently cured. *State v. Maguire*, 52 Mo. 420.

In *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81, it was held that after the assessment of all the taxable property had been made and a tax levied therein, the council had no power to order an additional assessment of property subsequently coming within the city limits.

Where the proceeds of a special assessment levied for the purpose of constructing public improvements, become insufficient for the purpose indicated, by reason of a failure to collect the

amount assessed upon particular property, there can be no new assessment upon other property embraced in the original assessment which is not delinquent to supply such deficiency. *Chicago v. People*, 56 Ill. 327; *Workman v. Chicago*, 61 Ill. 463.

3. *Cummings v. Fitch*, 40 Ohio St. 56; *Atchison, etc., R. Co. v. Atchison County*, 47 Kan. 722; *Osborne County v. Blake*, 25 Kan. 356; *Atchison, etc., R. Co. v. Woodcock*, 18 Kan. 20; *National Bank v. Barber*, 24 Kan. 546; *Dumphy v. Humboldt County*, 58 Iowa 273; *Sterling School Furniture Co. v. Harvey*, 45 Iowa 466. And see *Wattles v. Lapeer*, 40 Mich. 624; *State v. Cage*, 34 La. Ann. 506; *Benoist v. St. Louis*, 19 Mo. 179; *Arnold v. Hawkins*, 95 Mo. 569; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 633.

That the first levy which exhausted the limit, was compelled by *mandamus*, furnishes no ground for a new levy in excess thereof. *Vance v. Little Rock*, 30 Ark. 435.

Under the *Illinois* statutes, two different methods are provided for raising money for repairing roads, bridges, etc.; money may be raised for a road tax by either mode, and in case of failure to raise money in one mode the other may be adopted; but when a levy is made in one mode it cannot be made in the other, the statute contemplating but one tax. *Thatcher v. People*, 79 Ill. 597.

In *Osborne County v. Blake*, 19 Kan. 299, it was held that where only a small amount of tax was levied for the current expenses of previous years, county commissioners may be allowed to levy an additional amount of tax for the current expenses of those years, provided the two levies for any one year shall not exceed in the aggregate the maximum rate allowed by law. See also *People v. Waynesville*, 88 Ill. 469.

In *Dean v. Lufkin*, 54 Tex. 265, it was held that where a commissioners' court has exhausted its power in making a levy to pay ordinary debts of the county, it exceeds its authority in making an additional levy partly for the same purpose, and that the whole levy is illegal, and is not cured by an order

cessful attempt to lay a tax does not exhaust the power, and a new and valid levy may be made afterwards.<sup>1</sup>

5. **Compulsory Levy.**—See *MANDAMUS*, vol. 14, p. 88.

6. **Record of the Levy.**—Every essential proceeding in the course of a levy of taxes should appear in some written and permanent form in the records of the bodies authorized to act upon it; <sup>2</sup> the record being usually the only evidence to show that the tax was duly levied,<sup>3</sup> and ordinarily conclusive as to all matters therein

afterwards made declaring a part of the levy to be illegal.

1. *Himmelmann v. Cofran*, 36 Cal. 411; *Society for Savings v. New London*, 29 Conn. 174; *People v. Waynesville*, 88 Ill. 469; *Bangor v. Lancey*, 21 Me. 472; *Pond v. Negus*, 3 Mass. 230; 3 Am. Dec. 131; *Libby v. Burnham*, 15 Mass. 144; *State v. Newark*, 34 N. J. L. 236; *Monroe v. Fort Howard*, 50 Wis. 228. And see *State v. Maguire*, 52 Mo. 420; *Wells v. Board of Education*, 20 W. Va. 157; *Sanford v. Prentice*, 28 Wis. 358.

A school district meeting voted a tax for a schoolhouse. No action was taken upon the vote, and it was neither reconsidered nor rescinded. Four months afterwards a like tax was voted at a special meeting. It was held that the last vote was valid. *Randall v. Smith*, 1 Den. (N. Y.) 214.

2. *Moser v. White*, 29 Mich. 59; *Folkerts v. Power*, 42 Mich. 283; *Power's Appeal*, 29 Mich. 504; *Hodgkin v. Fry*, 33 Ark. 716; *Sherwin v. Bugbee*, 17 Vt. 337; *Cardigan v. Page*, 6 N. H. 182; *Athens County v. Baltimore, etc., R. Co.*, 37 Ohio St. 205. And see *Nalle v. Fenwick*, 4 Rand. (Va.) 585.

In *Gearhart v. Dixon*, 1 Pa. St. 224, it was held that school directors are not required to keep a record of their proceedings, in levying a school tax, although it is advisable that they should do so.

In *Kansas City, etc., R. Co. v. Tontz*, 29 Kan. 460, a tax was held to be valid, notwithstanding the fact that the county clerk and the county commissioners neglected for six months to enter the levy of the tax upon the county commissioner's record. See also *Jefferson County v. Johnson*, 23 Kan. 717.

In *Gage v. Bailey*, 102 Ill. 11, it was held that when the law requires a county board to cause a tax to be levied, it will be presumed that the tax, having been actually levied, was levied by proper authority, although no record of the action of the board is made to appear.

In *State v. Saalmann*, 37 N. J. L. 156, it was held that an order of a township for raising money for the payment of an existing indebtedness of the township, need not be in writing.

3. *Cardigan v. Page*, 6 N. H. 182; *Williams v. Mears*, 61 Mich. 86; *Moor v. Newfield*, 4 Me. 44; *Taylor v. Henry*, 2 Pick. (Mass.) 397; *Halleck v. Boylston*, 117 Mass. 469; *Andrews v. Boylston*, 110 Mass. 214; *Hintrager v. Kiene*, 62 Iowa 605; *Moore v. Cooke*, 40 Iowa 290; *Burlington, etc., R. Co. v. Lancaster County*, 4 Neb. 293; *Paul v. Linscott*, 56 N. H. 347; *Farrar v. Fessenden*, 39 N. H. 268; *State v. Hardcastle*, 26 N. J. L. 143; *Hilton v. Bender*, 69 N. Y. 75; *Dent v. Bryce*, 16 S. Car. 1; *Hecht v. Boughton*, 2 Wyoming 368. And see *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Sherwin v. Bugbee*, 17 Vt. 337; *In re Jefferson*, 35 Minn. 215; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Casady v. Lowry*, 49 Iowa 523.

A grant of a city tax is proved by the statute book; the grant of a county tax must be proved by the record of the doings of the county convention. *Cardigan v. Page*, 6 N. H. 182.

Parol evidence is inadmissible to prove the transactions of a school district meeting, the only legal evidence being the record itself or an attested copy. *Moor v. Newfield*, 4 Me. 44. And it is not competent to prove by oral testimony, the existence of facts to be ascertained by public commissioners, preparatory to laying a tax which such commissioners are required to certify in writing. *Baltimore v. Hughes*, 1 Gill & J. (Md.) 481; 19 Am. Dec. 243.

The record of the proceedings of a district meeting has been held admissible in a proceeding to compel the proper officers to levy a tax, although not expressly required by law to be kept. *Rose v. Hindman*, 36 Iowa 160.

In *Vermont*, the warning for a meeting of a school district, must be recorded by the district clerk, and if the record of the warning does not show

stated.<sup>1</sup> It should show that the requisite statutory preliminary requirements have been complied with;<sup>2</sup> that a meeting of the proper body has been held, and the proceedings thereof,<sup>3</sup> and that the proposition to make the levy has been duly presented and adopted;<sup>4</sup> and the facts constituting performance of the statutory requirements should appear, a mere statement that the statute was complied with being usually not enough.<sup>5</sup> Due au-

that the hour of the day for the meeting was specified in the warning, the defect cannot be supplied by parol evidence that the hour was named in the original warning. *Sherwin v. Bugbee*, 17 Vt. 337.

1. See *First Nat. Bank v. Concord*, 50 Vt. 257; *Eddy v. Wilson*, 43 Vt. 362; *West v. Whitaker*, 37 Iowa 598; *People v. Queens County*, 1 Hill (N. Y.) 195; *Gaither v. Green*, 40 La. Ann. 362; *Voes v. Frankfort*, 64 Me. 229; *Smith v. Crittenden*, 16 Mich. 152; *Venice v. Murdock*, 92 U. S. 494. And see *Greer v. Howell*, 64 Tex. 688.

In *State v. Van Winkle*, 25 N. J. L. 73, it was held that a book of minutes kept by the trustees of a school district, is admissible in evidence to establish their acts in making a levy, but that it is not conclusive and may be overcome by parol evidence. And if defective it may be explained or supplied by parol testimony. *Gearhart v. Dixon*, 1 Pa. St. 224.

The denomination of a tax in the levy as "for judgment fund" and "for city judgment tax," is not a latent ambiguity, such as will admit evidence to show how the proceeds were intended by the city council to be applied. *Rice v. Walker*, 44 Iowa 458.

2. *Taymouth v. Koehler*, 35 Mich. 22; *Warren v. Grand Haven*, 30 Mich. 25; *Flint, etc., R. Co. v. Auditor Gen'l*, 41 Mich. 635; *Boyce v. Sebring*, 66 Mich. 210; *Cardigan v. Page*, 6 N. H. 182; *State v. Van Winkle*, 25 N. J. L. 73; *State v. Duryea*, 40 N. J. L. 266; *State v. Hardcastle*, 26 N. J. L. 143; *Hardcastle v. State*, 27 N. J. L. 551. And see *Spear v. Ditty*, 8 Vt. 419; *Sherwin v. Bugbee*, 17 Vt. 337; *Venice v. Murdock*, 92 U. S. 494.

A certificate of trustees, reciting that the company in aid of which a tax is voted, has so complied with the act as to be entitled to the tax, complies with the terms of a statute requiring it to recite a compliance with the statutes in all respects. *Casady v. Lowry*, 49 Iowa 523. And see *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243.

3. *Taymouth v. Koehler*, 35 Mich. 22; *Steckert v. East Saginaw*, 22 Mich. 104; *State v. Van Winkle*, 25 N. J. L. 73. And see *State v. McIntoch*, 7 Ired. (N. Car.) 68; *Dudley v. Oliver*, 5 Ired. (N. Car.) 227; *Dent v. Bryce*, 16 S. Car. 1.

In *North Carolina*, the record must affirmatively show that on voting a tax a majority of the justices of the county court was present. *Dudley v. Oliver*, 5 Ired. (N. Car.) 227.

A statement in the minutes, that all the school directors were present, and that the vote was unanimous, but without giving the names of the persons voting, either in the affirmative or negative, is a substantial compliance with a requirement that the names of the members voting, both in the affirmative and negative, be entered upon the minutes, the recording of such vote being contemplated only where there are votes on both sides. *Tobin v. Morgan*, 70 Pa. St. 229.

4. See *Steckert v. East Saginaw*, 22 Mich. 104; *Pontiac v. Axford*, 49 Mich. 69; *Boyce v. Auditor Gen'l*, 90 Mich. 314; *State v. Van Winkle*, 25 N. J. L. 73; *State v. Duryea*, 40 N. J. L. 266; *Andrews v. Boylston*, 110 Mass. 214; *Judd v. Thompson*, 125 Mass. 553.

Where a tax is ordered, the sworn certificate required by the *New Jersey* laws to be delivered by the trustee to the assessor, should show all the facts necessary to render the tax legal, and that such facts are within the knowledge of at least two of the trustees; and the certificate should be verified by their oath. *Hardcastle v. State*, 27 N. J. L. 551; *State v. Padden*, 44 N. J. L. 151. And it should show the apportionment by the meeting of a specific amount for each specific purpose. *State v. Padden*, 44 N. J. L. 151.

The county clerk, before the delivery of the tax books, may amend his record by showing when the levy of a road tax was made. *Ohio, etc., R. Co. v. People*, 119 Ill. 207.

5. See *Nelson v. Pierce*, 6 N. H. 194; *State v. Hardcastle*, 26 N. J. L. 143; *Hardcastle v. State*, 27 N. J. L. 551;

thentication as required by law is necessary to the validity of the record,<sup>1</sup> and though it is proper and desirable that it should be signed by the presiding officer and clerk of the body by which it is made,<sup>2</sup> an entry of the levy on the proper book of record kept for that purpose may be sufficient.<sup>3</sup>

Absence of the record from the place provided for its preservation, and in which it ought to be found, raises a presumption that it never existed;<sup>4</sup> but facts may be shown from which its existence and subsequent loss or destruction may be inferred;<sup>5</sup> and when such loss or destruction is established, secondary evidence of its contents may be given.<sup>6</sup>

*Sherwin v. Bugbee*, 17 Vt. 337; *Weber v. Ohio, etc., R. Co.*, 108 Ill. 451. See also *Longyear v. Aplin*, 72 Mich. 415.

In *Houghton v. Davenport*, 23 Pick. (Mass.) 235, it was held that the return of a constable, on a warrant for calling an annual town meeting, that he has warned the inhabitants of a town, is sufficient evidence that the meeting is legally warned, even though the return does not state in what manner he warned them. See also *Sexton v. Nimms*, 14 Mass. 315; *Briggs v. Murdock*, 13 Pick. (Mass.) 305; *Waldron v. Lee*, 5 Pick. (Mass.) 323.

It need not appear on the face of a certificate of town auditors, allowing accounts against the town, that they were made at the proper time and place. It is sufficient if in fact their meeting was regular in those respects. *People v. Queens County*, 1 Hill (N. Y.) 195.

1. *Hogelskamp v. Weeks*, 37 Mich. 423; *In re Jefferson*, 35 Minn. 215; *State v. Padden*, 44 N. J. L. 151; *Hardcastle v. State*, 27 N. J. L. 551.

2. *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Hogelskamp v. Weeks*, 37 Mich. 423.

In *Goddard v. Stockman*, 74 Ind. 400, it was held that while it is the better practice that the record of the proceedings of a board of county commissioners should be signed by the members thereof, unsigned orders of the board are not void, and when properly signed within a reasonable time, they become valid from the time when made. And in *Jefferson County v. Johnson*, 23 Kan. 717, it was held that the failure of a county clerk to attach his certificate to the tax roll, is a mere irregularity which will not invalidate the subsequent proceedings.

3. *Martin v. Cole*, 38 Iowa 141; *People v. Eureka Lake, etc., Canal Co.*, 48 Cal. 143; *MacKenzie v. Wooley*, 39 La. Ann. 944; *Lacey v. Davis*, 4 Mich. 140;

66 Am. Dec. 524. And see *Beck v. Allen*, 58 Miss. 143. But see *Hogelskamp v. Weeks*, 37 Mich. 423.

The general rule that every public document required by law to be executed by a public officer must be verified by his official signature, does not extend to records of a corporate board or body which exercises powers municipal and quasi legislative. A tax is not void, therefore, because the record of the board levying it is not signed by the chairman and clerk of the board. The effect of a statute requiring it to be so signed is merely to make their signatures evidence of the identity of the levy. *People v. Eureka Lake, etc., Canal Co.*, 48 Cal. 143.

A certificate of town auditors, allowing accounts against the town, purporting in the body of it to have been made by the board of auditors of the proper town, is sufficient, though the officers have merely signed their names, without the addition of their official titles. *People v. Queens County*, 1 Hill (N. Y.) 195.

4. *Hilton v. Bender*, 69 N. Y. 75. And see *Hintrager v. Kiene*, 62 Iowa 605.

In *Michigan*, the rule that when a record is not to be found in the proper office, it must be accounted for before it can be assumed to have ever existed, is changed by statute, and the contrary presumption is indulged. *Upton v. Kennedy*, 36 Mich. 215; *Hogelskamp v. Weeks*, 37 Mich. 422. And see *Silsbee v. Stockle*, 44 Mich. 568.

5. *Hilton v. Bender*, 69 N. Y. 75. And see *Boyce v. Auditor Gen'l*, 90 Mich. 314. Proof of loss should be made by the party claiming the benefit of the levy. *Moore v. Cooke*, 40 Iowa 290.

6. *Farrar v. Fessenden*, 39 N. H. 268; *Weber v. Ohio, etc., R. Co.*, 108 Ill. 451; *Irwin v. Miller*, 23 Ill. 348; *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Quinby v. North American Coal, etc.,*

**7. Commutation of Tax.**—In the absence of constitutional prohibition, the legislature may commute or remit unpaid taxes,<sup>1</sup> or even refund those which have been paid;<sup>2</sup> but such action should

Co., 2 Heisk. (Tenn.) 596. And see *Norris v. Russell*, 5 Cal. 249.

In *Weber v. Ohio*, etc., R. Co., 108 Ill. 451, it was held that if certificates for the levy and extension of school taxes, are copied in the record book, the copy is only secondary evidence, and in no event admissible, until proof is made of the return of the original certificates and of the loss thereof.

The loss of a paper showing the right to the issue of a *mandamus* to compel the levy of a tax, will not dispense with the clear proof that it contains all the legal requirements. *People v. Oldtown*, 88 Ill. 202.

1. *Demoville v. Davidson County*, 87 Tenn. 214; *People v. Lee*, 28 Hun (N. Y.) 469; *Danghrill v. Alabama L. Ins.*, etc., Co., 31 Ala. 91; *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86; *Hunsaker v. Wright*, 30 Ill. 146; *State Bank v. People*, 5 Ill. 303; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *McDonough County v. Campbell*, 42 Ill. 490; *Jacksonville v. McConnel*, 12 Ill. 138; *Cooper v. Ash*, 76 Ill. 11; *Gardiner v. State*, 21 N. J. L. 557. And see *White v. Wheeler*, 51 Hun (N. Y.) 573; *Terrel v. Wheeler*, 49 Hun (N. Y.) 262; *Kelly v. Wheeler* (Supreme Ct.), 3 N. Y. Supp. 289; *Wallerstein v. Bohanna* (Supreme Ct.), 5 N. Y. Supp. 319; *Fethian v. Wheeler*, 125 N. Y. 696; *Lamb v. Connolly*, 122 N. Y. 531; *In re Stevens County* (Minn. 1887), 31 N. W. Rep. 942. But see *Wilson v. Sutter County*, 47 Cal. 91.

The commutation of all taxes and licenses upon the payment of a designated sum, is not an illegal exemption, and does not conflict with a constitutional provision that taxation shall be equal and uniform, and in proportion to the value of the property. *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86.

The power to investigate and determine what part of a tax shall be commuted, may be delegated to boards of assessors or other inferior officers. *White v. Wheeler*, 51 Hun (N. Y.) 573.

County and municipal taxes, as well as state taxes, may be remitted by the legislature. *Demoville v. Davidson County*, 87 Tenn. 214. And see *Pro-*

*phet v. Lundy*, 63 Miss. 603. But city taxes are not under the supervision of the board of supervisors of the county, and cannot be remitted by them. *Manufacturers' Bank v. Troy*, 24 How. Pr. (N. Y.) 250.

The objection that the legislature cannot delegate the power of taxation within an incorporated city, to a commissioner newly created by itself, is not applicable to a statute conferring authority upon the board of assessors of a city to determine what portion of certain taxes which are in arrear shall be charged against, and collected out of, the lands upon which they were assessed; their duty not being to impose, but rather to abate, a tax. *White v. Wheeler*, 51 Hun (N. Y.) 573. And see *Terrel v. Wheeler*, 49 Hun (N. Y.) 262.

In *Nebraska*, taxes cannot be released or commuted. *Lancaster County v. Rush*, 35 Neb. 119; *Lancaster County v. Trimble*, 33 Neb. 121. And in *State v. Graham*, 17 Neb. 43, it was held that an assignment by county commissioners upon tax certificates for less than the amount of taxes due thereon when the property if sold would bring the full amount, violates the constitutional prohibitions against the commutations of taxes.

Many exemptions are in the nature of commutations. *Baltimore*, etc., R. Co. v. Maryland, 21 Wall. (U. S.) 456; *Milwaukee*, etc., R. Co. v. Crawford County, 29 Wis. 116; *Johnston v. Macon*, 62 Ga. 645. And when exemptions are prohibited, there can be no power to commute. *New Orleans v. Lafayette Ins. Co.*, 28 La. Ann. 756; *New Orleans v. St. Charles Street R. Co.*, 28 La. Ann. 497; *New Orleans v. New Orleans Sugar Shed Co.*, 35 La. Ann. 548; and see *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440; *Ide v. Finneran*, 29 Kan. 569.

As to commutation by rendering services, see *infra*, this title, *Municipal Taxation*; and see generally, *supra*, this title, *Power to Tax*.

2. See *Lancaster County v. State*, 13 Neb. 523; *Warder v. Clark County*, 38 Ohio St. 639.

Though a tax has been remitted, provision need not necessarily be made for refunding such parts of it as have been

operate with fairness and not conflict with the constitutional provision in regard to uniformity and equality.<sup>1</sup>

**XI. THE ASSESSMENT**—1. **Definition; Necessity for.**—An assessment may be defined to be the act of assessing, determining, or adjusting the amount of taxation to be paid by an individual or a community;—an official valuation of property, profits, or income, for purposes of taxation.<sup>2</sup>

Where taxes are to be levied in proportion to an estimate, either of values, benefits, or the results of business, an assessment is indispensable.<sup>3</sup>

paid. *Demoville v. Davidson County*, 87 Tenn. 214.

Where taxes are rightfully levied under an existing taxing power, they are not invalidated by provisions for their repayment, or partial repayment, to the taxpayer, in case of a failure of the enterprise in aid of which the taxes are levied, or because the benefit might not be equal in its operation. *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.

1. *Cooper v. Ash*, 76 Ill. 11. And see *Lancaster County v. Trimble*, 33 Neb. 121; *Lancaster County v. Rush*, 35 Neb. 119. Where a statute restricting the foreclosure of tax liens by counties, to cases in which the amount due exceeds a specified sum, was held void under constitutional provisions requiring all taxable property to contribute its proportionate share of taxes, and prohibiting the legislature from releasing the property of individuals from taxation.

2. Cent. Dict. See *New York v. Weaver*, 100 U. S. 539; *Green v. Gruber*, 26 La. Ann. 694; *Seattle v. Yesler*, 1 Wash. Ter. 571.

As commonly used, the assessment consists of the two processes of listing the persons and property to be taxed, *Seattle v. Yesler*, 1 Wash. Ter. 571; *State v. Fournet*, 30 La. Ann. 1103; *Miller v. Hale*, 26 Pa. St. 435; *Wells v. Smyth*, 55 Pa. St. 159; *New York v. Weaver*, 100 U. S. 539; and of estimating the sums which are to be a guide in the apportionment of the tax between them. *New York v. Weaver*, 100 U. S. 539; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *U. S. v. Haloran*, 14 Blatchf. (U. S.) 1; *State v. Fournet*, 30 La. Ann. 1103; *Miller v. Hale*, 26 Pa. St. 435; *Wells v. Smyth*, 55 Pa. St. 159; *Seattle v. Yesler*, 1 Wash. Ter. 571.

In *Wells v. Smyth*, 55 Pa. St. 159, it was held that property is assessed when the assessor has returned his list

and valuation and the commissioners have apportioned the rate *per cent.* on the several townships.

**Assessment, in its broadest sense**, includes all the steps necessary to be taken in the legitimate exercise of the power to tax. *Hurford v. Omaha*, 4 Neb. 336; *San Luis Obispo v. Pettit*, 87 Cal. 499.

The words "assessing" and "collecting" may be so used as to include the operation called the levy of a tax. *San Luis Obispo v. Pettit*, 87 Cal. 499.

**List.**—In one sense, the assessment denotes the list and valuation of taxable property made by the proper officers for the purposes of taxation. *Green v. Gruber*, 26 La. Ann. 694; *Bratton v. Mitchell*, 1 W. & S. (Pa.) 310. And see *Wells v. Smyth*, 55 Pa. St. 159.

3. *New York v. Weaver*, 100 U. S. 539; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Driggers v. Cassady*, 71 Ala. 529; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Waller v. Hughes* (Arizona, 1886), 11 Pac. Rep. 122; *People v. Hastings*, 29 Cal. 449; *Smith v. Davis*, 30 Cal. 539; *Kelsy v. Abbott*, 13 Cal. 618; *People v. Pearis*, 37 Cal. 259; *Moss v. Shear*, 25 Cal. 45; 85 Am. Dec. 94; *People v. Sneath*, 28 Cal. 612; *Lake County v. Sulphur Bank Min. Co.*, 66 Cal. 17; *Hurlbutt v. Butenop*, 27 Cal. 50; *Rood v. Mitchell County*, 39 Iowa 444; *Bailey v. Fisher*, 38 Iowa 229; *Early v. Whittingham*, 43 Iowa 162; *Worthington v. Whitman*, 67 Iowa 190; *Graves v. Bruen*, 11 Ill. 431; *Slaughter v. Louisville*, 89 Ky. 112; *National Bank of Commerce v. Licking Valley Land, etc., Co.* (Ky. 1893), 22 S. W. Rep. 381; *McWilliams v. Michel*, 43 La. Ann. 984; *Woolfolk v. Fonbene*, 15 La. Ann. 15; *Augusti v. Lawless*, 43 La. Ann. 1097; *Person v. O'Neal*, 32 La. Ann. 237; *Thurston v. Little*, 3 Mass. 429; *Thayer v. Stearns*, 1 Pick. (Mass.) 482; *Gamble v. Witty*, 55 Miss. 26;

While the legislature may alter the manner of making the assessment, it may not dispense with it altogether,<sup>1</sup> unless the statute levying the tax itself prescribes the amount to be paid, in which case no assessment is required.<sup>2</sup>

**2. When Made.**—For the purpose of general taxation, assessments are required to be made periodically,<sup>3</sup> usually every year.<sup>4</sup> But for special purposes and for local improvements, they need be made only when the special occasion arises.<sup>5</sup> When an annual assessment is required, the property must be listed each year, or the tax will be invalid.<sup>6</sup>

A tax based upon the valuation of a year other than that of the year for which it was originally assessed, is invalid.<sup>7</sup>

*Morrill v. Taylor*, 6 Neb. 236; *Nebraska City v. Nebraska City Hydraulic Gas Light, etc., Co.*, 9 Neb. 339; *South Platte Land Co. v. Crete*, 11 Neb. 344; *Matter of Nichols*, 54 N. Y. 62; *May v. Traphagen*, 139 N. Y. 478; *Miller v. Hale*, 26 Pa. St. 432; *McCall v. Lorimer*, 4 Watts (Pa.) 351; *McReynolds v. Longenberger*, 75 Pa. St. 13; *Yenda v. Wheeler*, 9 Tex. 408; *Judevine v. Jackson*, 18 Vt. 470; *Marsh v. Clark County*, 42 Wis. 502; *Schettler v. Fort Howard*, 43 Wis. 48; *Hershey v. Barron County*, 37 Wis. 75.

Where no assessment was ever made by the proper authorities, upon which a tax could be levied, no previous tender is required as a condition of equitable relief against a tax. *Bode v. New England Investment Co.*, 6 Dakota 499.

**Illegal in Part.**—Where an assessment is in part illegal and the illegal portion is inseparably blended with that which is legal, the whole assessment is void. *California v. Central Pac. R. Co.*, 127 U. S. 1.

**1.** *Marsh v. Clark County*, 42 Wis. 502; *Smith v. Cleveland*, 17 Wis. 556; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210. See also *Dean v. Gleason*, 16 Wis. 1.

Where a constitutional provision is made for the assessment of property, the legislature cannot fix the valuation. *People v. Hastings*, 29 Cal. 449. See also *Slaughter v. Louisville*, 89 Ky. 112.

In *McReynolds v. Longenberger*, 59 Pa. St. 13, it was held that the want of an assessment made by competent authority, is not a mere irregularity which can be corrected by curative statutes.

**2.** *U. S. v. Halloran*, 14 Blatchf. (U. S.) 1; *King v. U. S.*, 99 U. S. 229; *Provident Inst. v. Massachusetts*, 6

*Wall. (U. S.)* 611; *State v. Sterling*, 20 Md. 502; *Texas Banking, etc., Co. v. State*, 42 Tex. 630. And see *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *St. Croix, etc., R. Co. v. Osceola County*, 45 Iowa 168.

**3.** *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *Wilson v. Marsh*, 34 Vt. 352; *People v. Tax Com'rs*, 104 U. S. 466.

**4.** See *People v. Hastings*, 29 Cal. 449; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *People v. Tax Com'rs*, 104 U. S. 466.

**5.** See *infra*, this title, *Local Assessments; Municipal Taxation*.

In *Hall v. Houston, etc., R. Co.*, 39 Tex. 286, it was held that where a special tax is levied, no special assessment of the taxable property on which it is to be collected need be made.

**6.** *People v. Hastings*, 29 Cal. 449. And see *Clove Spring Iron Works v. Cone*, 56 Vt. 603; *Newkirk v. Fisher*, 72 Mich. 113.

The same rule applies to a requirement of a biennial, triennial, or quadrennial assessment. See *Ayers v. Moulton*, 51 Vt. 115.

**7.** *Davis v. Boston*, 129 Mass. 378; *Nason v. Whitney*, 1 Pick. (Mass.) 140; *State v. Cook*, 82 Mo. 185; *State v. Union Trust Co.*, 92 Mo. 157; *Johnson v. Royster*, 88 N. Car. 194; *Alger v. Curry*, 38 Vt. 382; *South Platte Land Co. v. Crete*, 11 Neb. 344; *People v. Hastings*, 29 Cal. 449; *Lebanon v. Ohio, etc., R. Co.*, 77 Ill. 539; *Davidson v. Sterrett*, 13 Ky. L. Rep. 265; *Paldi v. Paldi*, 84 Mich. 346; *Scheiber v. Kaehler*, 49 Wis. 291.

Under the *Iowa* statute, an assessment may be made in any year for a tax which should have been levied and collected in the preceding year. *Peirce*



Assessments are usually made to relate to a day certain in each year,<sup>1</sup> from which time the liability of the person or property assessed becomes fixed for that year; after that time neither a change of ownership nor a change of value will affect the tax; nor can the assessor change names, or put new names on the roll for taxation.<sup>2</sup> The rule has been laid down that an assessment not made within the time required by law is invalid and will not support a tax.<sup>3</sup> But an assessment is not invalid because made after the usual

*v. Weare*, 41 Iowa 378. And a somewhat similar statute exists in *Illinois*. See *Fairfield v. People*, 94 Ill. 244.

In *Shotwell v. Moore*, 129 U. S. 590, a statute providing for the ascertainment of the monthly average amount or value of the property or goods held by persons during the preceding year, and for the assessment for taxation on that basis, was held to be valid.

1. See *Clark v. Norton*, 49 N. Y. 243; *Mygatt v. Washburn*, 15 N. Y. 316; *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57; *Ayers v. Moulton*, 51 Vt. 115; *San Francisco v. Pennie*, 93 Cal. 465; *Com. v. Gaines*, 80 Ky. 489; *Montgomery County v. Montgomery Gas Light Co.*, 64 Ala. 269; *Price v. Kramer*, 4 Colo. 546; *Martin County v. Drake*, 40 Minn. 137; *Warren v. Werner*, 14 Wis. 366.

**Presumption as to Time.**—Where no day is designated, either expressly or by implication, for the beginning of the tax year, it will be presumed that the calendar year was intended. See *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Com. v. North Pennsylvania R. Co.*, 129 Pa. St. 460.

2. *Hunt v. McFadgen*, 20 Ark. 277; *State v. Certain Lands*, 40 Ark. 34; *San Gabriel Valley Land, etc., Co. v. Wetmer*, 96 Cal. 623; *Shaw v. Dennis*, 10 Ill. 405; *Briggs v. People*, 96 Ill. 381; *Sully v. Poorbaugh*, 45 Iowa 453; *Howell v. Scott*, 44 Kan. 247; *Com. v. Gaines*, 80 Ky. 489; *Templeton v. Levee Com'rs*, 16 La. Ann. 117; *Vaughan v. Street Com'rs*, 154 Mass. 143; *Davis v. Boston*, 129 Mass. 377; *Richardson v. Boston*, 148 Mass. 508; *Martin County v. Drake*, 40 Minn. 137; *State v. Hardin*, 34 N. J. L. 79; *State v. Hanson*, 36 N. J. L. 50; *State v. Union Tp.*, 36 N. J. L. 309; *State v. Pettit*, 39 N. J. L. 654; *State v. Shurts*, 41 N. J. L. 279; *State v. Jersey City*, 44 N. J. L. 156; *Clark v. Norton*, 49 N. Y. 245; *Overing v. Foote*, 65 N. Y. 263; *People v. Tax Com'rs*, 91 N. Y. 593; *People v. McComber* (Supreme Ct.), 7 N. Y.

Supp. 71; *May v. Traphagen*, 139 N. Y. 478; *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81; *Harth v. Gibbes*, 3 Rich. (S. Car.) 316; *McClellan v. Memphis, etc., R. Co.*, 11 Lea (Tenn.) 336; *Walker v. Miner*, 32 Vt. 769; *Pitkin v. Parks*, 54 Vt. 301; *Warren v. Werner*, 14 Wis. 366; *Pennsylvania Coal Co. v. Porth*, 63 Wis. 77; *People v. Tax Com'rs*, 104 U. S. 466.

Property shipped from outside the taxing district on the assessment date, but not arriving within it until afterwards, is not subject to assessment for that year. *Johnson v. Lyon*, 106 Ill. 64.

In *State v. Eastabrook*, 3 Nev. 173, it was held that property within the state at the time of the levy, is liable, though it is removed before assessment.

In *Crutchfield v. Stambaugh*, 8 Heisk. (Tenn.) 832, it was held that where land is sold after the assessment, an agreement by the buyer to pay the taxes for that year will not release the seller from liability therefor.

In *Washburn v. Walworth*, 133 Mass. 499, it was held that a partner who withdraws from the firm before the date of the assessment, retaining no interest therein, is not liable for taxes.

In *Pueblo County v. Wilson*, 15 Colo. 90, it was held that personal property not *in esse* upon the date of assessment, cannot be assessed.

That property assessed has ceased to exist after assessment, is no defense to the tax. *Shelby County v. Mississippi, etc., R. Co.*, 16 Lea (Tenn.) 401; *Rutledge v. Fogg*, 3 Coldw. (Tenn.) 554.

A change in the list does not invalidate the whole list. *Willard v. Pike*, 59 Vt. 202.

A corporation not practically organized, although its certificate has been filed before the date of assessment, is not liable for that year. *Anglo-American Ins. Co. v. District of Columbia*, 5 Mackey (D. C.) 422.

3. See *Stockman v. Robbins*, 80 Ind. 195; *Williamsport v. Kent*, 14

time, when the act under which the tax was levied furnishes no limitation upon the exercise of the power.<sup>1</sup>

**3. By Whom Made.**—In the absence of constitutional provision, the legislature may provide for such agencies for the assessment of taxes as it may see fit.<sup>2</sup> The agencies provided for must be constituted in the manner prescribed by law; and the assessment must be made by the officers duly elected or appointed for that purpose.<sup>3</sup>

When the constituted authorities neglect or refuse to act, it is within legislative power to provide for the performance of their duties by other officers and instrumentalities,<sup>4</sup> though the act of filling an office exhausts the power until the removal or dismissal of the incumbent in the manner prescribed by law.<sup>5</sup> It is essential to the validity of the list as a basis of taxation, and therefore to the validity of the tax itself, that the assessment should be made by officers having competent authority,<sup>6</sup> and the qualifications re-

Ind. 306; *Wolfe v. Murphy*, 60 Miss. 1; *Ayers v. Moulton*, 51 Vt. 115; *Woodward v. French*, 31 Vt. 337.

**Extension of Time.**—In *Brigins v. Chandler*, 60 Miss. 862, it was held that a statute extending the time for assessment applied only to cases in which the law had not been complied with.

1. *Hallo v. Helmer*, 12 Neb. 87; *Anderson v. Mayfield* (Ky. 1892), 19 S. W. Rep. 598; *State v. Northern Belle Mill, etc., Co.*, 15 Nev. 385. And see *American Coal Co. v. Alleghany County*, 59 Md. 185.

2. *North Carolina R. Co. v. Alamanace*, 82 N. Car. 259; *Chicago, etc., R. Co. v. People*, 98 Ill. 350. And see *Sawyer v. Dooley*, 21 Nev. 390.

3. *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *St. Louis, etc., R. Co. v. Surrell*, 88 Ill. 535; *Felamthal v. Johnson*, 104 Ill. 21; *People v. Lots in Ashley*, 122 Ill. 297; *Twombly v. Kimbrough*, 24 Ark. 459; *People v. Hastings*, 29 Cal. 449; *People v. White*, 47 Cal. 616; *Reily v. Lancaster*, 39 Cal. 354; *Hawkins v. Jonesboro*, 63 Ga. 527; *Williams v. Corcoran*, 46 Cal. 553; *Birch v. Fisher*, 13 S. & R. (Pa.) 208; *Evansville, etc., R. Co. v. Hays*, 118 Ind. 214; *People v. Lothrop*, 3 Colo. 428; *State v. Segoine*, 53 N. J. L. 339.

In *Pensacola v. Bell*, 22 Fla. 469, it was held that an assessment roll commenced by one assessor and perfected by another, is valid.

A city ordinance authorizing the appointment of assessors by the comptroller, confers the authority upon the comptroller as such, and not upon the individual who holds the office at the

time of the enactment. *People v. Allen*, 42 Barb. (N. Y.) 203.

4. *Du Page County v. Jenks*, 65 Ill. 275; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153. And see *Farrington v. New England Invest. Co.*, 1 N. Dak. 102; *Bode v. New England Invest. Co.*, 1 N. Dak. 121.

Under the *Maine* statutes, when no assessors are elected, the selectmen must, each of them, be sworn as an assessor before they can legally assess a tax. They cannot make an assessment as officers *de facto*, which will sustain an action for taxes. *Dresden v. Goud*, 75 Me. 298.

Under a power to appoint a successor to a delinquent assessor, the delinquent may not be appointed as his own successor. But a person so appointed would be an officer *de facto* as to third persons. *Wolfe v. Murphy*, 60 Miss. 1. See also *Guyer v. Andrews*, 11 Ill. 444.

5. See *PUBLIC OFFICERS*, vol. 19, p. 378. See also *People v. Woodruff*, 32 N. Y. 355; *Smith v. New York, 1 Hun* (N. Y.) 57; 47 How. Pr. (N. Y.) 277; *People v. Stevens*, 51 How. Pr. (N. Y. Ct. App.) 139.

In *Mix v. People*, 116 Ill. 265, it was held that a board of supervisors has no power to appoint a committee to reassess lands previously assessed by the proper body.

6. *Rood v. Mitchell County*, 39 Iowa 444; *Bailey v. Fisher*, 38 Iowa 229; *Du Page County v. Jenks*, 65 Ill. 275; *Paldi v. Paldi*, 84 Mich. 346; *Williams v. Corcoran*, 46 Cal. 553; *People v. Parker*, 117 N. Y. 86; *Birch v. Fisher*,

quired by law.<sup>1</sup> This rule, however, is qualified by the general principles applicable to the validity of acts of *de facto* officers.<sup>2</sup> The duties of assessors are confined to the listing and valuation of the property;<sup>3</sup> their authority cannot be delegated, and the assessment, in the absence of a statute authorizing it, cannot be made by a deputy,<sup>4</sup> though the listing or other clerical duty may be.<sup>5</sup> The means and measures by which an assessor has reached

13 S. & R. (Pa.) 208. And see *Stockman v. Robbins*, 80 Ind. 195; *People v. Ward*, 105 Ill. 620.

In *Farrington v. New England Investment Co.*, 1 N. Dak. 102, it was held that an assessment of the proper officer, in the proper time and manner, which is not copied into the assessment roll until after the assessor has resigned, is not void in equity where it appears that the assessment was in fact copied accurately.

1. *Ayers v. Moulton*, 51 Vt. 115; *Coit v. Wells*, 2 Vt. 318; *Isaacs v. Wiley*, 12 Vt. 674; *Lynde v. Dummerstoy*, 61 Vt. 48; *Orneville v. Palmer*, 79 Me. 472; *Payson v. Hall*, 30 Me. 319; *Dresden v. Goud*, 75 Me. 298; *Bowler v. Brown*, 84 Me. 376; *Gould v. Monroe*, 61 Me. 544; *Pike v. Hanson*, 9 N. H. 491; *Ainsworth v. Dean*, 21 N. H. 400; *Lynam v. Anderson*, 9 Neb. 367; *Morrill v. Taylor*, 6 Neb. 245; *Hallo v. Helmer*, 12 Neb. 87; *Parker v. Overman*, 18 How. (U. S.) 137; *Martin v. Barbour*, 34 Fed. Rep. 701.

The oath taken when the list is completed is not sufficient. *Ayers v. Moulton*, 51 Vt. 115; *Walker v. Burlington*, 56 Vt. 131.

In *Nichols v. Bridgeport*, 23 Conn. 189; 60 Am. Dec. 636, it was held that an assessment will not be held to be invalid merely because it does not appear that the committee who made it were freeholders.

2. See *Washington County v. Miller*, 14 Iowa 584; *Peirce v. Weare*, 41 Iowa 378; *Equalization Board v. Landowners*, 51 Ark. 516; *Barton v. Lattourette*, 55 Ark. 81; *Moore v. Turner*, 43 Ark. 243; *Radcliffe v. Scruggs*, 46 Ark. 96; *Scott v. Watkins*, 22 Ark. 556; *Murphy v. Shepard*, 52 Ark. 356; *Hawkins v. Jonesboro*, 63 Ga. 527; *Bath v. Reed*, 78 Me. 276; *Koontz v. Hancock*, 64 Md. 134; *Tucker v. Aiken*, 7 N. H. 113; *State v. Metz*, 31 N. J. L. 365; *State v. Brown*, 53 N. J. L. 162; *State v. Ocean Tp.*, 39 N. J. L. 75; *Ray v. Murdock*, 36 Miss. 692; *Kissimmee City v. Cannon*, 26 Fla. 3; *Merriam v. Dovey*, 25 Neb. 618; *Texas, etc., R. Co. v. Har-*

*rison County*, 54 Tex. 119; *Guyer v. Andrews*, 11 Ill. 494; *Ronkendorf v. Taylor*, 4 Pet. (U. S.) 349. And see *PUBLIC OFFICERS*, vol. 19, p. 378; *DE FACTO OFFICERS*, vol. 5, p. 93.

It has been held that an assessor who neglects or fails to take the prescribed oath of office is nevertheless an officer *de facto*, and that as to third persons his acts are valid and binding. *State v. Perkins*, 24 N. J. L. 409; *State v. Pierson*, 47 N. J. L. 247; *Sullivan v. State*, 66 Ill. 75. See also *Lord v. Parker*, 83 Me. 539; and cases cited *supra* this note. It is not necessary that the assessor should be sworn for each case. *Turpin v. Eagle Creek, etc., Road Co.*, 48 Ind. 45.

3. They cannot levy a tax. *State v. Fournet*, 30 La. Ann. 1103.

The assessor and his deputies have implied authority to administer all necessary oaths in connection with tax-lists. *State v. Reynolds*, 108 Ind. 353.

4. *Stokes v. State*, 24 Miss. 621; *Snell v. Fort Dodge*, 45 Iowa 564; *Merchants' Mutual Ins. Co. v. Board of Assessors*, 40 La. Ann. 371. And see *Adams v. Justices*, 21 Ga. 206.

In *Covington v. Rockingham*, 93 N. Car. 134, it was held that a tax list made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid.

*Farrington v. New England Invest. Co.*, 1 N. Dak. 102; *Bode v. New England Invest. Co.*, 1 N. Dak. 121.

In *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210, it was held that a deputy county clerk, in the absence of his principal, may act as one of the board of appraisers and assessors to assess railroad property, as provided by statute in *Kansas*.

5. *Snell v. Fort Dodge*, 45 Iowa 564.

In *Woodman v. Auditor Gen'l*, 52 Mich. 30, it was held that the listing of property is clerical, but the ascertaining and determining of its value is judicial, and cannot be dispensed with in

a conclusion will not be inquired into judicially.<sup>1</sup> Where a board is required to act in making the assessment, all its members must have been duly chosen and qualified;<sup>2</sup> but when thus chosen and qualified, a majority of their number may generally act.<sup>3</sup>

**4. How Made—*a*. GENERAL RULE.**—Subject to constitutional restrictions, it is for the legislature to provide the method and mode of assessing property for purposes of taxation.<sup>4</sup> The assessment must be made in accordance with these provisions and with the securities and solemnities provided by statute.<sup>5</sup>

making a valid assessment roll. See also *Paldi v. Paldi*, 84 Mich. 346.

1. *Snell v. Fort Dodge*, 45 Iowa 564; *Du Page County v. Jenks*, 65 Ill. 275.

A provision that the assessors shall make out the assessment roll by wards, showing the taxable property of each ward separately, is complied with by the assessor of each ward making an assessment of the property in his ward, the assessors then coming together as a body and comparing their several lists and agreeing upon the correctness of the whole. *Dean v. Gleason*, 16 Wis. 1.

2. *Williamsburg v. Lord*, 51 Me. 599; *Jordan v. Hopkins*, 85 Me. 159; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; 34 Am. Dec. 223; *People v. Parker*, 117 N. Y. 86; *Lemoreaux v. O'Rourke*, 3 Abb. App. Dec. (N. Y.) 15.

Where one assessor has not been qualified, the other two cannot assess a tax. *Machiasport v. Small*, 77 Me. 109.

3. *Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Metcalf v. Messenger*, 46 Barb. (N. Y.) 329; *State v. McIntock*, 7 Ired. (N. Car.) 68; *Wells v. Austin*, 59 Vt. 157.

When one of three assessors, after due notice, refuses to attend and act in assessing a tax, the other two may proceed without him. *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75.

A majority, however, is necessary. One assessor cannot make the assessment. *Metcalf v. Messenger*, 46 Barb. (N. Y.) 325; *Oteri v. Parker*, 42 La. Ann. 374. See also *Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404.

Where the record shows that a number of officers were present at the time of the assessment, it will be presumed that they constituted a majority of the board. *State v. McIntock*, 7 Ired. (N. Car.) 68.

Where the board is required to act jointly, all must be present and act. *People v. Hagar*, 49 Cal. 229.

4. *Marsh v. Clark County*, 42 Wis. 501; *Smith v. Cleveland*, 17 Wis. 556; *Dean v. Gleason*, 16 Wis. 1; *San Luis Obispo v. Pettit*, 87 Cal. 499; *Du Page County v. Jenks*, 65 Ill. 275; *State v. Eastabrook*, 3 Nev. 173; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Williams v. Albany County*, 122 U. S. 154.

It is generally required that assessments shall be made up with certainty, that the taxpayer may know for what and how much he is taxed. *Goddard v. Seymour*, 30 Conn. 394; *Hamersley v. Franey*, 39 Conn. 179; *Adams v. Litchfield*, 10 Conn. 127; *Peck v. Wallace*, 10 Conn. 131.

5. *Marsh v. Clark County*, 42 Wis. 502; *People v. Lee*, 112 Ill. 113; *San Luis Obispo v. Pettit*, 87 Cal. 499; *Lake County v. Sulphur Bank Min. Co.*, 66 Cal. 17; *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; *Clove Spring Iron Works v. Cone*, 56 Vt. 603; *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 175; *Lyon v. Alley*, 130 U. S. 177; *Davis v. Farnes*, 26 Tex. 296; *Clark v. Norton*, 49 N. Y. 243; *Chemung Canal Nat. Bank v. Elmira*, 53 N. Y. 604. And see *Kitchen v. Smith*, 101 Pa. St. 452; *State v. Sloss*, 87 Ala. 119; *Baltimore, etc., R. Co. v. Koontz*, 77 Va. 698.

A radical defect in the assessment is such a nullity that it cannot be cured by prescription. *Davenport v. Knox*, 34 La. Ann. 407; *Woolfolk v. Fonbene*, 15 La. Ann. 15; *Townsend v. Edwards*, 25 Fla. 582. And when an assessment is so defective as to be totally void, the legislature cannot cure it by a retrospective enactment. *People v. Holladay*, 25 Cal. 300; *McReynolds v. Longenberger*, 57 Pa. St. 13.

An assessment which violates a provision of the Federal Constitution is void. *San Francisco, etc., R. Co. v. Dinwiddie*, 8 Sawyer (U. S.) 312; 13 Fed. Rep. 789.

In *New Jersey*, an assessment blend-

Where the legislature has failed to prescribe the details of the method of assessment, the reasonable discretion of the assessors may be exercised.<sup>1</sup> An assessor cannot assess property situated beyond the limits of his district.<sup>2</sup> Property not subject to taxation is, of course, not assessable.<sup>3</sup>

6. LISTING.—In some of the states the taxpayer is required to make and furnish to the assessor a list of his taxable property;<sup>4</sup> and corporations may be required to furnish a list of their stockholders<sup>5</sup> or of their capital stock;<sup>6</sup> or to furnish a report of the

ing together the state, county and township taxes, is illegal. *Camden, etc., R. Co. v. Hillegas*, 18 N. J. L. 11. See also *State v. Falkenburge*, 15 N. J. L. 320.

1. See *People v. Adams*, 125 N. Y. 471; *Insurance Co. v. Yard*, 17 Pa. St. 331; *Laird v. Hiester*, 24 Pa. St. 452; *Wilson County v. Carolina Cent. R. Co.*, 76 N. Car. 123.

2. *People v. Placerville, etc., R. Co.*, 34 Cal. 656; *Bailey v. Fisher*, 38 Iowa 229; *Barber v. Farr*, 54 Iowa 57; *Winslow v. Morrill*, 47 Me. 411; *Brown v. Veazie*, 25 Me. 359; *Dorn v. Backer*, 61 N. Y. 261; *Dorn v. Fox*, 61 N. Y. 264. And see *Green v. Allen*, 1 Busb. (N. Car.) 228; *Hoffman v. Woods*, 40 Kan. 382; *Chisholm v. Adams*, 71 Tex. 678; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Wadleigh v. Marathon Co. Bank*, 58 Wis. 546. Such an assessment has no validity and is of no effect for any purpose. *Toby v. Haggarty*, 23 Ark. 370; *Camden v. Mulford*, 26 N. J. L. 49; *Martin v. Carron*, 26 N. J. L. 228. That the assessment was made in good faith and in ignorance of the fact, is immaterial. *Taylor v. Youngs*, 48 Mich. 268.

3. See *Berry v. Missoula County*, 6 Mont. 121; *National Bank v. Elmers*, 53 N. Y. 53.

4. See *St. Louis, etc., R. Co. v. Surrell*, 88 Ill. 535; *Felsenthal v. Johnson*, 104 Ill. 21; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625; *Louisville, etc., R. Co. v. State*, 25 Ind. 177; *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 106; *Porter v. Norfolk Co.*, 5 Gray (Mass.) 365; *Lanesborough v. Berkshire County*, 131 Mass. 424; *State v. Hannibal, etc., R. Co.*, 60 Mo. 143; *Montgomery County v. Montgomery Gas Light Co.*, 64 Ala. 269; *State v. Apgar*, 31 N. J. L. 358; *Green v. Allen*, 1 Busb. (N. Car.) 228; *Ludlow v. Willich*, 1 Cin. Sup. Ct. (Ohio) 315; *Delaware, etc., Canal Co. v. Com.*, 43 Pa. St. 227; *Harper v.*

*Farmers', etc., Bank*, 7 W. & S. (Pa.) 204; *Bartlett v. Wilson*, 60 Vt. 644; *Weatherhead v. Guilford*, 62 Vt. 327.

Where one owns property in several districts, he must make return of the property to the assessors of each respectively. *Price v. Cramer*, 4 Colo. 546.

Mailing to the taxpayers, as far as they are known to the assessor, blank statements with a notice that they must comply therewith and must appear before him for that purpose, is a sufficient compliance with a statute directing the assessor to require every person to make a true written statement under oath of all his taxable property. *Turner v. Dickerman*, 95 Mich. 1.

5. *Donovan v. Firemen's Ins. Co.*, 30 Md. 155. And see *State v. Home Ins. Co.*, 91 Tenn. 558.

The officers of a corporation should make the proper returns to the assessor, whether solicited or not. *Pacific Hotel Co. v. Lieb*, 83 Ill. 602.

Although the corporation may keep a list of its stockholders, from which the lists of the town might, on application, transcribe the stock taxable in their town, this will not absolve the cashier from returning a list of the stockholders. *Newman v. Wait*, 46 Vt. 689.

6. *People v. Ward*, 105 Ill. 620. And see *State v. Hannibal, etc., R. Co.*, 60 Mo. 143; *Williamson v. New Jersey, etc., R. Co.*, 28 N. J. Eq. 277; *Bank of Bramwell v. Mercer County Ct.*, 36 W. Va. 341.

It has been held under the *California* statute, that the superintendent of a mining company should furnish the list as managing agent. *Lake County v. Sulphur Bank Min. Co.*, 68 Cal. 14.

In *Nevada*, it was held that the list must show that the person making it is one of those required by statute, and it must be subscribed by him. *State v. Washoe County*, 5 Nev. 317.

amount of their business<sup>1</sup> or their indebtedness.<sup>2</sup> Statutes imposing various penalties for a failure or refusal to make a return of the list are frequently found, and have been upheld as constitutional.<sup>3</sup>

1. See *First Nat. Bank v. Kentucky*, 9 Wall. (U. S.) 353; *Montgomery County v. Montgomery Gas Light Co.*, 64 Ala. 269; *State v. Louisiana Mut. Ins. Co.*, 19 La. Ann. 474; *State v. Central Pac. R. Co.*, 17 Nev. 259; *State v. McFetridge*, 64 Wis. 130; *People v. Tax Com'rs*, 99 N. Y. 254; *State v. Harshaw*, 76 Wis. 230.

A like return is required of private bankers, under the *Pennsylvania* statute. *Com. v. Cooke*, 50 Pa. St. 201.

2. See *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Com. v. North Pennsylvania R. Co.*, 129 Pa. St. 460.

3. **Taking Away Right of Appeal or Review.**—Thus, statutes taking away the right of appeal or review. See *State v. Comptroller*, 54 N. J. L. 135; *Johnson v. Roberts*, 102 Ill. 655; *State v. Central Pac. R. Co.*, 17 Nev. 259; *State v. Washoe County*, 7 Nev. 83; *State v. Washoe County*, 5 Nev. 317; *Tucker v. Aiken*, 7 N. H. 113; *Porter v. Norfolk County*, 5 Gray (Mass.) 365; *Otis County v. Ware*, 8 Gray (Mass.) 509; *National Bank of Commerce v. New Bedford*, 155 Mass. 313; *Vaughan v. Street Com'rs*, 154 Mass. 143; *Hartford v. Champion*, 58 Conn. 268; *McNulty v. Wilson*, 4 Strobh. (S. Car.) 231; *Weatherhead v. Guilford*, 62 Vt. 327; *State v. Appar*, 31 N. J. L. 358; *People v. Tax Com'rs*, 99 N. Y. 254.

It was held in *Merchants' Mut. Ins. Co. v. Board of Assessors*, 40 La. Ann. 372, that the *Louisiana* statute was not mandatory, and that a failure to comply with it was not a bar to a review of the assessment made by the assessors.

**Statutes Multiplying or Adding to the Tax.**—See *Butler v. Bailey*, 2 Bay (S. Car.) 244; *Ex p. Lynch*, 16 S. Car. 32; *State v. Allen*, 2 McCord (S. Car.) 55; *Biddle v. Oaks*, 59 Cal. 94; *Harper v. Farmers', etc., Bank*, 7 W. & S. (Pa.) 204; *Boyer v. Jones*, 14 Ind. 354; *McCormick v. Fitch*, 14 Minn. 252; *Fox's Appeal*, 112 Pa. St. 337; *Perry's Petition*, 16 N. H. 44; *Perley v. Parker*, 20 N. H. 263; *Bartlett v. Wilson*, 59 Vt. 23; *Howes v. Bassett*, 56 Vt. 141; *Bartlett v. Wilson*, 60 Vt. 644; *Rowell v. Horton*, 58 Vt. 1; *Weatherhead v. Guilford*, 62 Vt. 327; *Meserve v. Folsom*, 62 Vt. 504.

Listers, in assessing the double pen-

alty, may take the appraisal of the preceding year and double that. *Bartlett v. Wilson*, 60 Vt. 644.

Where the assessors double the tax because the taxpayer has not given in property which he does not really own, the double tax is illegal. *White v. State*, 51 Ga. 252.

A repeal of the statute authorizing the penalty, will not affect additional taxes assessed for refusal to list before the repeal. *Hartford v. Champion*, 58 Conn. 268.

**Statutes Imposing Definite Penalties for Refusal or Failure.**—See *Hartford v. Champion*, 58 Conn. 268; *Com. v. Cooke*, 50 Pa. St. 201; *Spalding v. Com.*, 88 Ky. 135; *Biddle v. Oaks*, 59 Cal. 94; *Durham v. State*, 117 Ind. 477; *State v. Washoe County*, 5 Nev. 317; *Washington v. Com.*, 2 Va. Cas. 258; *Powder River Cattle Co. v. Custer County*, 45 Fed. Rep. 323.

Where it is required by statute that the taxpayer shall make oath to his inventory, he does not incur the penalty prescribed by refusing to subscribe printed affidavits, unless there is an offer to administer the statutory oath. *Marion County v. Kruidenier*, 72 Iowa 92.

**Penalty Assessed for Each Offense—Double Penalty.**—In *Com. v. Cooke*, 50 Pa. St. 201, it was held that the taxpayer is liable for each neglect to make a proper return, and not for a single penalty as for one offense. But in *Roseberry v. Hough*, 27 Ind. 12, it was held that the penalty is not to be added for each year that the tax of a particular year remains unpaid.

Where one penalty is prescribed for giving a false return, and another for a failure to give a true list or refusal to take the oath prescribed by law, both penalties may be imposed without a violation of the constitutional provision against putting a person twice in jeopardy, the offenses being different. *Durham v. State*, 117 Ind. 477; *Burgh v. State*, 108 Ind. 135.

**Statutes Authorizing the Issue of Execution Against a Party.**—See *State v. Allen*, 2 McCord (S. Car.) 55.

**Statutes Making a Default an Indictable Offense.**—See *Berry v. State*, 10 Tex. App. 315; *Caldwell v. State*, 14

Statutes authorizing such penalties, being penal in their nature, are to be strictly construed.<sup>1</sup> The evasion of the law, or attempted evasion, must have been willful.<sup>2</sup> Where the failure to comply with the statute is owing to the fault of the tax officers, the penalty is not incurred.<sup>3</sup>

The list is to be taken as presumptively correct.<sup>4</sup> It is not, however, deemed conclusive upon the assessor. The list itself does not constitute the assessment; it is merely evidence from which an assessment may be made by the assessor.<sup>5</sup> He may resort to

Tex. App. 171; *Mock v. State*, 11 Tex. App. 56; *Burns v. State* (Ind. 1892), 31 N. E. Rep. 547; *State v. Welsh*, 28 Mo. 600.

A law taxing business during the whole of the current year in which the law is passed, and providing a penalty for a refusal to render an account of the business done during that year, is not *ex post facto*. *State v. Bell*, 1 Phil. (N. Car.) 76.

In *Berry v. State*, 10 Tex. App. 315, it was held that the indictment must allege the year in which the property was assessable. See also *Haugh v. State*, 12 Tex. App. 343. In *Caldwell v. State*, 14 Tex. App. 171, it was held that the indictment must allege a demand for the list and a refusal to give it, and that the taxpayer had taxable property. And see as to the requirements of the indictment, *State v. Lenfesty*, 10 Ind. 397; *Buckingham v. State*, 17 Ind. 305.

The indictment must show in what respect the list is fraudulent or false. *State v. Welsh*, 28 Mo. 600.

All information which alleges the ownership of property, its kind, quality and value, and the fact that the delinquent has failed and refused to list it for the years named therein, or to give it in for assessment, is sufficient. *Com. v. Singer Mfg. Co.* (Ky. 1893), 21 S. W. Rep. 354.

1. *Alexander v. Com.*, 1 Bibb (Ky.) 515; *Gager v. Prout*, 48 Ohio St. 89; *Rowell v. Horton*, 58 Vt. 1; *Perley v. Parker*, 20 N. H. 263.

In *Powder River Cattle Co. v. Custer County*, 45 Fed. Rep. 323, it was held that before the tax with the added penalty could be assessed, a demand must be made.

In *Leper v. Pulsifer*, 37 Ill. 110, a statute prescribing the penalty was held to apply to personal property only.

In *Walker v. Cochran*, 8 N. H. 166, it was held that where a list was given in by a member of a taxpayer's family in his absence, he could not be doomed

without notice that such return was unsatisfactory.

2. *Smith v. State*, 43 Ala. 344; *Perry's Petition*, 16 N. H. 44. See also *Harper v. Farmers', etc., Bank*, 7 W. & S. (Pa.) 204. But see *German Sav. Bank v. Archbold*, 15 Blatchf. (U. S.) 398.

Where a statement not under oath is accepted by the assessor, the taxpayer cannot be said to have refused to be sworn. *State v. Nunn*, 44 N. J. L. 354. See also *Melvin v. Weare*, 56 N. H. 436.

A mere mistake in the return will not subject the person to a penalty. *Ludlow v. Willich*, 1 Cin. Sup. Ct. 315. And see *Insurance Co. v. Cappellar*, 38 Ohio St. 560; *Goldsbury v. Warrick*, 112 Mass. 384.

3. *Lowell v. Middlesex County*, 3 Allen (Mass.) 546; *Marion County v. Galvin*, 73 Iowa 18; *Ludlow v. Willich*, 1 Cin. Sup. Ct. (Ohio) 315; *Powell v. Madison*, 21 Ind. 335.

An assessment for taxes is not vitiated by the fact that the assessor omitted to demand a sworn statement. *State v. Western Union Tel. Co.*, 4 Nev. 338; *Lyman v. Anderson*, 9 Neb. 367.

4. *Lanesborough v. Berkshire County*, 131 Mass. 124; *Newburyport v. Essex County*, 12 Met. (Mass.) 211; *Oregon, etc., Sav. Bank v. Jordan*, 16 Oregon 113.

5. *State Auditor v. Jackson County*, 65 Ala. 142; *Hartford v. Champion*, 58 Conn. 268; *State v. Southwestern R. Co.*, 70 Ga. 11; *Chicago, etc., R. Co. v. Bureau County*, 25 Ill. 475; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Felsenthal v. Johnson*, 104 Ill. 21; *Illinois, etc., R. Co. v. Stookey*, 122 Ill. 358; *St. Louis, etc., R. Co. v. Surrell*, 88 Ill. 535; *Humphreys v. Nelson*, 115 Ill. 45; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Baldwin v. Shine*, 84 Ky. 502; *Louisville, etc., R. Co. v. Com.*, 85 Ky. 198; *State v. Louisiana Mut. Ins. Co.*, 19 La. Ann. 474; *Winnisimmet Co. v. Assessors of Chelsea*, 6 Cush. (Mass.)

other means to determine the property to be assessed and its value; and, in his discretion, he may make such additions or alterations as are warranted by the facts.<sup>1</sup> Upon the refusal of the taxpayer to make the list as required by law, the assessor is generally authorized to assess upon the best information he can obtain.<sup>2</sup> Where the taxpayer fails to return the list within the

477; *Porter v. Norfolk County*, 5 Gray (Mass.) 265; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Jones v. Seward County*, 5 Neb. 561; *Lyman v. Anderson*, 9 Neb. 367; *State v. Kruttschnitt*, 4 Nev. 178; *People v. Tax Com'rs*, 46 How. Pr. (N. Y. Supreme Ct.) 315; *People v. Tax Com'rs*, 31 Hun (N. Y.) 568; *People v. Tax Com'rs*, 76 N. Y. 64; *People v. Tax Com'rs*, 99 N. Y. 254; *Oregon, etc., Sav. Bank v. Jordan*, 16 Oregon 113; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Delaware, etc., Canal Co. v. Com.*, 43 Pa. St. 227; *State v. State Board of Assessment* (So. Dak. 1892), 53 N. W. Rep. 192; *Bartlett v. Wilson*, 60 Vt. 644; *Weatherhead v. Guilford*, 62 Vt. 327; *Howes v. Bassett*, 56 Vt. 141; *Bullock v. Guilford*, 59 Vt. 516; *Lawrence v. Janesville*, 46 Wis. 364; *State v. Gaylord*, 73 Wis. 306.

This rule applies to assessments made by state boards of equalization as well as to those made by local assessors. *Illinois, etc., R. Co. v. Stookey*, 122 Ill. 358.

In *Florida*, it was held that it was for the owner to assign his land to the taxable grade to which it belonged. *Levy v. Smith*, 4 Fla. 154.

Where the taxpayer's statement containing no details by which its accuracy can be tested is rejected by the assessors, their action will not be interfered with without evidence affirmatively showing that the taxpayer was aggrieved thereby. *People v. Barker*, 68 Hun (N. Y.) 513.

1. *Felsenthal v. Johnson*, 104 Ill. 21; *Chicago, etc., R. Co. v. Bureau County*, 25 Ill. 475; *Hartford v. Champion*, 54 Conn. 436; *Collier v. Morrow*, 90 Ga. 148; *State v. Kruttschnitt*, 4 Nev. 178; *Roe v. St. John*, 7 Neb. 139; *Lyman v. Anderson*, 9 Neb. 367; *Jones v. Seward County*, 5 Neb. 561; *State v. Covington*, 35 S. Car. 245; *Weatherhead v. Guilford*, 62 Vt. 327. And see *Connor v. Waxahachie* (Tex. 1889), 13 S. W. Rep. 30; *Ferris v. Kemble*, 75 Tex. 476; *Eschenburg v. Lake County*, 129 Ind. 398.

In *Gager v. Prout*, 48 Ohio St. 89, it was held that a certified copy of the

inventory of the estate of a deceased person, filed by the executor in probate court, is competent evidence to show omissions in the returns of the deceased, and in the absence of anything to the contrary, may warrant the assessor in making additions.

He cannot act upon a mere rumor as to what a person is worth. *Howes v. Bassett*, 56 Vt. 141. Though it is not necessary that he should have knowledge of specific property kept back. *Hartford v. Champion*, 54 Conn. 436.

Under the *Indiana* statute, the assessor has power to call before him arbitrarily any one whom he chooses to call when he entertains doubt as to the correctness of a taxpayer's statement. *Burns v. State* (Ind. 1892), 31 N. E. Rep. 547.

It has been held in *Illinois*, that the assessor, after accepting the list without question, cannot alter or raise the valuation without giving the party assessed, notice. *McConkey v. Smith*, 73 Ill. 313; *Cleghorn v. Postlewaite*, 47 Ill. 428; *First Nat. Bank v. Cook*, 77 Ill. 622. But where the assessor discovers other property from that listed, he may list and assess it without giving the owner notice. *Wabash, etc., R. Co. v. Johnson*, 108 Ill. 11.

Thus, in *Gager v. Prout*, 48 Ohio St. 89, it was held, where the inventory of the estate filed by the executor in the probate court showed omissions in the list, that the assessor might make additions.

In *California*, the taxpayer must be cited to appear and answer under oath. *Weyse v. Crawford*, 89 Cal. 196. And notice must be given in *Ohio*. *Gager v. Prout*, 48 Ohio St. 89.

2. *State v. Louisiana Mut. Ins. Co.*, 19 La. Ann. 474; *Hartford v. Champion*, 58 Conn. 268; *Hartford Tp. v. Champion*, 54 Conn. 436; *McMillan v. Carter*, 6 Mont. 215; *People v. Tax Com'rs*, 99 N. Y. 254. And see *Noyes v. Hale*, 137 Mass. 266; *Weatherhead v. Guilford*, 62 Vt. 327; *Taylor v. Moore*, 63 Vt. 60.

In *Clark v. Belknap* (Ky. 1890), 13



time prescribed,<sup>1</sup> or to make or verify it in the manner required,<sup>2</sup> he is held to be in default as though he had refused to give it in. An omission of taxable property constitutes a false return,<sup>3</sup> but a mere irregularity in the return is not equivalent to a refusal to make the list.<sup>4</sup>

A taxpayer is estopped to deny the correctness of a list furnished by him to the assessor, and to contest the assessment made thereon.<sup>5</sup> But where the taxpayer has included exempt prop-

*S. W. Rep.* 212, it was held under the *Kentucky* statute, that upon a refusal of the taxpayer to make the list, the assessor has no authority to list it of his own accord. And see as to the power of the county court to direct the assessment, *Louisville, etc., R. Co. v. Com.*, 85 Ky. 198.

1. See *Tucker v. Aiken*, 7 N. H. 113; *State v. Board of Equalization*, 7 Nev. 83; *State v. Parker*, 34 N. J. L. 49; *State v. Bishop*, 34 N. J. L. 45; *State v. Parker*, 33 N. J. L. 192; *State v. McChesney*, 34 N. J. L. 63.

In *West Hampton v. Searle*, 127 Mass. 502, it was held sufficient to leave the return with the chairman of the board, where assessors had no office.

2. *Lee v. Com.*, 6 Dana (Ky.) 311; *Newell v. Whitingham*, 58 Vt. 341. And see *Narragansett Pier Co. v. Assessors*, 17 R. I. 452.

Where a person is prosecuted for refusing to verify an assessor's list of his taxable property, it is not necessary to show that the assessor actually administered the oath; a refusal to take it is sufficient. *Washington County v. Miller*, 14 Iowa 584.

In *Lyman v. Anderson*, 9 Neb. 367, it was held that it is the duty of the assessor to require the taxpayer to make oath to his list of taxable property, but that his failure to require such oath is a mere irregularity which does not render the assessment invalid. See also *State v. Western Union Tel. Co.*, 4 Nev. 338; *McMillan v. Carter*, 6 Mont. 215; *Washington v. Com.*, 2 Va. Cas. 258. But see *Turner v. Muskegon County*, 95 Mich. 449; *Gratwick, etc., Lumber Co. v. Oscoda* (Mich. 1893), 56 N. W. Rep. 600; *Hazzard v. O'Bannon*, 36 Fed. Rep. 854.

**Contents of List.**—In *State v. Central Pac. R. Co.*, 17 Nev. 259, it was held that a general list of the property, real and personal, was sufficient.

In *Maine*, the taxpayer's list need not specify values. *Orland v. County Com'rs*, 76 Me. 460.

In *Indiana*, it has been held that only the aggregate value need be given. *State v. Emshwiller*, 6 Blackf. (Ind.) 76.

3. *Ingalls v. Ratterman* (Ohio, 1891), 24 Wkly. L. Bull. 433. And see *Tripp v. Torrey*, 17 R. I. 359; *Olds v. Com.*, 3 A. K. Marsh. (Ky.) 465.

In *Sudderth v. Brittain*, 76 N. Car. 458, it was held that after the payment of the tax for the year, the assessors could not reassess for that year, land, the area of which had been fraudulently understated.

4. See *Timmerman v. St. John*, 21 Can. Sup. Ct. Rep. 691; *Lanesborough v. Berkshire County*, 131 Mass. 424.

In *State v. Nunn*, 44 N. J. L. 354, it was held that to authorize the assessor to fix the highest valuation, the taxpayer must have actually refused to be sworn.

So a list is not invalid for want of particularity in the description. *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Tobey v. Wareham*, 2 Allen (Mass.) 594; *Noyes v. Hale*, 137 Mass. 266.

5. *People v. Stockton, etc., R. Co.*, 49 Cal. 414; *Lake County v. Sulphur Bank, etc.*, Min. Co., 68 Cal. 14; *Albany Brewing Co. v. Meriden*, 48 Conn. 244; *People v. Atkinson*, 103 Ill. 45; *Telle v. Green*, 28 Ind. 184; *Conwell v. Connersville*, 8 Ind. 358; *Pingree v. Berkshire County*, 102 Mass. 76; *Mathews v. Kansas*, 80 Mo. 231; *Price v. Kramer*, 4 Colo. 546; *Bemis v. Phelps*, 41 Vt. 1; *Cerbat Min. Co. v. State*, 29 Hun (N. Y.) 81; *Kissimmee City v. Drought*, 26 Fla. 1; 23 Am. St. Rep. 545; *Sage v. Burlingame*, 74 Mich. 120; *Leonard v. Madison County*, 64 Iowa 418; *Factors, etc., Ins. Co. v. Levi*, 42 La. Ann. 432; *Ives v. North Canaan*, 33 Conn. 402; *Fairbault Water Works Co. v. Rice County*, 44 Minn. 12; *Shelby County v. Mississippi, etc., R. Co.*, 16 Lea (Tenn.) 401. The rule applies even though the taxpayer protested that the tax was unlawful at the time of making the return.

erty in his list, he is not estopped from claiming an abatement therefor.<sup>1</sup>

c. THE ROLL—(1) *Form and Contents Generally*.—It is essential to the validity of an assessment that a roll or list should be kept, in which it is the duty of the assessor to enter a description of all the taxable property which he can discover in his jurisdiction, together with the name of the person owning each parcel, and its value.<sup>2</sup> The intentional omission by the assessors of taxable property from the list or roll, has been held in some states to vitiate the whole tax levied upon the roll from the district in which it occurs; and this notwithstanding that the assessor in good faith believed the property omitted to be exempt.<sup>3</sup> But

*American Union Express Co. v. St. Joseph*, 66 Mo. 675; 27 Am. Rep. 382.

The omission by a party's agent of one parcel of land, in consequence whereof the same is taxed as the property of a non-resident, affords the owner no ground for complaint. *Kinsworthy v. Mitchell*, 21 Ark. 145; *Nelson v. Pierce*, 6 N. H. 194.

But an erroneous return of property for assessment in one district when it is situated in another, will not estop the owner to deny the validity of an assessment on the property made by the assessor of the district in which the property is situated. *State v. Bellew* (Wis. 1893), 56 N. W. Rep. 782.

If the valuation adopted by the assessor is not based upon the return made by the taxpayer, he is not estopped by it. *Dunnell Mfg. Co. v. Pawtucket*, 7 Gray (Mass.) 277.

A guardian who has listed the property of his ward, is not estopped from showing the death of the ward and the listing of the property by his personal representative. *Sommers v. Boyd*, 48 Ohio St. 648.

1. *Charlestown v. Middlesex County*, 109 Mass. 270; *Dunnell Mfg. Co. v. Pawtucket*, 7 Gray (Mass.) 277; *Salter v. Burlington*, 42 Iowa 531. And see *Phillips v. Shuster*, 47 Conn. 477. But see *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292.

In *Telle v. Green*, 28 Ind. 184, it was held that if the erroneous inclusion of non-taxable property was through mistake of law, no relief can be had.

2. *Thurston v. Little*, 3 Mass. 429; *Thayer v. Stearns*, 1 Pick. (Mass.) 482; *Bailey v. Ackerman*, 54 N. H. 527; *People v. Hagadorn*, 104 N. Y. 516; *Trowbridge v. Horan*, 78 N. Y. 489; *Howard v. Shumway*, 13 Vt. 358; *Roe*

*v. St. John*, 7 Neb. 139; *O'Neal v. Virginia, etc.*, *Bridge Co.*, 18 Md. 1; 79 Am. Dec. 669. See also *People v. Stockton, etc.*, R. Co., 49 Cal. 414.

The list must be perfect in itself without reference to a former list, and all property must be entered in the current list in order that taxes may be enforced against it. *Downing v. Roberts*, 21 Vt. 441.

Two rolls may be provided, each being required to contain a designated class of assessments. See *Folkert v. Power*, 42 Mich. 283.

In *Noyes v. Hale*, 137 Mass. 266, it was held that the entry of property in a separate book or paper complied with the statute. See also *Morrill v. Douglas*, 14 Kan. 293; *Thomas v. Chapin*, 116 Mo. 396.

State, county, and town taxes are usually required to be assessed separately and put into separate lists. *Thayer v. Stearns*, 1 Pick. (Mass.) 482; *State v. Falkinburge*, 15 N. J. L. 320. And see *State v. Wabash, etc.*, R. Co., 90 Mo. 166.

3. *Hersey v. Milwaukee County*, 16 Wis. 195; 82 Am. Dec. 713; *Smith v. Smith*, 19 Wis. 615; 88 Am. Dec. 707; *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 586; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Simple v. Langlade County*, 75 Wis. 354; *Brauns v. Green Bay*, 55 Wis. 113; *State v. Platt*, 24 N. J. L. 108; *State v. Branim*, 23 N. J. L. 484; *Walsh v. King*, 74 Mich. 354; *Merrill v. Humphrey*, 24 Mich. 170; *Auditor Gen'l v. Jenkinson*, 90 Mich. 523; *Auditor Gen'l v. Prescott*, 94 Mich. 190. And see *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 175.

In *Illinois*, in *Dunham v. Chicago*, 55 Ill. 357, and *Merritt v. Farris*, 22 Ill. 303, it has been held that the rule is

where the officer has endeavored to carry out the provisions of the statute, and the omission is unintentional, it will not affect the validity of the tax levied upon the assessment.<sup>1</sup>

It is generally provided that the assessment roll shall be arranged in columns; that in the first column the names of all the taxable inhabitants are to be put down; in the second, the quantity, and in the third the value of the land. The provisions, however, differ as to order and number of columns, but in any case the statute must be substantially complied with.<sup>2</sup> Unless

otherwise. And see *Spencer v. People*, 68 Ill. 513; and to the same effect in *Massachusetts*, see *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *George v. Second School Dist.*, 6 Met. (Mass.) 497.

In *Johnston v. Oshkosh*, 65 Wis. 473, it was held that where the assessors omitted taxable property, believing it to be exempt, the taxes assessed on the roll were invalid.

But in *Hersey v. Milwaukee County*, 16 Wis. 185; 82 Am. Dec. 713, it was held that the omission of property liable to taxes in one ward did not invalidate ward taxes levied according to such assessment roll on property situated in another ward.

In *Hyatt v. Allen*, 54 Cal. 353, it was held that a taxpayer was entitled to a writ of *mandamus* to compel the assessor to assess property subject to taxation.

1. *Smith v. Smith*, 19 Wis. 615; 88 Am. Dec. 707; *Weeks v. Milwaukee*, 10 Wis. 186; *Hersey v. Milwaukee County*, 16 Wis. 195; 82 Am. Dec. 713; *Dean v. Gleason*, 16 Wis. 1; *Hale v. Kenosha*, 29 Wis. 599; *Lefferts v. Calumet County*, 21 Wis. 688; *Plumer v. Marathon County*, 46 Wis. 163; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *People v. McCreery*, 34 Cal. 432; *Puget Sound Agricultural Soc. v. Pierce County*, 1 Wash. Ter. 159; *Dunham v. Chicago*, 55 Ill. 361; *Spencer v. People*, 68 Ill. 510; *Schofield v. Watkins*, 22 Ill. 66; *Merrett v. Farris*, 22 Ill. 311; *New Orleans v. Davidson*, 30 La. Ann. 554; 31 Am. Rep. 228; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *Watson v. Princeton*, 4 Met. (Mass.) 602; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Smith v. Messer*, 17 N. H. 420; *State v. Platt*, 24 N. J. L. 108; *State v. Randolph*, 25 N. J. L. 431; *People v. Assessors*, 16 Hun (N. Y.) 196; *Goddard v. Stockman*, 74 Ind. 400; *Insurance Co. v. Yard*, 17 Pa. St. 331; *Capwell v. Hopkins*, 10

R. I. 378; *Van Deventer v. Long Island City*, 139 N. Y. 133; *Spear v. Braintree*, 24 Vt. 414. See also *Bond v. Kenosha*, 17 Wis. 284; *Winter v. Montgomery*, 65 Ala. 403; *Muscatine v. Mississippi*, etc., R. Co., 1 Dill. (U. S.) 542.

In *Perry County v. Selma*, etc., R. Co., 65 Ala. 391, it was held that property omitted from the assessment roll is not thereby relieved from liability for the tax.

The presumption that a public officer has done his duty, applies to an assessor who has omitted lands from assessment, if the facts as shown do not exclude it. *Perkins v. Nugent*, 45 Mich. 156.

Private information by a single member of the board of assessors that property has been omitted from the last assessment, is not chargeable to the board. *Noyes v. Hale*, 137 Mass. 266. 2. *Trowbridge v. Horan*, 78 N. Y. 439; *Knott v. Peden*, 84 Cal. 299; *People v. Hollister*, 47 Cal. 408; *Thompson v. Honey Creek Draining Co.*, 33 Ind. 268; *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 175; *The North Cape*, 6 Biss. (U. S.) 505. And see *Smith v. Hard*, 61 Vt. 469; *State v. St. Louis*, etc., R. Co. (Mo. 1893), 22 S. W. Rep. 910. But see *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Insurance Co. v. Yard*, 17 Pa. St. 331; *Lewis v. Eastford*, 44 Conn. 477.

Wherever the specific statutory requisites are material, they must be strictly construed. *People v. Hagadorn*, 104 N. Y. 516.

In *Albany City Nat. Bank v. Maher*, 6 Fed. Rep. 417, it was held that noncompliance with a statute requiring the names of the shareholders of a national bank to be placed upon the roll, vitiated the tax, although a separate list was kept showing the names and numbers of shares.

Where the name appears in the proper column, it does not matter if the

the omission of words or marks indicating dollars and cents tends to mislead the owner, the assessment is not vitiated thereby.<sup>1</sup>

(2) *Designation of the Person Taxed.*—The person taxed must be designated in the roll with certainty.<sup>2</sup>

In order to hold a taxpayer personally liable, the tax must be charged against him directly and properly.<sup>3</sup>

Property is to be listed against the owner or other person primarily liable, where his name can be ascertained,<sup>4</sup> and if assessed

name extends beyond the line of that column. *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 371.

In *New York*, the value of personal property must be placed in a fourth column. *People v. Hagadorn*, 104 N. Y. 516.

The rate per cent. and the amount of the tax assessed are in some states placed in another column. *State v. Perkins*, 24 N. J. L. 409; *State v. Sloss*, 87 Ala. 119; *Thompson v. Honey Creek Draining Co.*, 33 Ind. 268.

**Formal Errors or Omissions.**—But the omission to comply with a merely formal requisite directory in its nature, does not invalidate the assessment. See *Downing v. Roberts*, 21 Vt. 441; *Henry v. Chester*, 15 Vt. 460; *Stearns v. Miller*, 25 Vt. 20; *State v. Bishop*, 34 N. J. L. 45; *State v. Manning*, 41 N. J. L. 275; *Thomas v. Chapin*, 116 Mo. 396; *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Pacific Hotel Co. v. Leib*, 83 Ill. 604; *Wall v. Trumbull*, 16 Mich. 228.

In *People v. Clapp* (Supreme Ct.), 19 N. Y. Supp. 531, it was held that the assessment roll need not be in a single volume or collection of sheets united together, if they are united when finally completed with the verification attached.

1. *Jenkins v. McTigue*, 22 Fed. Rep. 148. And see *San Luis Obispo County v. White* (Cal. 1890), 24 Pac. Rep. 864; *Emeric v. Alvarado*, 90 Cal. 444; *State v. Allen*, 43 Ill. 456; *Elston v. Kennicott*, 46 Ill. 187; *Chickering v. Faile*, 38 Ill. 342; *Jackson v. Cummings*, 15 Ill. 449; *Bird v. Perkins*, 33 Mich. 28; *First Nat. Bank v. St. Joseph*, 46 Mich. 526; *State v. Sadler*, 21 Nev. 13; *Ward v. Gallatin County*, 12 Mont. 23; *Ensign v. Barse*, 107 N. Y. 329; *Chamberlain v. Taylor*, 36 Hun (N. Y.) 24; *Hopkins v. Young*, 15 R. I. 48; *Spo-kane Falls v. Browne*, 3 Wash. 84; *Sawyer v. Gleason*, 59 N. H. 140.

The abbreviation "dolls." is equiva-

lent to the word "dollars." *Salisbury v. Shirley*, 66 Cal. 223.

Where the dollar mark is placed at the head of the column, it is not necessary that it should be prefixed to each item. *State v. Sadler*, 21 Nev. 13.

*In re Church of the Holy Sepulchre*, 61 How. Pr. (N. Y.) 315, it was held that the omission of anything to indicate whether the figures represented dollars or cents, invalidated the assessment. See also *Tilton v. Oregon Cent.*, etc., Road Co., 3 Sawyer (U. S.) 22; *Emeric v. Alvarado*, 90 Cal. 444.

2. *Kelsey v. Abbott*, 13 Cal. 609; *Dowell v. Portland*, 13 Oregon 248; *Albany City Bank v. Maher*, 19 Blatchf. (U. S.) 175; *Hayes v. Viator*, 33 La. Ann. 1162; *Lynam v. Anderson*, 9 Neb. 367; *Whitney v. Thomas*, 23 N. Y. 281; *Evans v. Newell* (R. I. 1892), 25 Atl. Rep. 347; *Philadelphia v. Miller*, 49 Pa. St. 440; *Putnam v. Tyler*, 117 Pa. St. 570; *Lyman v. Philadelphia*, 56 Pa. St. 488.

Where the statute requires money in court to be assessed to the treasurer, assessment to the plaintiff is invalid. *San Luis Obispo v. Pettit*, 87 Cal. 499.

In *Crawford v. Schmidt*, 47 Cal. 617, it was held that the designation of the owner by his surname alone was insufficient.

The name of the owner or occupant must appear on the assessment roll. *Dubois v. Webster*, 7 Hun (N. Y.) 371.

3. See *Jefferson v. Mock*, 74 Mo. 61; *State v. Gibson*, 12 Mo. App. 1; *People v. Whipple*, 47 Cal. 591; *Lake County v. Sulphur Bank*, etc., Min. Co., 66 Cal. 17; *Bell v. Barnard*, 37 Ill. App. 275; *State v. Sloss*, 87 Ala. 119; *Wheeler v. Bramel* (Ky. 1888), 8 S. W. Rep. 199.

In *Parker v. Cochran*, 64 Iowa 757, it was held that where taxes on land were duly assessed to the owner, the omission of the owner's name in transcribing the tax into a tax list does not invalidate the assessment.

4. *Lynam v. Anderson*, 9 Neb. 367.

to another or to persons unknown, the tax is void.<sup>1</sup> But the assessor, when unable to discover who is liable for the tax, may assess it to unknown owners.<sup>2</sup> If the owner's name could have been ascertained from public records or otherwise, however, the property cannot be assessed to unknown owners.<sup>3</sup>

Statutes providing that an assessment made in the name of some other than the true owner shall not be invalid, and that any error in the name of the person taxed shall not vitiate the assessment, are not infrequent, and their constitutionality has been upheld.<sup>4</sup>

And see *Pease v. Whitney*, 5 Mass. 380; *Meyer v. Trubee*, 59 Conn. 422; *Willard v. Blount*, 11 Ired. (N. Car.) 624; *Madison v. Whitney*, 21 Ind. 261; *Springfield v. First Nat. Bank*, 87 Mo. 441; *Henkle v. Keota*, 68 Iowa 334; *Bird v. Benlisa*, 142 U. S. 664.

An assessment made to a person by name is to be deemed an assessment to him as owner. *Blatner v. Davis*, 32 Cal. 328.

1. *Le Blanc v. Blodgett*, 34 La. Ann. 107; *Denegre v. Gerac*, 35 La. Ann. 952; *Maspereau v. New Orleans*, 38 La. Ann. 400; *Workingmen's Bank v. Lannes*, 30 La. Ann. 871; *Norres v. Hays*, 44 La. Ann. 907; *Dowell v. Portland*, 13 Oregon 248; *Redmund v. Banks*, 60 Miss. 293; *Philadelphia v. Miller*, 49 Pa. St. 440; *Baer v. Choir* (Wash. 1893), 32 Pac. Rep. 776; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Hecht v. Boughton*, 2 Wyoming 368; *Tracy v. Reed*, 38 Fed. Rep. 69; *Brown v. Veazie*, 25 Me. 359; *Bidleman v. Brooks*, 28 Cal. 72; *Green v. Craft*, 28 Miss. 70; *Lassitter v. Lee*, 68 Ala. 287; *Hume v. Wainscott*, 46 Mo. 145; *Abbott v. Lindenbower*, 42 Mo. 162; *State v. Gibson*, 12 Mo. App. 1; *Barker v. Blake*, 36 Me. 433; *Picotter v. Whaley*, 80 Mich. 257; *State v. Vanderbilt*, 33 N. J. L. 38; *Smith v. Read*, 51 Conn. 10; *Thompson v. Ela*, 60 N. H. 562; *Perham v. Haverhill Fibre Co.*, 64 N. H. 2; *Burpee v. Russell*, 64 N. H. 62; *Crook v. Anniston City Land Co.*, 93 Ala. 4; *Klumpke v. Baker*, 68 Cal. 559; *Hearst v. Egglestone*, 55 Cal. 365; *Newell v. Wheeler*, 48 N. Y. 486; *Whitney v. Thomas*, 23 N. Y. 281; *Zink v. McManus* (Supreme Ct.), 3 N. Y. Supp. 487; *Desmond v. Babbitt*, 117 Mass. 233; *Lynde v. Brown*, 143 Mass. 337; *L'Engle v. Florida Cent., etc., R. Co.*, 21 Fla. 353; *People v. Whipple*, 47 Cal. 591; *Sargent v. Bean*, 7 Gray (Mass.) 125. Such an assessment is equivalent to an entire omission of the name. *People v. Whipple*, 47 Cal. 591;

*Lewis v. Withers*, 44 Fed. Rep. 165; *Johnson v. M'Intire*, 1 Bibb (Ky.) 295; *Wheeler v. Bramel* (Ky. 1888), 8 S. W. Rep. 199; *Baskins v. Doe*, 24 Miss. 431. Compare *Clifton Heights Land Co. v. Randell*, 82 Iowa 89.

Thus, if property is assessed in the name of the agent of the owner, the interest of the owner is not covered by the lien. *Meyer v. Trubee*, 59 Conn. 422. And where land is not assessed to the owner, and is knocked down to the state at a tax sale, the state takes nothing. *McWilliams v. Michel*, 43 La. Ann. 984.

A statute limiting the right of the former owner to redeem to one year, has no application where the land is not assessed to the owner. *Bird v. Benlisa*, 142 U. S. 664. And see *Davenport v. Knox*, 34 La. Ann. 407; *Perison v. O'Neal*, 32 La. Ann. 228.

2. *Robinson v. Williams* (La. 1893), 12 So. Rep. 499. And see *Bird v. Benlisa*, 142 U. S. 664; *Tracy v. Reed*, 38 Fed. Rep. 69.

3. *Barker v. Hesselstine*, 27 Me. 354. And see *Oliver v. Robinson*, 58 Ala. 46; *Klumpke v. Baker*, 68 Cal. 559; *Meyer v. Trubee*, 59 Conn. 422; *Nichols v. McGlathery*, 43 Iowa 189; *Sutton v. Calhoun*, 14 La. Ann. 205; *Rapp v. Lowrey*, 30 La. Ann. 1272; *Perham v. Haverhill Fibre Co.*, 64 N. H. 2. But see *Corning Town Co. v. Davis*, 44 Iowa 622; *State v. Hurt*, 113 Mo. 90.

The knowledge of one assessor as to ownership will be imputed to all. *Thompson v. Gerrish*, 57 N. H. 85.

An assessor can demand of a warehouseman the ownership of property in his possession. *Bode v. Holtz*, 65 Cal. 106.

4. See *Stilz v. Indianapolis*, 81 Ind. 582; *Schrodt v. Deputy*, 88 Ind. 90; *Small v. Lawrenceburgh*, 28 Ind. 231; *Merrick v. Hutt*, 15 Ark. 331; *Gari-baldi v. Jenkins*, 27 Ark. 453; *Kinsworthy v. Mitchell*, 21 Ark. 145; *Landregan v. Peppin*, 86 Cal. 122; *Peo-*

The assessment cannot be made to the owner or occupant in the alternative, nor to them collectively.<sup>1</sup> It must be definitely to the one or the other.<sup>2</sup>

Where the assessment is to unknown owners, it is not necessary that the assessor should state in his list that it is so assessed because the owner is unknown. Where the owner is not named, it will be presumed that he is unknown. This upon the general presumption that a public officer has done his duty.<sup>3</sup>

In assessing property to a trustee,<sup>4</sup> agent,<sup>5</sup> executor, or other

ple *v. Home Ins. Co.*, 29 Cal. 533; *Union Trust Co. v. Weber*, 96 Ill. 346; *Haight v. New York*, 99 N. Y. 280; *Collins v. Long Island City*, 56 Hun (N. Y.) 647; *People v. Barker*, 67 Hun (N. Y.) 649; *State v. Matthews*, 40 N. J. L. 269; *State v. Vanderbilt*, 33 N. J. L. 38; *Lynam v. Anderson*, 9 Neb. 367; *Bradley v. Bouchard*, 85 Mich. 18; *Petrie Lumber Co. v. Collins*, 66 Mich. 64; *Michigan Dairy Co. v. McKinlay*, 70 Mich. 574; *Hill v. Graham*, 72 Mich. 659; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166; *Glass v. Gilbert*, 58 Pa. St. 266; *Dunn v. Winston*, 31 Miss. 135.

Under the *Indiana* statute, the fact that a wife's land was charged in the name of the husband, does not invalidate the assessment. *Helms v. Wagner*, 102 Ind. 385.

In *Tyler v. Hardwick*, 6 Met. (Mass.) 470, it was held that the statute applied to a person whose surname only was inserted in the assessment, and that, provided the party was taxable and could be identified by the assessors, no error in the name would invalidate the tax. See also *Westhampton v. Searle*, 127 Mass. 502.

In *Collins v. Long Island City*, 56 Hun (N. Y.) 647, it was held that under such a statute, an assessment of land of non-residents was not vitiated by being assessed to unknown owners.

1. *Pearson v. Creed*, 78 Cal. 144; *Greenwood v. Adams*, 80 Cal. 74; *Jatum v. O'Brien*, 89 Cal. 57; *Daly v. Ah Goon*, 64 Cal. 512; *Grinn v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 365; *Grotefend v. Ultz*, 53 Cal. 666; *Stafford v. Twitchell*, 33 La. Ann. 520. And see *Bosworth v. Webster*, 64 Cal. 1; *Brunn v. Murphy*, 29 Cal. 326.

In *California*, an assessment to the owner and all claimants is invalid. *Daly v. Ah Goon*, 64 Cal. 512; *Brady v. Dowden*, 59 Cal. 51; *Pierson v. Creed*, 78 Cal. 144; *Hearst v. Egglestone*, 55 Cal. 365.

But where the land is assessed to the owner, the general heading of the assessment roll "to all owners, claimants, known or unknown, etc.," will not vitiate it. *Bosworth v. Webster*, 64 Cal. 1; *San Francisco v. Phelan*, 61 Cal. 617.

2. *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Grotefend v. Ultz*, 53 Cal. 666; *Sargent v. Bean*, 7 Gray (Mass.) 125. And see *People v. Wemple*, 53 Hun (N. Y.) 197.

But in whosoever name the assessment is, the succeeding steps must be in the same name; viz., in the advertisement and sale. *Bettirson v. Budd*, 21 Ark. 578. See also *Shimmin v. Inman*, 26 Me. 232; *Watt v. Gilgore*, 2 Yeates (Pa.) 330.

3. *Cardigan v. Page*, 6 N. H. 182; *Smith v. Messer*, 17 N. H. 420; *Merritt v. Thompson*, 13 Ill. 716; *Corning Town Co. v. Davis*, 44 Iowa 622; *Brown v. Veazie*, 25 Me. 359; *Jenkins v. McTigue*, 22 Fed. Rep. 148; *Jackson v. Cummings*, 15 Ill. 449; *Burdick v. Connell*, 69 Iowa 458; *Griffin v. Tuttle*, 74 Iowa 219.

The fact that the owner was known to the purchaser at the tax sale is immaterial. *Lassitter v. Lee*, 68 Ala. 287.

In *California*, it is necessary, where lands are assessed to unknown owners, that the assessor should state in his list that it was so assessed because it was unoccupied and the owner unknown. *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Smith v. Davis*, 30 Cal. 536. But compare *Brunn v. Murphy*, 29 Cal. 326.

4. *Trowbridge v. Horan*, 78 N. Y. 439; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277; *Latrobe v. Baltimore*, 19 Md. 13; *People v. Coleman*, 53 Hun (N. Y.) 482.

5. See *Welles v. Battelle*, 11 Mass. 477; *Lake County v. Sulphur Bank*, etc., Min. Co., 68 Cal. 14; *Meyer v. Trubee*, 59 Conn. 422; *People v. Coleman*, 53 Hun (N. Y.) 482.

Under the *Illinois* statute, the word "agent" need not be added when the

person than the owner,<sup>1</sup> the assessor should designate the capacity in which he is taxed. Property of a partnership should be assessed to the firm.<sup>2</sup>

The property of joint tenants, or tenants in common, may be assessed to them collectively, or their several undivided interests may be assessed severally, but no definite part or stipulated number of acres can be assessed to one of them.<sup>3</sup>

An immaterial mistake in the name of the person to whom the property is assessed will be disregarded.<sup>4</sup> Where the owner of

agent has neglected to list the property. *Lockwood v. Johnson*, 106 Ill. 334.

In *Lake County v. Silver Bank, etc.*, Min. Co., 68 Cal. 14, it was held that an assessment to the company, "F. Fiedler, agent," indicated an assessment to the company.

1. See *Williams v. Holden*, 4 Wend. (N. Y.) 223; *McLean v. Horn* (Supreme Ct.), 17 N. Y. Supp. 119; *San Francisco v. Pennie*, 93 Cal. 465; *State v. Holmdel Tp.*, 39 N. J. L. 79; *Wolfe v. Geffroy*, 16 Ohio St. 219.

Where the assessment is imposed upon administrators, it is an assessment upon the administrators themselves, and will support a commitment under the *New York* statute for failure to pay the tax. *McLean v. Horn* (Supreme Ct.), 17 N. Y. Supp. 119.

But in *State v. Runyon*, 41 N. J. L. 98, it was held that an assessment against one of several executors should not be set aside, though the assessor failed to designate his representative capacity.

In *Bath v. Reed*, 78 Me. 276, it was held that an assessment against parties as "administrators," when it should have been against them as executors, did not invalidate the tax.

Where the administrator has distributed the estate among the parties entitled thereto, no tax can be assessed against him. *Carleton v. Ashburnham*, 102 Mass. 348.

2. *Hubbard v. Winsor*, 15 Mich. 146; *Hill v. Graham*, 72 Mich. 659; *Van Dyke v. Carleton*, 61 N. H. 574; *People v. Ferguson*, 8 Cow. (N. Y.) 102; *Wheeler v. Anthony*, 10 Wend. (N. Y.) 346. And see *Petrie Lumber Co. v. Collins*, 66 Mich. 64.

It should be assessed in the firm name, even though the title to the property has vested in the survivors, owing to the death of one of the partners. *Blodgett v. Muskegon*, 60 Mich. 580.

An assessment of the personal property of a former member of a firm after

dissolution of the firm, is void. *People v. Sneath*, 28 Cal. 612.

3. *Cooley on Taxation* (2d ed.) 399, citing *Hayes v. Viator*, 33 La. Ann. 1162. And see *Payne v. Danley*, 18 Ark. 441; 68 Am. Dec. 187; *Jenkins v. Rice*, 84 Ind. 342; *Noble v. Indianapolis*, 16 Ind. 506; *Norres v. Hays*, 44 La. Ann. 907.

In *State v. Rand*, 39 Minn. 502, it was held that a credit consisting of part of the purchase price of land formerly owned in common, should not be assessed as a whole against the vendors.

An assessment cannot be invalidated by the fact that one of several cotenants has been named as owner. *Fleischauer v. West Hoboken*, 40 N. J. L. 109; *Welles v. Battelle*, 11 Mass. 477. And see *Factors', etc.*, Ins. Co. v. *Levi*, 42 La. Ann. 432; *Williams v. Holden*, 4 Wend. (N. Y.) 223; *Howard v. Proctor*, 7 Gray (Mass.) 128.

4. *Pierce v. Richardson*, 37 N. H. 306; *Carpenter v. Dalton*, 58 N. H. 615; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309; *Van Dyke v. Carleton*, 61 N. H. 574; *Tyler v. Hardwick*, 6 Met. (Mass.) 470; *Farnsworth Co. v. Rand*, 65 Me. 19; *Hill v. Graham*, 72 Mich. 659; *O'Neal v. Virginia, etc., Bridge Co.*, 18 Md. 1; *Van Voorhis v. Budd*, 39 Barb. (N. Y.) 479; *In re Hartshorn*, 63 Hun (N. Y.) 623; *McLean v. Horn* (Supreme Ct.), 17 N. Y. Supp. 119; *State v. Diamond Valley Live Stock, etc., Co.*, 21 Nev. 86; *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511; *Lyle v. Jacques*, 101 Ill. 644; *People v. Tax Com'rs* (Supreme Ct.), 17 N. Y. Supp. 923; *Pennington v. Mendes*, 38 N. J. Eq. 336; *State v. Matthews*, 40 N. J. L. 269. And see *Westhampton v. Searle*, 127 Mass. 502.

In *Adams v. Sleeper*, 64 Vt. 544, it was held that a tax levied on the property of a wife is not illegal because assessed in the name of both husband and wife, such error being harmless.

property is habitually known by a certain name, an assessment to him in that name is sufficient, though it is not his true name.<sup>1</sup>

In order that property may not escape taxation, the statutes of some of the states provide that the estates of deceased persons shall be assessed as the estates of such deceased persons, in the place where the deceased last dwelt;<sup>2</sup> but, after the qualification of an executor or the appointment of an administrator, the assessment must be to such representative.<sup>3</sup> In the absence of such statutes, the estate must be assessed to the persons by name upon whom it has devolved.<sup>4</sup>

It is provided sometimes that the undivided real estate of a deceased person may be assessed to his heirs or devisees, without designating any of them by name. But under such provisions the estate cannot be taxed to heirs when it is given to devisees, nor to devisees in case of intestacy.<sup>5</sup> And after a division of the

An assessment to "D. Knowlton & Company" instead of to "D. Knowlton Company," was held immaterial. *Thorndike v. Camden*, 82 Me. 39.

The designation of a corporation by the initials of its name was held not to invalidate an assessment. *Gratwick, etc., v. Lumber Co. v. Oscoda*, 97 Mich. 221.

**Material Mistakes.**—But in *Emeric v. Alvarado*, 90 Cal. 444, it was held that an assessment to "Castero" instead of "Castro" was invalid. And so in *Smith v. Read*, 51 Conn. 10, an assessment to "Julia Read" instead of to "Sarah E. Reed."

Where property is assessed against a divorced woman who has assumed her maiden name, by her husband's name, the tax is invalid. *Maspereau v. New Orleans*, 38 La. Ann. 400.

1. *Van Voorhis v. Budd*, 39 Barb. (N. Y.) 479; *Lyle v. Jacques*, 101 Ill. 644; *Farnsworth Co. v. Rand*, 65 Me. 19.

A banker who assumes a special name by which his business is characterized and known, may be assessed by that name. *Patchin v. Ritter*, 27 Barb. (N. Y.) 34.

2. *Noble v. Indianapolis*, 16 Ind. 506; *Moale v. Baltimore*, 61 Md. 224; *Dickison v. Reynolds*, 48 Mich. 158; *Surget v. Newman*, 43 La. Ann. 873; *Tobin v. Gillespie*, 152 Mass. 219. And see *Cook v. Leland*, 5 Pick. (Mass.) 236; *Wood v. Torrey*, 97 Mass. 321; *Haight v. New York*, 32 Hun (N. Y.) 153.

3. *Fairfield v. Woodman*, 76 Me. 549; *Dallinger v. Rapello*, 14 Fed. Rep.

32. And see *Dickison v. Reynolds*, 48 Mich. 158.

In *State v. Corson*, 50 N. J. L. 381, it was held that an erroneous assessment to the estate of a deceased person might be amended by the court.

4. *Trowbridge v. Horan*, 78 N. Y. 439; *In re Kenworthy* (Supreme Ct.), 17 N. Y. Supp. 655; *Jackson v. King*, 82 Ala. 432; *L'Engle v. Wilson*, 21 Fla. 461; *Jackson v. King*, 82 Ala. 432; *Kerns v. Collins*, 40 La. Ann. 453; *Pearson v. Crud*, 69 Cal. 538; *Fairfield v. Woodman*, 76 Me. 549; *Berlien v. Bieler*, 96 Mo. 491; *Morrison v. McLaughlin*, 88 N. Car. 251; *Gamble v. Witty*, 55 Miss. 26; *State v. Holmdel Tp.*, 39 N. J. L. 79.

An assessment made to a deceased person is void. *Smith v. Davis*, 30 Cal. 536. But in *State v. Platt*, 24 N. J. L. 108, it was held that an assessment of taxes to the estate of a deceased person is not such an error as will authorize the court to set aside the tax on *certiorari*, where the estate is a large one and is shown to have been well known by that description.

5. *Tobin v. Gillespie*, 152 Mass. 219; *Elliot v. Spinney*, 69 Me. 31. See also *Wheeler v. Anthony*, 10 Wend. (N. Y.) 346; *Noble v. Indianapolis*, 16 Ind. 506.

In the absence of such a provision, the heirs must be named. *Berlien v. Bieler*, 96 Mo. 491.

Where the statute permits the property of an estate to be assessed to the heirs or devisees thereof without naming them, an assessment to the estate by name is equivalent thereto



estate, the assessment must be to the persons taking shares by name.<sup>1</sup>

(3) *Designation of the Property Taxed*—(a) *General Requirements*.—The classification of the property must be in accordance with the statute authorizing the assessment,<sup>2</sup> and special rules with reference to what shall be deemed real and what personal property must be observed.<sup>3</sup>

The requirement that lands shall be classified as resident and non-resident, is generally held to be imperative, and the assessment of either in the list of the other, void.<sup>4</sup>

and sufficient. *Dickison v. Reynolds*, 48 Mich. 158.

1. *Tobin v. Gillespie*, 152 Mass. 219; *Carter v. New Orleans*, 33 La. Ann. 816. And see *Stafford v. Twitchell*, 33 La. Ann. 520; *Cunningham v. White*, 2 Pa. Dist. Rep. 531.

In the absence of anything to show in a partition that the property has been had, it will be presumed that the property is enjoyed in common, and an assessment to the heirs without naming them will be upheld. *Moale v. Baltimore*, 61 Md. 224.

In *Re Baton Rouge Oil Works*, 34 La. Ann. 255, it was held that an assessment in the name of the heirs of a living person is void, and the forfeiture to the state for taxes thus assessed is a nullity.

2. *People v. Owyhee Min. Co.*, 1 Idaho 409; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; *People v. Chicago, etc., R. Co.*, 116 Ill. 181.

The situation of the property and the uses to which it is put, should determine its classification. *People v. Palmer*, 113 Ill. 346.

In *Fletcher v. Alcona Tp.*, 72 Mich. 18, it was held that standing timber is not "forest product" and not assessable as personalty, but as realty, even though it is owned by some one other than the owner of the land upon which it stands.

The blending together of several different kinds of taxes in one assessment, invalidates the tax. *People v. Moore*, 1 Idaho 662. A sale of lands for taxes, assessed jointly on realty and personalty, is void. *Stark v. Shupp*, 112 Pa. St. 395.

3. *Wilgers v. Com.*, 9 Bush (Ky.) 556.

The legislature has power to make any kind of property personalty, for the purposes of taxation, although it is real estate for all other purposes. *Johnson v. Roberts*, 102 Ill. 655. And see *Central Iowa R. Co. v. Wright County* (Iowa, 1885), 22 Am. & Eng. R.Cas. 223.

As in *Rhode Island*, it is provided that for all purposes of taxation, fixed machinery shall be regarded as real estate and as owned by the owner of real estate to which it is affixed. See *Steere v. Walling*, 7 R. I. 317.

In *Pennsylvania*, manufactories of all descriptions are subject to taxation as real estate. *Hawes Mfg. Co.'s Appeal* (Pa. 1890), 17 Atl. Rep. 219.

4. *Seymour v. Peters*, 67 Mich. 415; *Hanscom v. Hinman*, 30 Mich. 419; *Rayner v. Lee*, 20 Mich. 384; *Perley v. Stanley*, 59 N. H. 587; *Bowles v. Clough*, 55 N. H. 389; *Rising v. Granger*, 1 Mass. 48; *Barker v. Hesselstine*, 27 Me. 354; *Joslyn v. Rockwell*, 128 N. Y. 334; *Fowler v. Springfield*, 64 N. H. 108; *Tebbetts v. Job*, 11 Ill. 453; *Messinger v. Germain*, 6 Ill. 631; *Lunt v. Wormell*, 19 Me. 100. And see *Glover v. Edgewater*, 3 Thomp. & C. (N. Y.) 497.

But in *Connecticut*, such a requirement is merely directory. *Adams v. Seymour*, 30 Conn. 402.

*Seated and Unseated Lands*.—In *Pennsylvania*, seated and unseated lands are required to be assessed in separate lists, and failure to do so invalidates the assessment. *Miller v. McCullough*, 104 Pa. St. 624; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Larimer v. McCall*, 4 W. & S. (Pa.) 133; *Stewart v. Trevor*, 56 Pa. St. 374; *Hathaway v. Elsbree*, 54 Pa. St. 498; *Bechtle v. Lingle*, 66 Pa. St. 38.

But where the owner causes his land to be placed upon the wrong list, he is estopped from taking advantage of the defect. *Milliken v. Benedict*, 8 Pa. St. 169; *Harper v. Farmers', etc., Bank*, 7 W. & S. (Pa.) 204; *Heft v. Gephart*, 65 Pa. St. 510. And the lands may be transferred from the seated to the unseated list, upon notice to the owner. *Milliken v. Benedict*, 8 Pa. St. 169. But see *Arthurs v. Smathers*, 38 Pa. St. 40; *Laird v. Heister*, 24 Pa. St. 452.

(b) **Description of Personalty.**—As a general rule, it is only necessary to assess personal property in general terms under a gross valuation, a specific description of such property not being required.<sup>1</sup> But it should be properly classified, and, if placed in an entirely different and distinct class from that to which it belongs, the assessment will be invalid.<sup>2</sup> And when the authority to assess is limited to particular kinds of personal property, it should appear that the assessment is made only on those kinds.<sup>3</sup>

Every article placed upon the list must appear on the face thereof to be legally subject to taxation.<sup>4</sup>

(c) **Description of Realty.**—The assessment list must show an accurate designation or description of the property taxed. A description so false or inadequate as not to identify the property, is fatal to the validity of an assessment.<sup>5</sup> The description should

The character of the land is to be determined by its condition at the time of the assessment. *Murray v. Guilford*, 8 Watts (Pa.) 548.

As to what are seated lands, see SEATED, vol. 21, p. 981; *Wilson v. Waterson*, 4 Pa. St. 214; *Watson v. Davidson*, 87 Pa. St. 270; *Patterson v. Blackmore*, 9 Watts (Pa.) 104; *Stewart v. Trevor*, 56 Pa. St. 374; *Harbeson v. Jack*, 2 Watts (Pa.) 124.

A description of unseated lands is sufficient if it leads the owner to the truth on inquiry. *Dunden v. Snodgrass*, 18 Pa. St. 151. A misstatement of the number of acres is immaterial. *Putnam v. Tyler*, 117 Pa. St. 570.

1. *Hartford v. Champion*, 58 Conn. 268; *Atlantic, etc., R. Co. v. Yavapai County (Arizona)*, 1889, 21 Pac. Rep. 768; *Donnell v. Webster*, 63 Me. 15; *People v. Rains*, 23 Cal. 131; *People v. Sneath*, 28 Cal. 612.

Where personal property is specifically enumerated on the tax roll instead of in gross, the specific description is surplusage. *Comstock v. Grand Rapids*, 54 Mich. 641.

**State bonds** belonging to non-residents, but deposited within the state, are sufficiently described in an assessment thereof, by being designated "money and bonds deposited as per statute." *People v. Home Ins. Co.*, 29 Cal. 533.

**Vessels.**—An assessment and warrant against a vessel by name and not against the owner, is not objectionable. *The North Cape*, 6 Biss. (U. S.) 505.

2. *Thompson v. Davidson*, 15 Minn. 412.

In *California*, § 3650 Code Civ. Proc., provides that all property must be spec-

ified, etc., "showing the number, kind, amount, and quality; but a failure to enumerate in detail such personal property does not invalidate the assessment." The word "enumerate" applies to each specification. It is sufficient if the assessment shows generally the character of the property. See *People v. Home Ins. Co.*, 29 Cal. 549; *People v. McCreery*, 34 Cal. 441; *Dear v. Varnum*, 80 Cal. 86; *Doland v. Mooney*, 72 Cal. 34.

The description of property as "mining stock" was held sufficient in *San Francisco v. Flood*, 64 Cal. 504.

In *San Francisco v. Pennie*, 93 Cal. 465, a description of "the property as per inventory on file in the superior court department No. 9, personal property, one hundred thousand dollars," was held sufficient. And in *Dear v. Weineke*, 94 Cal. 322, "the value of personal property, exclusive of money, and solvent credits," was sufficient.

3. *Dunnell Mfg. Co. v. Newell*, 15 R. I. 234.

4. *Adam v. Litchfield*, 10 Conn. 127; *Whittelsey v. Clinton*, 14 Conn. 72.

But in *Munroe v. New Canaan*, 43 Conn. 309, it was held that an addition to a tax list by the assessors was legal, although the list did not show that it might not have been exempt from taxation. See also *Lewis v. Eastford*, 44 Conn. 477; *Hammersley v. Franey*, 39 Conn. 175.

5. *Lewis v. Eastford*, 44 Conn. 477; *Thibodaux v. Keller*, 29 La. Ann. 508; *Woolfolk v. Fonbene*, 15 La. Ann. 15; *Rougelot v. Quick*, 34 La. Ann. 123; *Augusti v. Lawless*, 43 La. Ann. 1097; *In re Baton Rouge Oil Works*, 34 La. Ann. 255; *Greene v. Walker*,

be sufficient to enable the owner to identify his property,<sup>1</sup> and such that it may be located readily in subsequent proceedings in the collection of the tax.<sup>2</sup>

The description, however, is sufficient if by it the land can be

63 Me. 311; *Brigham v. Smith*, 64 Me. 450; *Jefferson v. Whipple*, 71 Mo. 519; *Wilkins v. Tourtellott*, 28 Kan. 589; *Lyon County v. Goddard*, 22 Kan. 389; *Yenda v. Wheeler*, 9 Tex. 408; *Tallman v. White*, 2 N. Y. 66; *Greenough v. Fulton Coal Co.*, 74 Pa. St. 486; *Philadelphia v. Miller*, 49 Pa. St. 440; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Dane v. Glennon*, 72 Ala. 160; *Driggers v. Cassady*, 71 Ala. 529; *Jones v. Pelham*, 84 Ala. 208; *People v. Flint*, 39 Cal. 670; *Salisbury v. Shirley*, 66 Cal. 223; *Power v. Larabee*, 2 N. Dak. 141; *Power v. Bowdle* (N. Dak. 1893), 54 N. W. Rep. 404; *State v. Elizabeth*, 39 N. J. L. 689; *State v. Franklin*, 46 N. J. L. 437; *Sanford v. People*, 102 Ill. 374; *Richardson v. State*, 5 Blackf. (Ind.) 51; *Wing v. Minor* (Miss. 1890), 7 So. Rep. 347; *Sims v. Warren*, 67 Miss. 278; *Head v. James*, 13 Wis. 641; *Holmes v. School Dist. No. 15*, 11 Oregon 332; *Morristown v. King*, 11 Lea (Tenn.) 669; *Bird v. Benlisa*, 142 U. S. 664.

If any discrepancy in the description of the property exist between the original list and the copies furnished, the description in the original must control. *Green v. Gruber*, 26 La. Ann. 694.

Substantial compliance with a statutory requirement as to description is sufficient. *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

#### Description in a Grant or Conveyance.

—It is held that a description sufficiently certain to convey land would not answer in a proceeding to enforce collection of taxes. *People v. Mahoney*, 55 Cal. 286; *Keane v. Connovan*, 21 Cal. 302; 82 Am. Dec. 738; *People v. Cannovan*, 28 Cal. 429. But in *Law v. People*, 80 Ill. 268, it was held that less strictness was required.

1. *Oldtown v. Blake*, 74 Me. 280; *Greene v. Lunt*, 58 Me. 518; *Bosworth v. Danzien*, 25 Cal. 296; *State v. Franklin*, 46 N. J. L. 437; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Putnam v. Tyler*, 117 Pa. St. 570; *Bird v. Benlisa*, 142 U. S. 664.

It must be certainly identified, either by the language used or by that referred to. *Greene v. Walker*, 63 Me. 311.

An insufficient description is not

cured by an accurate description in the report of sale. *Morristown v. King*, 11 Lea (Tenn.) 669.

Where the description is not sufficient to impart notice to the owner, the title of a purchaser at a tax sale made for the non-payment of the tax, is not protected by the short Statute of Limitations. *Bird v. Benlisa*, 142 U. S. 664.

In *Shaw v. Orr*, 30 Iowa 355, it was held that a taxpayer cannot be relieved from liability for payment of the tax for want of a sufficient description of the property to enable a stranger to identify it. See also *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112.

2. *Brinson v. Lassiter*, 81 Ga. 40; *Persson v. O'Neal*, 32 La. Ann. 228; *Rougeot v. Quick*, 34 La. Ann. 123; *Woolfolk v. Fonbene*, 15 La. Ann. 15; *Greene v. Lunt*, 58 Me. 518; *Greene v. Walker*, 63 Me. 311; *Sharp v. Johnson*, 4 Hill (N. Y.) 92; 40 Am. Dec. 259; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 531; *Matter of New York Cent., etc., R. Co.*, 90 N. Y. 342; *Tallman v. White*, 2 N. Y. 66; *Peck v. Mallams*, 10 N. Y. 509; *Yenda v. Wheeler*, 9 Tex. 408; *Smith v. Messer*, 17 N. H. 420; *Tilton v. Oregon Cent., etc., Road Co.*, 3 Sawyer (U. S.) 22.

In *New Jersey*, if lands are not designated by such a description as will be sufficient to ascertain the location and extent, a sale thereof cannot be made, but the tax may still be collected by warrant against the goods, chattels and person of the owner. *State v. Union Tp.*, 36 N. J. L. 309; such a description is indispensable to create a lien on the real estate. *State v. Miles*, 48 N. J. L. 451.

**Statutory Correction.**—In *Bennett v. Buffalo*, 17 N. Y. 383, it was held that a statute providing that whenever any land returned for the non-payment of any tax or assessment is so imperfectly described that it cannot be located with certainty, a designated officer shall have power to make out an accurate description of such land, and the council shall have power to order a new tax roll to be made out of the same, does not permit the insertion in the new tax roll of a name that did not appear in the original roll.

identified with the help of extrinsic evidence.<sup>1</sup> And it has been held that the description is sufficient if the property can be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence.<sup>2</sup>

Abbreviations in common use may be used.<sup>3</sup> And where the items of the assessment are placed in proper columns, headed by descriptive words showing the tract, range, and section of land intended, it is sufficient.<sup>4</sup>

An assessment, designating the property as a part of a certain lot or tract, without designating the particular part intended to

1. *Driggers v. Cassady*, 71 Ala. 529; *Woodside v. Wilson*, 32 Pa. St. 52; *Allen v. Woodbridge Tp.*, 42 N. J. L. 401. And see *State v. Wabash*, etc., R. Co., 114 Mo. 1.

In *Glass v. Gilbert*, 58 Pa. St. 266, it was held that an assessment is void only when it wholly fails to lead to identification.

A description may be sufficient, although it is necessary to introduce parol evidence for the purpose of applying a description to certain land by removing a latent ambiguity. *Judd v. Anderson*, 51 Iowa 345; *Jenkins v. Sharpf*, 27 Wis. 472. But extrinsic evidence cannot be resorted to for the purpose of supplementing and making a description certain, which is so defective that it does not identify the land. *Evans v. Newell* (R. I. 1892), 25 Atl. Rep. 347.

Where the description is applicable to either of two lots, it is erroneous to submit the question of identity to a jury without evidence. *Marsh v. Nelson*, 101 Pa. St. 51; *Hess v. Herrington*, 73 Pa. St. 438.

It is necessary for the one claiming under the assessment to furnish the proof of the identity. *Blair v. Scott*, 44 Iowa 143.

In *Jones v. Pelham*, 84 Ala. 208, an assessment in which the property was described as a "house and lot on Battle Street, in the town of —, property of C. P.," without other descriptive or identifying words, was void for uncertainty, as it was shown that C. P. owned two adjoining houses and lots on that street.

But an assessment, "R. E. N., land fifty acres, in Road Dist. No. 21," was sufficient description for the owner to identify the property assessed, as he owned but one lot in the district. *Allen v. Woodbridge Tp.*, 42 N. J. L. 401.

In *Mississippi*, the statute provides for the admission of parol evidence, if there is enough in the description on

the roll to apply to the particular tract of land, by the aid of such testimony. See *Dodds v. Marx*, 63 Miss. 443; *Sims v. Warren*, 67 Miss. 278.

2. *People v. Stahl*, 101 Ill. 346; *Law v. People*, 80 Ill. 268; *Fowler v. People*, 93 Ill. 116; *Buck v. People*, 78 Ill. 460.

In *San Francisco*, etc., R. Co. v. State Board of Equalization, 60 Cal. 12, it was held that a description of the roadway of a railroad company, by the termini, courses and distances, was sufficient.

3. **Abbreviations.**—*Jenkins v. McTigue*, 22 Fed. Rep. 148; *Taylor v. Wright*, 121 Ill. 455; *Olcott v. State*, 10 Ill. 481; *Buck v. People*, 78 Ill. 560; *Law v. People*, 80 Ill. 268; *Jordan Ditching Assoc., etc. v. Wagoner*, 33 Ind. 50; *Havard v. Day*, 62 Miss. 748. But see *Power v. Bowdle* (N. Dak. 1893), 54 N. W. Rep. 404.

A description, "W. side N.  $\frac{1}{2}$  S. E. N. W. ten acres, section 8, T. 23, R. 10," in *Taylor v. Wright*, 121 Ill. 465, and as "3  $\frac{1}{2}$  S. W.  $\frac{1}{4}$ , section 24, Town 3, South range W. 80 acres," in *Sibley v. Smith*, 2 Mich. 486, were sufficient.

In *State v. Newark*, 36 N. J. L. 288, it was held that abbreviations, so long as they were intelligible, might be used by the assessor. The abbreviations "h. l. and stable" were held to indicate house, lot and stable.

In *Illinois*, the use of abbreviations is expressly authorized by statute. See *Buck v. People*, 78 Ill. 560.

4. See *Hopkins v. Young*, 15 R. I. 48; *Burdick v. Connell*, 69 Iowa 458; *Hixon v. Oneida County*, 82 Wis. 515.

An assessment in which is placed, under the head of "buildings of all kinds described by naming their use," two houses, one barn, and under the head of "description by name or otherwise of each and every lot of land," the number of acres of mowing, tillage,

be taxed, is invalid.<sup>1</sup> And, on the other hand, although a tract is correctly described, if a part thereof is excepted from the assessment, but not sufficiently identified, the assessment is void.<sup>2</sup>

Tracts may be described by reference to government surveys, or authenticated plats or maps, according to their numbers;<sup>3</sup> or by

pasture, wood and unimproved lands, is sufficient. *Westhampton v. Searle*, 127 Mass. 502.

1. *Atwell v. Zeluff*, 26 Mich. 118; *People v. Flint*, 39 Cal. 670; *Sims v. Warren*, 67 Miss. 278; *Massie v. Long*, 2 Ohio 287; *Turney v. Yeoman*, 16 Ohio 25; *Lafferty v. Byers*, 5 Ohio 458; *Raymond v. Longworth*, 14 How. (U. S.) 76.

The following descriptions have been held insufficient: "60 acres, part of North half of section 13," *Treon v. Emerrick*, 6 Ohio 391; "60 acres, part of government right," *Ainsworth v. Dean*, 21 N. H. 400; "143 acres in N. E.  $\frac{1}{4}$  of section 24, etc.," *Dingey v. Paxton*, 60 Miss. 1038; and as "the unsold portion of" certain property described. *People v. Pico*, 20 Cal. 595.

In *Hintrager v. Nightingale*, 36 Fed. Rep. 847, it was held that a description of land as an "undivided portion of the south middle 31-2-12 feet," of a certain lot, the lot not being capable of fractional division of the size mentioned, is void for uncertainty.

But a description of land as "the East half of the Southeast quarter of a section," omitting to give the number of the section, was not so defective as to be void where the taxing district contained but one tract answering to the description. *Bird v. Perkins*, 33 Mich. 28. And an assessment of a balance of a certain tract is not void for uncertainty where the assessment is immediately preceded by an assessment of the main part of the tract described by metes and bounds. *Greenwood v. La Salle*, 137 Ill. 225.

A description of a tract consisting of a specific quantity of land granted by a foreign government to be selected within the boundaries of a designated tract, was valid, the description being as definite as the case would admit of. *People v. Crockett*, 33 Cal. 150.

2. *People v. Cone*, 48 Cal. 427; *People v. Hancock*, 48 Cal. 631; *People v. Hyde*, 48 Cal. 431. See also *People v. Mariposa County*, 31 Cal. 106.

An assessment of land designated by quantity and boundaries, excepting therefrom a portion before sold, with-

out a description of the excepted portion, is void. *People v. Hyde*, 48 Cal. 431.

3. *Adams v. Larrabee*, 46 Me. 516; *State v. Platt*, 24 N. J. L. 108; *State v. Galloway Tp.*, 42 N. J. L. 415; *Taylor v. Wright*, 121 Ill. 455; *Chinquy v. People*, 78 Ill. 570; *Kelly v. Salinger*, 53 Ark. 114; *Webre v. Lutchner* (45 La. Ann.), 12 So. Rep. 834; *Wright v. Cradlebaugh*, 3 Nev. 341; *Janesville v. Markoe*, 18 Wis. 350. And see *Havard v. Day*, 62 Miss. 748; *Cahalan v. Van Sant* (Iowa, 1893), 54 N. W. Rep. 433.

Where a statute required a map of the property assessed to be filed with the assessment, in the absence of other designation or identification than by the map number, failure to file the map as required rendered the assessment invalid. *Lalor v. New York*, 12 Daly (N. Y.) 235. See also *May v. Traphagen*, 139 N. Y. 478.

Of two official maps, the later may be referred to. See *White v. Wheeler*, 51 Hun. (N. Y.) 573.

The assessment will be invalid if made according to an unauthorized map. *Merton v. Dolphin*, 28 Wis. 456. But the fact that the map referred to has not been recorded, will not invalidate the assessment, if it has been recognized as authentic and been acted upon. *Roads v. Estabrook*, 35 Neb. 297. Where the owner of the property did not know of a map, which, though recognized by the town officials, had not been formally adopted, the assessment was invalid. *Richter v. Beaumont*, 67 Miss. 285.

In *Williams v. Central Land Co.*, 32 Minn. 440, it was held that under a statute authorizing lands to be platted and described according to the plat, a plat which does not present the means of identifying the land, is not such a plat as contemplated by the statute. See also *People v. Reat*, 107 Ill. 581.

Blocks of land in a city may be assessed by blocks when they are assessed to the owner, even if they have been subdivided into lots. *People v. Culverwell*, 44 Cal. 620.

**Mistake in Number.**—A mistake in

particular names by which they are generally and popularly known in the neighborhood.<sup>1</sup>

The description of a tract of land merely by the number of acres included in it is insufficient.<sup>2</sup> But, unless required by statute, it is not necessary to describe lands by metes and bounds.<sup>3</sup>

(d) *Distinct and Separate Parcels*.—Separate and distinct parcels of real estate are to be considered as distinct subjects of taxation, and must be separately valued and assessed;<sup>4</sup> the rule applies to lots and blocks into which lands in cities and towns are usually

the number of a lot will not vitiate assessments, if the description otherwise is such that the land can be identified. *Marsh v. Nelson*, 101 Pa. St. 51.

1. *People v. Leet*, 23 Cal. 161; *High v. Shoemaker*, 22 Cal. 363; *Glass v. Gilbert*, 58 Pa. St. 266; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Hopkins v. Young*, 15 R. I. 48; *Alexander v. Hunter*, 29 Neb. 259; *Sutton v. Calhoun*, 14 La. Ann. 205.

Parol evidence is competent to show that the name acquired by repute coincides with the proper description. *Gilfillan v. Hobart*, 34 Minn. 67.

In *Kelly v. Herrall*, 20 Fed. Rep. 364, it was held that a description of property assessed to a person by name as "lot 3 in Portland Homestead" is sufficiently certain, where there is but one Portland Homestead within the county containing such a lot, of which the person assessed is the owner.

A description of property as the "parsonage" was sufficient, *People v. O'Brien*, 53 Hun (N. Y.) 580; and as "the estate of J. B. Coles, deceased," in *State v. Platt*, 24 N. J. L. 108. See also *Driggers v. Cassidy*, 71 Ala. 529; or as the "vacant strip," *Whitney v. Gunderson*, 31 Wis. 359.

2. *State v. Franklin*, 46 N. J. L. 437; *State v. Mulford*, 43 N. J. L. 550; *Rutherford v. Union Tp.*, 36 N. J. L. 309; *State v. Elizabeth*, 39 N. J. L. 689; *Philadelphia v. Miller*, 49 Pa. St. 440; *Bush v. Williams, Cooke* (Tenn.) 274. But see *Cressey v. Parks*, 76 Me. 532.

An entry upon an assessment roll, "acres of land—value—," is void, *Holmes v. School Dist. No. 15*, 11 Oregon 332; or "Bush's heirs—acres." *Bush v. Williams, Cooke* (Tenn.) 274.

A mistake in the number of acres, where the valuation is not by the acre, is immaterial. *People v. Adams* (Supreme Ct.), 10 N. Y. Supp. 295. See also *Gilman v. Riopelle*, 18 Mich. 145; *Williston v. Colkett*, 9 Pa. St. 38. Such an error is not sufficient to over-

turn the number of the tract or the name of the warrantee when they conflict. *Brown v. Hays*, 66 Pa. St. 229; *Putnam v. Tyler*, 117 Pa. St. 570.

3. *High v. Shoemaker*, 22 Cal. 363; *Patten v. Green*, 13 Cal. 325, practically overruling *Lachman v. Clark*, 14 Cal. 131.

Where a statute requires an assessor to state metes and bounds in describing a bridge, he should state its length and the length of its approach. *Keokuk, etc., Bridge Co. v. People*, 145 Ill. 596.

4. *Hayden v. Foster*, 13 Pick. (Mass.) 492; *Nason v. Ricker*, 63 Me. 381; *People v. Hollister*, 47 Cal. 408; *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511; *Howe v. People*, 86 Ill. 288; *Insurance Co. v. Yard*, 17 Pa. St. 338; *Brown v. Hays*, 66 Pa. St. 229; *Fisk v. Corey*, 141 Pa. St. 334; *St. Marys Church v. Tripp*, 14 R. I. 307; *Young v. Joslin*, 13 R. I. 675; *State v. Baker*, 49 Tex. 763; *Walker v. Chapman*, 22 Ala. 116; *French v. Edwards*, 13 Wall. (U. S.) 511. More especially is this the rule where the tracts of land are not contiguous. *Dundy v. Richardson County*, 8 Neb. 508. And see *Moore v. People*, 106 Ill. 376.

Under Rev. St. Mo., §§ 7552, 7555, the assessment of real estate must contain an accurate description thereof by the smallest legal subdivisions. *State v. Wabash R. Co.*, 114 Mo. 1.

Such a provision in a statute is mandatory. *Young v. Joslin*, 13 R. I. 675. And a tax deed which shows upon its face that two or more separate and distinct tracts of land were sold together, is void on its face. *Hall v. Dodge*, 18 Kan. 277; *Mathews v. Buckingham*, 22 Kan. 169.

In *May v. Traphagen* (B'klyn City Ct.), 19 N. Y. Supp. 679, it was held that the gross assessment of several lots as one parcel, is not an error when the statute provides for an apportionment thereof in case of objection.

subdivided,<sup>1</sup> as well as to the sections or legal subdivisions of government land,<sup>2</sup> and failure to observe this requirement will render the assessment void.<sup>3</sup> But the rule does not require that a tract shall be divided into the smallest legal subdivisions,<sup>4</sup> and where two or more lots or tracts adjoin each other, and are used and occupied as one, they may be assessed as a single tract.<sup>5</sup> An assessor may not divide a single tract without the consent of the

Nor is it a defense to a simple action to recover a tax, when no forfeiture is sought to be enforced. *Rockland v. Ulmer*, 84 Me. 503.

**Railroad Property.**—In assessing the property of railroads, the different franchises, etc., owned or controlled by a single company may be separately assessed; and the same rule applies in assessing the rolling stock, etc. But the road bed, franchise, and superstructure are properly assessed together. *Louisville, etc., R. Co. v. Bate*, 12 Lea (Tenn.) 573.

**Unimproved and Unoccupied Land.**—The same rule applies to unimproved and unoccupied lands. *Shimmin v. Inman*, 26 Me. 228; *Dike v. Lewis*, 2 Barb. (N. Y.) 344.

The *Pennsylvania* statutes in relation to unseated lands, contemplate taxation by single tracts following the title of the owner. *Reading v. Finney*, 73 Pa. St. 467.

But in *Russell v. Wertz*, 24 Pa. St. 337, it was held that the assessment as one tract, of two adjoining tracts of unseated land owned by the same person, will be held to be an unimportant irregularity under the curative provisions of the act of 1815, after a treasurer's and assessor's sale thereof. And where the owner purchased two adjoining tracts of unseated land at separate sales, and had a survey made including both, it was held that it might be assessed as one tract. *Harper v. M'Keehan*, 3 W. & S. (Pa.) 238.

**Assessment of Lots Owned With Those not Owned.**—An assessment against a party, under one aggregate value, of lots owned by him with others neither owned nor occupied by him, is void. *Hamilton v. Fond du Lac*, 25 Wis. 490; *Orton v. Noonan*, 25 Wis. 672; *Siegel v. Outagamie County*, 26 Wis. 70; *State v. Williston*, 20 Wis. 228; *Knox v. Huidekoper*, 21 Wis. 527; *Terrill v. Groves*, 18 Cal. 149; *Howe v. People*, 86 Ill. 288; *Romig v. Lafayette*, 33 Ind. 30; *Challis v. Hekelu-kaemper*, 14 Kan. 474; *State v. North Bergen*, 39 N. J. L. 694; *Barker v.*

*Blake*, 36 Me. 433; *Mowry v. Blandin*, 64 N. H. 3; *Hayden v. Foster*, 13 Pick. (Mass.) 492; *Jennings v. Collins*, 59 Mass. 29; *Cooley v. Waterman*, 16 Mich. 366; *Farnham v. Jones*, 32 Minn. 7; *Dunn v. Winston*, 31 Miss. 135; *Sims v. Warren*, 67 Miss. 278; *Douglass v. Dungerfield*, 10 Ohio 156; *Fisk v. Corey*, 141 Pa. St. 334.

1. *State v. Baker*, 49 Tex. 763; *Kissimmee v. Cannon*, 26 Fla. 3. And see *State v. Wabash, etc., R. Co.*, 114 Mo. 1.

2. Land, etc., *Imp. Co. v. Bardon*, 45 Fed. Rep. 706. But the statute requiring each tract to be listed and valued separately, does not require such listing to be upon the smallest legal subdivision, *Spellman v. Curtenius*, 12 Ill. 409; for the terms "tract" and "parcel" may quite as properly be applied to a quarter-section, half-section, or a section, as to a "forty" or "eighty." *Martin v. Cole*, 38 Iowa 141.

3. *Shimmin v. Inman*, 26 Me. 228; *Dundy v. Richardson County*, 8 Neb. 508; *Cadwallader v. Nash*, 73 Cal. 43; *Evans v. Newell* (R. I. 1892), 25 Atl. Rep. 347.

A listing and assessment of a tract in the aggregate with others cannot be cured by a review of the assessment. *Howe v. People*, 86 Ill. 288. And see *Hamilton v. Fond du Lac*, 25 Wis. 490.

But where the assessment in this respect is partly legal and partly illegal, the court should so declare, sustaining the former and setting aside the latter. *Kissimmee v. Cannon*, 26 Fla. 3.

**Waiver of Separate Assessment.**—If the owner, by listing and valuing several lots of land as one parcel, consents to such mode of assessment, it will not be set aside, and he is estopped to complain that it is illegal. *Kissimmee v. Drought*, 26 Fla. 1; *Albany Brewing Co. v. Meriden*, 48 Conn. 243.

4. *Moore v. People*, 106 Ill. 376; *Spellman v. Curtenius*, 12 Ill. 409. See also *Pitkin v. Yaw*, 13 Ill. 251.

5. *McQuesten v. Swope*, 12 Kan. 32; *Hall v. Dodge*, 18 Kan. 280; *Dodge v.*

owner, where there are no known legal subdivisions, though he may follow a division made by the owner.<sup>1</sup>

(4) *Valuation*—(a) *How Made*.—Where privilege, poll, or other specific taxes upon persons or things, are laid, there is no necessity for a valuation;<sup>2</sup> but a valuation is of course an indispensable requisite to an *ad valorem* tax,<sup>3</sup> the value fixed being generally required to be entered in a separate column on the tax roll.<sup>4</sup> Taxable property, a separate description of which is required, must be separately valued.<sup>5</sup>

Emmons, 34 Kan. 732; *People v. Culverwell*, 44 Cal. 620.

The use and nature of the property must determine whether or not several lots assessed to one owner and sold *en masse* should be regarded as one lot. *Weaver v. Grant*, 39 Iowa 294.

Where contiguous tracts are conveyed and held by one deed as one tract, they are to be taken as one tract, though lying in different counties and separated by a river. *Hairston v. Stinson*, 13 Ired. (N. Car.) 479.

In *Bellows Falls Canal Co. v. Rockingham*, 37 Vt. 622, it was held that property consisting of several buildings connected together, may be set in the tax list in one gross sum, though it is equally proper to give the value of each part by itself.

In *Mix v. People*, 116 Ill. 265, it was held that where two or more tracts are assessed jointly, it will be presumed, in the absence of evidence to the contrary, that they were so situated that their value could not be separately ascertained.

Portions of distinct lots held under distinct warrants, but united in fact by a purchase, may be returned and assessed by whatever designation the owner may choose, and be sold as a unit. *Heft v. Gephart*, 65 Pa. St. 510.

**Blocks in Cities.**—It has been held in *California* and *New Jersey*, that it is not an error to assess all the lots in one block, when belonging to the same owner, at one gross sum, without distinguishing each. *People v. Morse*, 43 Cal. 534; *People v. Culverwell*, 44 Cal. 620; *State v. Platt*, 24 N. J. L. 108.

**Adjacent Lots.**—And it has been held in *Nevada* and *Rhode Island*, that two or more contiguous lots owned by the same individual, may be jointly assessed. *Wright v. Cradlebaugh*, 3 Nev. 341; *Howland v. Pettey*, 15 R. I. 603.

1. *Reading v. Finney*, 73 Pa. St. 467; *Brown v. Hays*, 66 Pa. St. 229; *Biddle-*

*man v. Brooks*, 28 Cal. 72; *Albany Brewing Co. v. Meriden*, 48 Conn. 243; *Kissimmee v. Drought*, 26 Fla. 1.

But where land is subdivided by one who does not own it, or has no authority for so doing, such subdivision is void, and an assessment in accordance therewith, as well as all subsequent proceedings thereunder, is also void. *Gage v. Rumsey*, 73 Ill. 473; *Reading v. Finney*, 73 Pa. St. 467.

In *Davis v. McGee*, 28 Fed. Rep. 867, it was held that the improper assessment of a piece of land as several tracts when it should have been assessed as one, will not invalidate a sale thereunder under the *Missouri* statutes. And the mere fact that an owner has divided his land into lots for the purpose of sale, will not require the assessor to make a separate valuation of each lot. *Jennings v. Collins*, 99 Mass. 29. And see *Thatcher v. People*, 79 Ill. 597.

2. See *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 237; *U. S. v. Halloran*, 14 Blatchf. (U. S.) 1; *U. S. v. Lyman*, 1 Mason (U. S.) 482; *Meredith v. U. S.*, 13 Pet. (U. S.) 486; *State v. Sterling*, 20 Md. 502.

Where the amount of a tax depends upon the average amount of deposits in a bank for a given time, neither the property nor the deposit are required to be valued in the assessment. *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611.

3. *Lebanon v. Ohio*, etc., R. Co., 77 Ill. 539; *King v. Gwynn*, 14 Fla. 32; *Hurlbutt v. Butenop*, 27 Cal. 50; *Emery v. Alvarado*, 90 Cal. 444; *People v. San Francisco Sav. Union*, 31 Cal. 132; *Brady v. Seaman*, 30 Cal. 610; *May v. Traphagen*, 139 N. Y. 478.

Thus, a franchise must be taxed according to the valuation. *Spring Valley Water Works v. Schottler*, 62 Cal. 69.

4. See *State v. Eureka Consolidated Min. Co.*, 8 Nev. 15.

5. *People v. Hollister*, 47 Cal. 408;



It is sometimes required by statute that the valuation shall be made from an actual view by the assessors.<sup>1</sup> In the absence of such statutes, however, assessors may proceed upon inquiry.<sup>2</sup> Statutes providing for the mode of ascertaining the value of taxable property must be substantially complied with.<sup>3</sup>

It is generally provided that the property shall be assessed at its cash value, which is said to mean the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.<sup>4</sup> If the property has no cash value,

*People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511. And see *Logan v. Washington County*, 29 Pa. St. 373.

In *Robertson v. Anderson*, 57 Iowa 165, it was held that it is immaterial whether land and improvements thereon are valued in the aggregate or separately. See also *People v. Culverwell*, 44 Cal. 620; *Atlantic, etc., R. Co. v. Yavapai Co.* (Arizona, 1889), 21 Pac. Rep. 768; *Tax Cases*, 12 Gill. & J. (Md.) 117.

In *Lowell v. Middlesex County*, 152 Mass. 372, it was held that a taxpayer is not entitled to an abatement because the assessors have valued the items in gross instead of separately.

1. See *Hersey v. Barron County*, 37 Wis. 75.

In *Moore v. Turner*, 43 Ark. 243, it was held that a failure of the assessor to personally view lands to ascertain their value, is no ground upon which to quash the assessment on *certiorari*.

2. *Beesen v. Johns*, 59 Iowa 166; *Weatherhead v. Guilford*, 62 Vt. 327; and make the valuation in the exercise of their own judgment upon all the information in their possession. *People v. Barker*, 48 N. Y. 76; *Vail v. Owen*, 19 Barb. (N. Y.) 22; *St. Louis, etc., R. Co. v. Surrrell*, 88 Ill. 535; *King v. Gwynn*, 14 Fla. 32; *Dewey v. Stratford*, 42 N. H. 282; *State v. Central Pac. R. Co.*, 10 Nev. 47; *Boorman v. Juneau County*, 76 Wis. 550.

The assessor must make the valuation for the purpose of taxation by the exercise of his own judgment; a valuation made by the taxpayer should not be permitted to influence or control him. *King v. Gwynn*, 14 Fla. 32.

Under a requirement to appraise property, the listers may proceed according to the ordinary rules of evidence. *Weatherhead v. Guilford*, 62 Vt. 327.

Assessors may act upon their own knowledge and judgment without hearing evidence. *St. Louis, etc., R. Co. v. Surrrell*, 88 Ill. 535.

Where the statute provides that the assessment may be made either from actual view or from the best information, the want of an actual view will not invalidate the assessment. *Boorman v. Juneau County*, 76 Wis. 550.

3. *People v. Hagar*, 49 Cal. 229.

4. *Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503; *Keener v. Union Pac. R. Co.*, 31 Fed. Rep. 126; *Capital City Water Co. v. Board of Revenue*, 92 Ala. 380; *People v. Lots in Ashley*, 122 Ill. 297; *Illinois, etc., R. Co. v. Stookey*, 122 Ill. 358; *Willis v. Crowder* (Ind. 1893), 34 N. E. Rep. 315; *State v. Vansyckle*, 49 N. J. L. 366; *Miller v. Hurford*, 13 Neb. 13; *People v. Board of Assessors*, 39 N. Y. 81; *Oswego Starch Factory v. Dollo-way*, 21 N. Y. 449; *People v. Ferguson*, 38 N. Y. 89; *Inman v. Colman*, 37 Hun (N. Y.) 170; *People v. Ganley* (Supreme Ct.), 8 N. Y. Supp. 563; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Territory v. Delinquent Tax List* (Arizona, 1890), 24 Pac. Rep. 182; *Clark v. Crane*, 5 Mich. 151; 71 Am. Dec. 776; *Hogelskamp v. Weeks*, 37 Mich. 422; *Wattles v. Lapeer*, 40 Mich. 624.

A chose in action should be listed at its true value, though less than its face value. *Exchange Bank v. Hines*, 3 Ohio St. 1. But the legislature may fix the face value of corporate obligations as a value for taxation. *Com. v. Lehigh R. Co.*, 129 Pa. St. 429.

Its present, and not its prospective value, should be taken. *State v. Illinois, etc., R. Co.*, 27 Ill. 64; 79 Am. Dec. 396; *People v. Tax Com'rs*, 4 N. Y. Supp. 43; 5 Hun (N. Y.) 641.

All buildings and improvements must be included in the appraised value. *Fitch v. Pinckard*, 5 Ill. 69.

The value should be assessed in legal tender currency. *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *State v. Kruttschnitt*, 4 Nev. 178.

Corporate property is included within the provision requiring property to

it need not be listed; and where the property has no market value, the actual value controls.<sup>1</sup>

All the elements which enter into the value of the property are to be considered by the assessors in making the valuation;<sup>2</sup> as the advantages of its situation,<sup>3</sup> its capacity for earning profits,<sup>4</sup> and the valuable use to which it is put.<sup>5</sup>

be assessed at its full actual value. *State v. Hornbacker*, 42 N. J. L. 635.

1. *Exchange Bank v. Hines*, 3 Ohio St. 1; *People v. Tax Com'rs*, 31 Hun (N. Y.) 32. And see *Perkins v. Nugent*, 45 Mich. 156.

Where the thing assessed has no market value, its actual value will control. *Willis v. Crowder* (Ind. 1893), 34 N. E. Rep. 315.

But though shares of stock in a corporation are worthless, its capital stock may yet be taxed. *Pacific Hotel Co. v. Lieb*, 83 Ill. 602.

If a chose in action is of some value, but less than its face, it should be listed at what it is worth. *Exchange Bank v. Hines*, 3 Ohio St. 1.

In assessing land for taxation, the probability that a projected improvement may not be made, in which event the land will be comparatively worthless, will not be considered. *Union Invest. Co. v. Harrison County*, 67 Miss. 614.

Choses in action will be presumed to have some value, and an assessment will not be set aside upon the ground that they have none. *Irvin v. Turner*, 47 Ga. 382; *Caneker v. Walton*, 47 Ga. 394.

2. *Hersey v. Barron County*, 37 Wis. 75; *Stein v. Mobile*, 17 Ala. 234; *Fitch v. Pinckard*, 5 Ill. 69; *Winnipiseogee Lake, etc., Mfg. Co. v. Gilford*, 64 N. H. 337; *State v. Metz*, 31 N. J. L. 378; *People v. Barker*, 48 N. Y. 70.

Thus, an intangible right or privilege attached to the property, must be considered in the valuation. *Stein v. Mobile*, 17 Ala. 234; *New York, etc., R. Co. v. Hughes*, 46 N. J. L. 67.

The cost of the property is an element in determining its value. *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1; *Winnipiseogee Lake, etc., Mfg. Co. v. Gilford*, 64 N. H. 337; *People v. Tax Com'rs*, 104 N. Y. 240; *People v. Keator*, 67 How. Pr. (N. Y. Supreme Ct.) 277; *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. Rep. 325. See also *Morgan La., etc., R., etc., Co. v. Board of Reviewers*, 41 La. Ann. 1156.

Previous assessments are not evidence of value, but an assessment will not be quashed because they are considered. *Lowell v. Middlesex County*, 152 Mass. 372.

3. *Hersey v. Barron County*, 37 Wis. 75; *Stein v. Mobile*, 17 Ala. 234; *State v. Southwestern R. Co.*, 70 Ga. 11; *State v. Flavell*, 24 N. J. L. 370; *Winnipiseogee Lake, etc., Mfg. Co. v. Gilford*, 64 N. H. 337. And see *People v. Tax Com'rs*, 23 Hun (N. Y.) 687.

In *Winnipiseogee Lake, etc., Mfg. Co. v. Gilford*, 64 N. H. 337, it was held that benefits accruing to property situated in one state on account of its proximity to property situated in another state, are to be considered.

Advantages derived from a company's water power should not be considered, when the water power itself is exempt. *State v. Flavell*, 24 N. J. L. 370.

4. *People v. Barker*, 48 N. Y. 76; *People v. Keator*, 36 Hun (N. Y.) 592; *People v. Pond*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 1; *Stein v. Mobile*, 17 Ala. 234; *State v. Bienville Water Supply Co.*, 89 Ala. 325; *State v. Illinois, etc., R. Co.*, 27 Ill. 64; 79 Am. Dec. 396. And see *Johnson v. Futch*, 57 Miss. 82. But see *State v. Randolph*, 25 N. J. L. 427.

The rent paid is evidence of value. *Atlantic, etc., R. Co. v. State*, 60 N. H. 133.

The value of railroad property is to be determined largely by reference to present and prospective profits, and not by the cost of construction alone. *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. Rep. 395; *People v. Keator*, 67 How. Pr. (N. Y. Supreme Ct.) 277; *People v. Weaver*, 67 How. Pr. (N. Y. Supreme Ct.) 477. And see *People v. Hicks*, 40 Hun (N. Y.) 598. But the fact that the road is run at a net loss does not show it to be of no value. *Atlantic, etc., R. Co. v. State*, 60 N. H. 133. And the cost is an important factor. *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1.

5. *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199; *Lowell v. Middlesex County*, 6 Allen (Mass.) 131;

The amount which property will bring at a public sale authorized by law, or at a fair private sale, is a good *prima facie* criterion by which its value for assessment may be determined.<sup>1</sup> Where there are several interests in property, to determine the valuation for assessment of a particular interest, the terms and conditions under which it is held are to be considered, as well as the value of the property itself.<sup>2</sup>

The assessment is void where it is clearly excessive or the overvaluation is intentional,<sup>3</sup> though in such case a new assessment is not necessary, but the taxpayer may be required to pay the amount justly due.<sup>4</sup>

Where the officer agrees with the taxpayer to make an under assessment, or does so intentionally without an agreement, the assessment is invalid.<sup>5</sup>

(b) *Deduction of Liabilities.*—In some states, statutes provide that

State *v.* Bienville Water Supply Co., 89 Ala. 325; Pingree *v.* Berkshire County, 102 Mass. 76; State *v.* Jersey City, 36 N. J. L. 56; Winnipiseogee Lake, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337. See also State *v.* Metz, 31 N. J. L. 378.

In assessing the value of a railroad, for purposes of taxation, the inquiry should be, what is the property worth used for the purposes for which it was designed. State *v.* Illinois, etc., R. Co., 27 Ill. 64; 79 Am. Dec. 396.

It is the policy of the tax law of *New Jersey* that property to be assessed, whether cultivated or wild land, shall be valued in the actual condition in which the owner holds it. State *v.* Abbott, 42 N. J. L. 111.

1. State *v.* Randolph, 25 N. J. L. 427; State *v.* Abbott, 42 N. J. L. 111; Willis *v.* Crowder (Ind. 1893), 34 N. E. Rep. 315; People *v.* Pond, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 1; Atlantic, etc., R. Co. *v.* State, 60 N. H. 133; State *v.* Illinois, etc., R. Co., 27 Ill. 64; 79 Am. Dec. 396; Morgan's La., etc., R., etc., Co. *v.* Board of Reviewers, 41 La. Ann. 1156. And see Oregon Steam Nav. Co. *v.* Wasco County, 2 Oregon 206; State *v.* Bienville Water Supply Co., 89 Ala. 325; Daugherty *v.* Thompson, 71 Tex. 192; Webster-Glover Lumber, etc., Co. *v.* St. Croix County, 63 Wis. 647; Salschieder *v.* Fort Howard, 45 Wis. 521.

2. Cincinnati College *v.* Yeatman, 30 Ohio St. 276; Logan *v.* Washington County, 29 Pa. St. 373. And see People *v.* San Francisco County, 77 Cal. 136; Philadelphia, etc., R. Co. *v.* Appeal Tax Court, 50 Md. 397; Daugherty *v.* Thompson, 71 Tex. 192; State *v.* Taylor (Tex. 1888), 12 S. W. Rep. 176.

The valuation of all the particular estates taken separately should not be greater than upon the whole taken together. Logan *v.* Washington County, 29 Pa. St. 373. See also Consolidated Coal Co. *v.* Baker, 135 Ill. 545.

The value of a life interest is to be ascertained by the table of mortality, upon the expectancy of the life of him who has such interest. State *v.* Vansyckle, 49 N. J. L. 366. And the estate of a remainderman is to be assessed at its present value, to be ascertained on the expectancy of the life of the life-tenant. State *v.* Milroy (N. J. 1890), 19 Atl. Rep. 732.

3. Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51; Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. Rep. 395; State *v.* Metz, 31 N. J. L. 365; People *v.* Ohio, etc., R. Co., 96 Ill. 411. And see State *v.* State, 24 N. J. L. 108; Smith *v.* Mosher (Supreme Ct.), 9 N. Y. Supp. 786; Wattles *v.* Lapeer, 40 Mich. 624.

In State *v.* Randolph, 25 N. J. L. 427, it was held that if the tax assessed is larger than that authorized by the property, the assessment will be set aside to the extent of the excess; and each person against whom the assessment is made, is entitled to a reduction in proportion to the amount of his assessment.

"Over assessment," under the *Louisiana* statute, means overvaluation. State *v.* Board of Assessors, 30 La. Ann. 261.

4. State *v.* Waterville Sav. Bank, 68 Me. 515; Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. Rep. 395.

5. Auditor Gen'l *v.* Jenkinson, 90 Mich. 523; Goff *v.* Outagamie County, 43 Wis. 55; Schettler *v.* Fort Howard,

the taxpayer shall be entitled to deduct his *bona fide* debts from his credits; or, that the taxpayer's total indebtedness shall be deducted from the value of his taxable property.<sup>1</sup> Thus, a mortgage debt is taxable to the mortgagee only for the amount due upon it.<sup>2</sup> Mortgages, in some jurisdictions, are taxable to the mortgagee only when the mortgagor has been allowed a deduction upon the valuation of the mortgaged property equal to the value of the mortgage debt.<sup>3</sup>

43 Wis. 48; *Semple v. Langlade County*, 75 Wis. 354; *Dunham v. Chicago*, 55 Ill. 357.

1. See *City Bank v. Bogel*, 51 Tex. 355; *Griffin v. Heard*, 78 Tex. 607; *State Bank v. Board of Revenue*, 91 Ala. 217; *Hammersley v. Franey*, 39 Conn. 176; *Bridgman v. Keokuk*, 72 Iowa 42; *Matter v. Campbell*, 71 Ind. 512; *Clark v. Belknap* (Ky. 1890), 13 S. W. Rep. 212; *Baldwin v. Hewett*, 88 Ky. 673; *Com. v. St. Bernard Coal Co.* (Ky. 1888), 9 S. W. Rep. 709; *Deane v. Hathaway*, 136 Mass. 129; *Detroit v. Board of Assessors*, 91 Mich. 78; *Standard L. Ins. Co. v. Board of Assessors*, 91 Mich. 517; *First Nat. Bank v. St. Joseph Tp.*, 46 Mich. 526; *Jones v. Seward County*, 5 Neb. 561; *Peavey v. Greenfield*, 64 N. H. 284; *State v. Pearson*, 24 N. J. L. 254; *State v. Hornbacker*, 42 N. J. L. 635; *People v. Ferguson*, 38 N. Y. 89; *People v. Barker* (Supreme Ct.), 25 N. Y. Supp. 340; *People v. Ryan*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 37; *People v. Haren* (Supreme Ct.), 3 N. Y. Supp. 86; *People v. Hicks*, 40 Hun (N. Y.) 598; 105 N. Y. 198; *Treasurer v. Bank*, 47 Ohio St. 503; *Wetmore v. Multnomah Co.*, 6 Oregon 464; *Ankeny v. Multnomah Co.*, 3 Oregon 386; *Tripp v. Merchants' Mut. F. Ins. Co.*, 12 R. I. 435; *In re Assessment and Collection of Taxes* (S. Dak. 1892), 54 N. W. Rep. 818; *Richards v. Rock Rapids*, 31 Fed. Rep. 505; *National Albany Exch. Bank v. Wells*, 18 Blatchf. (U. S.) 478; *Evansville Bank v. Britton*, 105 U. S. 322.

But it has been held that in the absence of such statute, credits may be taxed, though the person to whom they are due is indebted in an equal or greater amount. *Drexler v. Tyrrell*, 15 Nev. 128; *Lindell v. Bank of Missouri*, 4 Mo. 315. And see *Lappin v. Nemaha County*, 6 Kan. 403; *Allen v. Harford County*, 74 Md. 294.

**Debts Exceed Property—Debts Incurred to Escape Taxation.**—Where the debts of a taxpayer are greater than

the value of his taxable property, he is exonerated from assessment, *People v. Ryan*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 37; and it was held in that case that it made no difference that the indebtedness was incurred for the purpose of escaping taxation. And to the same effect is *Hutchinson v. Board*, 67 Iowa 182.

**Corporate property** falls within the meaning of such statutes. *People v. Coleman* (Supreme Ct.), 1 N. Y. Supp. 666; *McAden v. Mecklenburg County*, 97 N. Car. 355; *People v. Tax Com'rs*, 46 How. Pr. (N. Y. Supreme Ct.) 315. Compare *People v. Board of Education*, 46 Barb. (N. Y.) 588.

2. *State v. Jones*, 39 N. J. L. 652; *State v. Melroy* (N. J. 1890), 19 Atl. Rep. 732.

The same rule has been applied to taxation of annuities and annuity bonds. *State v. Cornell*, 31 N. J. L. 374; *State v. Melroy* (N. J. 1890), 19 Atl. Rep. 732. And see *State v. Pettit*, 39 N. J. L. 654.

In *McCoppin v. McCartney*, 60 Cal. 367, it was held that an assessment upon a mortgage which had been satisfied was not invalid, but was payable by the owner of the land.

3. See *State v. Runyon*, 41 N. J. L. 98; *State v. Trenton*, 40 N. J. L. 89; *State v. Jones*, 40 N. J. L. 105; *Merchants' Ins. Co. v. Newark*, 54 N. J. L. 138; *State v. Nunn*, 44 N. J. L. 354; *Hammersley v. Franey*, 39 Conn. 176; *Detroit v. Board of Assessors*, 91 Mich. 78.

In such case the mortgage is regarded as an interest in real property. *Detroit v. Board of Assessors*, 91 Mich. 78; *Knight v. Boston*, 159 Mass. 551.

In *State v. East Brunswick Tp.*, 44 N. J. L. 153, it was held that where a deduction was claimed and allowed on account of a mortgage upon the property taxed, the whole mortgage should be taxed to the mortgagee, though its amount exceeds the value of the premises. Such a provision is not open to

In the absence of a statute expressly permitting it, no such deductions can be made.<sup>1</sup> A constitutional provision that all property shall be subject to taxation has been held to preclude such deduction.<sup>2</sup> Where the indebtedness is exempt from taxation in the hands of the person to whom it is due, it cannot be deducted from the value of the debtor's property;<sup>3</sup> nor can deduction be made for debts due to a non-resident creditor.<sup>4</sup>

The statutory requisites must be complied with. Thus, only such deductions may be made, and from such property or credits, as the statute permits; and they must be made in the manner, and upon the production of such evidence, as the statute requires.<sup>5</sup>

the objection of imposing double taxation. *Atty. Gen'l v. Sanilac County*, 71 Mich. 16.

In *New Jersey*, the claim of deduction on account of a mortgage must be made in the first instance in the township where the person claiming it resides. *State v. Jones*, 40 N. J. L. 105. And see *State v. Pearson*, 24 N. J. L. 254; *State v. Grey*, 29 N. J. L. 380; *State v. Williamson*, 33 N. J. L. 77; *State v. Bishop*, 34 N. J. L. 45; *State v. Crosley*, 36 N. J. L. 426. But it need not be in writing. *State v. East Brunswick Tp.*, 44 N. J. L. 153.

1. Territory *v. Delinquent Tax List* (Arizona, 1890), 24 Pac. Rep. 182. And see *Wilcox v. Ellis*, 14 Kan. 588; 19 Am. Rep. 107; *Kansas Mut. L. Ins. Co. v. Hill* (Kan. 1893), 33 Pac. Rep. 300; *Hamersley v. Franey*, 39 Conn. 176; *Goldgart v. People*, 106 Ill. 25; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Lamar v. Palmer*, 18 Fla. 147.

2. *Exchange Bank v. Hines*, 3 Ohio St. 1; *Treasurer v. Bank*, 47 Ohio St. 503; *In re Assessment and Collection of Taxes* (S. Dak. 1893), 54 N. W. Rep. 818. And see *Clark v. Belknap* (Ky. 1890), 13 S. W. Rep. 212.

*In re Assessment and Collection of Taxes* (S. Dak. 1893), 54 N. W. Rep. 818, it was held, where such a provision permitted the owner of personal property to deduct his indebtedness from the value of such property without extending such privilege to the owners of realty, that it violated the provision in favor of equality and uniformity. But it has been held in *Oregon*, where no such distinction is made between real and personal property, that a provision permitting the deduction of indebtedness does not violate such a provision. *Wetmore v. Multnomah County*, 6 Oregon 464.

3. *State v. Trenton*, 40 N. J. L. 89; *State v. Silvers*, 41 N. J. L. 505; *State*

*v. Vansyckle*, 49 N. J. L. 366; *Balteson v. Hartford*, 50 Conn. 558. And see *Home Ins. Co. v. Board of Assessors*, 42 La. Ann. 1131.

When the mortgaged property is exempt, the mortgage must be taxed to the mortgagee without reference to the allowance. *State v. Lantz*, 53 N. J. L. 578. But in *California*, it has been held that where the state is the creditor, and, therefore, not liable to taxation, yet the debtor may deduct the mortgage from the value of the property. *People v. San Francisco County*, 77 Cal. 136; *Smith v. Keagle* (Cal. 1888), 20 Pac. Rep. 152.

4. *State v. Manning*, 40 N. J. L. 461; *State v. Vansyckle*, 49 N. J. L. 366; *Ankeny v. Multnomah County*, 4 Oregon 272. And see *Johnson v. Oregon City*, 3 Oregon 13.

A note payable at a specified place in the state is an indebtedness within the state, notwithstanding the owner may be a non-resident. *Ankeny v. Multnomah County*, 3 Oregon 386.

5. See *Ankeny v. Multnomah County*, 4 Oregon 271; *Lappin v. Nemaha County*, 6 Kan. 403; *People v. Tax Com'rs*, 51 Hun (N. Y.) 641; *People v. Coleman*, 135 N. Y. 231; *Farmers' L. & T. Co. v. New York*, 7 Hill (N. Y.) 261; *State v. Silvers*, 41 N. J. L. 505; *State v. Gray*, 29 N. J. L. 380; *State v. Pettit*, 39 N. J. L. 654; *Harness v. Williams*, 64 Miss. 600; *State v. Redwood Falls Bldg., etc., Assoc.*, 45 Minn. 154; *Hawkeye Ins. Co. v. Board of Equalization*, 75 Iowa 770; *Los Angeles Sav. Bank v. Hinton* (Cal. 1893), 32 Pac. Rep. 6; *Security Sav. Bank, etc., Co. v. Hinton*, 97 Cal. 214; *Equitable Ins. Co. v. Board of Equalization*, 74 Iowa 178; *Griffin v. Heard*, 78 Tex. 607; *Kansas Mut. L. Assoc. v. Hill* (Kan. 1893), 33 Pac. Rep. 300; *Standard L., etc., Ins. Co. v. Board of Assessors* (Mich. 1893), 55 N. W. Rep.

(5) *Extending the Taxes.*—After listing and valuation, and after the persons taxable have been designated, the amount to be imposed upon each must be computed and entered in the roll by the assessors, or by the officer or body upon whom the duty is imposed.<sup>1</sup> A failure to extend the tax, so as to show how much is imposed upon each person, is fatal to its validity.<sup>2</sup> The per-

112; *State v. Bettie*, 50 N. J. L. 132; *State v. Trenton*, 40 N. J. L. 89; *State v. Bishop*, 34 N. J. L. 45; *Taylor v. Love*, 43 N. J. L. 142; *State v. Parker*, 32 N. J. L. 341; *State v. Parker*, 34 N. J. L. 71; *State v. Horner*, 38 N. J. L. 212; *State v. Johnson*, 30 N. J. L. 452; *State v. East Brunswick Tp.*, 44 N. J. L. 153; *Bridgman v. Keokuk*, 72 Iowa 42; *People v. Davenport*, 25 Hun (N. Y.) 630; *Baltimore v. Canton County*, 63 Md. 218.

A debt which has been released or which is never intended to be paid, cannot be deducted. *Baldwin v. Hewitt*, 88 Ky. 673. See also *Kansas Mut. L. Assoc. v. Hill* (Kan. 1893), 33 Pac. Rep. 300; *People v. Tax Com'rs*, 99 N. Y. 154.

In *State v. Warner* (N. J. 1891), 22 Atl. Rep. 341, it was held that the refusal of the assessor to make allowance for debts does not discharge the taxpayer from presenting an account of his indebtedness.

In *State v. Creveling*, 40 N. J. L. 150, it was held that assessors allowing a deduction without the taxpayer's oath or affirmation are liable to indictment as for a misdemeanor.

In *New Jersey*, it has been held that though the assessor may require an affidavit to satisfy himself of the existence of the amount of the mortgage, yet, if the deduction is claimed and allowed and is correct, the owner of the mortgage cannot complain that an affidavit was not required. *State v. Runyon*, 41 N. J. L. 98.

#### What Are Credits From Which Debts May Be Deducted Within the Statutes.—

Under the *Texas* statute, a deposit at a bank is regarded as cash, and the liabilities of the taxpayer cannot be set off against it. *Campbell v. Wiggins* (Tex. 1892), 20 S.W. Rep. 730. And the rule is the same under the *Massachusetts* statute. *Gray v. Street Com'rs*, 138 Mass. 414.

In *Raleigh, etc., R. Co. v. Wake County*, 87 N. Car. 414, it was held that guaranteed stock is stock, and not a credit to be diminished by an outstanding indebtedness.

In *Seward County v. Cattle*, 14 Neb. 144, it was held that funds in the hands of correspondents or agents were not credits.

**Non-Taxable Credits.**—*United States* bonds, though not themselves taxable, will be counted as part of the assets of the taxpayer, and as off-setting to that extent the liabilities which may be deducted from the amount of his estate. *State v. Assessors*, 37 La. Ann. 850. See also *People v. Coleman*, 18 N. Y. Supp. 675; 63 Hun (N. Y.) 633; *People v. Barker* (Supreme Ct.), 25 N. Y. Supp. 394. And the same rule applies to national bank stock. *Ruggles v. Fond du Lac*, 53 Wis. 436; *Weston v. Manchester*, 62 N. H. 574.

1. *People v. Hagadorn*, 104 N. Y. 516; *Seymour v. Peters*, 67 Mich. 415; *Greenough v. Fulton Coal Co.*, 74 Pa. St. 486.

In *State v. Perkins*, 24 N. J. L. 409, it was held that it is not sufficient to give the valuation of property and mention the rate per cent. without mentioning the amount of the tax.

In *Harwood v. Brownell*, 48 Iowa 657, it was held that the validity of a tax does not depend upon its extension on the tax books in the year in which it was voted, and the failure to extend it does not prevent it from being afterwards entered as an unpaid tax of a former year. See also *Robbins v. Barron*, 33 Mich. 124.

Where the legislature authorizes the collection of a tax, but authorizes no one to extend the tax upon the tax list, the intention that such duty should be performed by the clerk of the board of supervisors, will be implied. *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57.

2. *Seymour v. Peters*, 67 Mich. 415; *Barke v. Early*, 72 Iowa 273; *Hooper v. Sac County Bank*, 72 Iowa 280; *Moon v. March*, 40 Kan. 58; *State v. Perkins*, 24 N. J. L. 409; *Bellinger v. Gray*, 51 N. Y. 610; *St. Louis, etc., R. Co. v. State*, 47 Ark. 323.

In *Thatcher v. People*, 79 Ill. 595, it was held that such failure does not af-

formance of this duty cannot be delegated, but must be performed by, or under the supervision of, the body or officer upon whom it is imposed.<sup>1</sup>

*d. AUTHENTICATION AND RETURN*—(1) *The Authentication*.—The provisions made by statute for the authentication of the assessment roll or list must be substantially complied with. An assessment may be invalidated by the failure of the assessor to annex his certificate<sup>2</sup> in the manner provided, or to verify by oath,<sup>3</sup> or to sign<sup>4</sup> the roll as required.

The formalities prescribed for the manner of making the oath

fect the substantial justice of the tax, and cannot defeat its collection.

A tax is collectible, notwithstanding the fact that the date fixed by law for assessment renders impossible a compliance with the formal requirements of the statute, respecting the manner in which the tax should be extended upon the tax list. *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57.

1. *People v. Hagadorn*, 104 N. Y. 516; *State v. Harper*, 11 Mo. App. 301.

The duty is judicial in its nature. *Beltinger v. Gray*, 51 N. Y. 610; *People v. Hagadorn*, 104 N. Y. 516.

It is presumed that taxes were placed upon the duplicate by the proper officer. *Adams v. Davis*, 109 Ind. 10.

The board authorized to make the extension must act as a body, and not as individuals. *People v. Wemple*, 67 Hun (N. Y.) 495.

But computing the amount, where the rate of tax is fixed by law, or otherwise, is a mere ministerial act which may be performed by anyone. *State v. Maginnis*, 26 La. Ann. 558; *Philadelphia, etc., R. Co. v. Com.*, 104 Pa. St. 86; *Heft v. Gephart*, 65 Pa. St. 510.

2. *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Matter of Cameron*, 50 N. Y. 502; *People v. Adams* (Supreme Ct.), 10 N. Y. Supp. 295; *Westfall v. Preston*, 49 N. Y. 349; *Kelly v. Craig*, 5 Ired. (N. Car.) 129; *Norridgewock v. Walker*, 71 Me. 181; *Newkirk v. Fisher*, 72 Mich. 113; *Alger v. Curry*, 38 Vt. 382; *Reed v. Chandler*, 32 Vt. 285; *Rowe v. Hullett*, 50 Vt. 637; *Lamb v. Farrell*, 21 Fed. Rep. 5.

3. *Bradley v. Ward*, 58 N. Y. 101; *People v. Suffern*, 68 N. Y. 323; *Beltinger v. Gray*, 51 N. Y. 610; *McNish v. Perrine*, 14 Neb. 582; *Morrill v. Taylor*, 6 Neb. 236; *Maxwell v. Paine*, 53 Mich. 32; *State v. Schooley*, 84 Mo. 451; *State v. Cook*, 82 Mo. 185; *Walker v. Burlington*, 56 Vt. 121; *Tunbridge*

*v. Smith*, 48 Vt. 648; *Iverslie v. Spaulding*, 32 Wis. 394; *Jarvis v. Silliman*, 21 Wis. 600; *Marshall v. Benson*, 48 Wis. 558; *Griggs v. St. Croix County*, 20 Fed. Rep. 341.

An oath executed by a former assessor who had made the valuation, and who was succeeded by another before the book was filled out, was insufficient. *Bode v. New England Invest. Co.*, 6 Dakota 499.

When the *quinquennial* appraisal of real estate is not sworn to by the listers, a subsequent annual list verified according to the provisions of the statute, does not cure the defect. *Houghton v. Hall*, 47 Vt. 333.

In *Wisconsin*, an attempt upon the part of the legislature to make the omission of the affidavit of no effect, declaring the requirement of the affidavit to be merely directory, was held to be invalid as an unauthorized intrusion upon the judicial functions. *Plumer v. Marathon County*, 46 Wis. 177; *Tierney v. Union Lumbering Co.*, 47 Wis. 248; *Marshall v. Benson*, 48 Wis. 565; *Scheiber v. Kaehler*, 49 Wis. 301; *Power v. Kindschi*, 58 Wis. 539; 46 Am. Rep. 652.

**Impossibility.**—The rule of the statute cannot be relaxed by showing that compliance with it is impossible. *Marsh v. Clark County*, 42 Wis. 502.

*Mandamus* will not lie to compel assessors to make oath to their assessment rolls, as prescribed by statute, that they estimated the value of the real estate at the true and full value thereof, when it appears that they have estimated it at less than its full value. *People v. Fowler*, 55 N. Y. 252.

4. *Smith v. Hard*, 61 Vt. 469; *Bartlett v. Wilson*, 59 Vt. 23; *Sullivan v. Peckham*, 16 R. I. 525; *Goddard v. Seymour*, 30 Conn. 394.

The signing of a warrant, inserted at the end of the tax bill, was not sufficient

or affidavit should be complied with.<sup>1</sup> The requirement to certify necessitates a written certificate.<sup>2</sup>

Omissions of material parts, or departures from the form of the affidavits or certificates prescribed by statute, will render the assessment invalid.<sup>3</sup> But defects in, or the omission of, the authentication do not necessarily render the tax invalid.<sup>4</sup> To entitle the taxpayer to relief in equity, he must show that the

in *Foxcroft v. Nevens*, 4 Me. 72. Nor was it sufficient on a leaf of the same book containing the assessment. Without a separate signature, the assessment is imperfect and invalid. *Colby v. Russell*, 3 Me. 227.

But in *Lowe v. Weld*, 52 Me. 588, it was held that the commitments subscribed by the assessors, prefixed to and incorporated with the lists in the collector's book and specifically referring to them, were a sufficient authentication of the list and compliance with the essential requirements of the statute that the assessors should make perfect lists under their hands, etc. *Norridgewock v. Walker*, 71 Me. 181.

1. *Painter v. Hall*, 75 Ind. 208; *Whitney v. Thomas*, 23 N. Y. 281.

When the affidavit of the assessors was required to be made before a justice of the peace, the deputy county clerk had no authority to administer it. *National Bank v. Elmira*, 53 N. Y. 40. But now in *New York*, under ch. 83, Laws of 1884, the affidavit may be made before any officer authorized to administer oaths. See *Kent v. Warner*, 47 Hun (N. Y.) 474.

2. *O'Donnell v. McIntyre*, 37 Hun (N. Y.) 615.

The requirement is not satisfied by parol evidence of the clerk to the board that he has made entry of the assessment by the direction of the assessors. *Hagood v. Thompson*, 18 S. Car. 583.

In *Nevada*, there is no particular form required for the certificate, and it is not required to be sworn. *State v. Western Union Tel. Co.*, 4 Nev. 338.

3. *Inman v. Coleman*, 37 Hun (N. Y.) 170; *Merritt v. Port Chester*, 71 N. Y. 309; 27 Am. Rep. 47; *Shattuck v. Bascom*, 105 N. Y. 39; *Brevoort v. Brooklyn*, 89 N. Y. 128.

Where it was required that the supervisor's certificate should state that the property was estimated at "its true cash value and not at the price it would sell for at a forced or auction sale," it was a fatal defect to state "at a fixed or at auction sale," *Paldi v. Paldi*, 84 Mich. 346; or "at what is believed to be the cash

value, as is customary by assessors," *Hurd v. Raymond*, 50 Mich. 369; or simply "at its true value," *Hogelskamp v. Weeks*, 37 Mich. 422; *Clark v. Crane*, 5 Mich. 151; 71 Am. Dec. 776; *Dickison v. Reynolds*, 48 Mich. 158; or to omit to state "at the true cash value," *Westbrook v. Miller*, 64 Mich. 129; or the clause "not at the price it would sell for at a forced or auction sale," *Silsbee v. Stockle*, 44 Mich. 562; *St. Clair v. Leamet*, 51 Mich. 343; or the words "at the price it would sell for," *Gilchrist v. Dean*, 55 Mich. 244.

The omission of the words "full and true," or the substitution of the word "knowledge" for "judgment," required in an affidavit, was a fatal defect. *Hinckly v. Cooper*, 22 Hun (N. Y.) 253.

And where it should state that the estimate of real estate should be at what was decided to be the true and full value thereof, it was a fatal defect to say instead "a fair proportionate value," etc. *Beach v. Hayes*, 58 How. Pr. (N. Y. Supreme Ct.) 17.

A failure to state in the certificate that each valuation "is the full value which could ordinarily be obtained," as required, was a fatal defect. *Scheiber v. Kaehler*, 49 Wis. 291; *Plumer v. Marathon County*, 46 Wis. 163.

**Use of Original Form When Amended by Statute.**—Failure to make a certificate originally required, conform to an amended form, did not invalidate the roll. *Darmstaetter v. Moloney*, 45 Mich. 921. See also *Crooks v. Whitford*, 47 Mich. 283. In *Sherrill v. Hewitt*, 13 N. Y. Supp. 498; 59 Hun (N. Y.) 619, where a certain form was prescribed, but subsequently amended by striking out the words "and at which they would appraise the same in payment of a just debt due from a solvent debtor," and also the words "and true" before "value thereof," it was held that a verification in the original form was sufficient. See also *People v. Jones*, 106 N. Y. 330.

4. *Wisconsin Cent. R. Co. v. Lincoln County*, 67 Wis. 478; *Fifield v. Marinette County*, 62 Wis. 532; *Marsh v.*



tax is unequal and unjust, and must offer to pay the sum which in justice and equity he ought to pay.<sup>1</sup>

In some states, these provisions are held to be merely directory.<sup>2</sup> And in all cases a substantial compliance is all that is required, and mere informalities in the manner of attaching the certificate, or of signing the roll, are not fatal.<sup>3</sup> Unless otherwise provided, a verification of a majority of the assessors is sufficient.<sup>4</sup> Provisions as to the time when the verification shall be made, are generally held to be directory.<sup>5</sup>

Clark County, 42 Wis. 317; Equalization Board v. Land Owners, 51 Ark. 516; Challiss v. Atchison County, 15 Kan. 49; Wood v. Helmer, 10 Neb. 65; Farrington v. New England Invest. Co., 1 N. Dak. 102; Bode v. New England Invest. Co., 6 Dakota 499; Frost v. Flick, 1 Dakota 137. And see Shoup v. Central Branch, etc., R. Co., 24 Kan. 547.

1. Wisconsin Cent. R. Co. v. Lincoln County, 67 Wis. 478; Fifield v. Marinette County, 62 Wis. 532.

2. Moore v. Turner, 43 Ark. 243; Odiorne v. Rand, 59 N. H. 504; Smith v. Bradley, 20 N. H. 117; State v. Metz, 31 N. J. L. 378; Bath v. Whitmore, 79 Me. 188. See Hart v. Smith, 44 Wis. 213.

In Stell v. Watson (Ark. 1889), 11 S. W. Rep. 822, the failure of the assessor to attach the required oath, was no ground for an injunction against the county clerk enjoining him from extending the assessment on the tax book.

In Mississippi, these requirements are held to be directory and not mandatory, in the sense that failure to observe them will annul the subsequent proceedings. Chesnut v. Elliott, 61 Miss. 569; Powers v. Penny, 59 Miss. 5; Wolfe v. Murphy, 60 Miss. 1.

In Pennsylvania, under an act providing that no alleged irregularity in the assessment process, or otherwise, shall be construed or taken to affect the title of the purchaser, the omission of the assessor's signature from the assessment roll did not invalidate the sale. Townsen v. Wilson, 9 Pa. St. 270.

3. Parish v. Golden, 35 N. Y. 462.

It is not necessary to state in the lister's oath every detail of official duty. Brock v. Bruce, 58 Vt. 261.

A failure to state in a certificate that the roll contained a statement of exempt property, was not a jurisdictional defect. Buffalo, etc., R. Co. v. Erie County, 48 N. Y. 93.

If the oath has been actually made at the proper time and filed with the

assessment roll as a part thereof, it is not necessary that it be actually attached. McClure v. Warner, 16 Neb. 447; Lynam v. Anderson, 9 Neb. 375.

When the list or roll is in divisions, the oath is sufficient when merely attached to one. Hallo v. Helmer, 12 Neb. 87. The omission of the official title of the assessor after his signature to the oath, is a mere irregularity. Shoup v. Central Branch, etc., R. Co., 24 Kan. 547. In Bradford v. Randall, 5 Pick. (Mass.) 497, one seal affixed to the signature of the assessors to a warrant concluding with "given under our hands," omitting "and seals," was held valid.

**Clerical Errors.**—An error in the date of the affidavit to the assessment which is shown to be made on the proper day, will be disregarded. State v. Hurt, 113 Mo. 90.

4. Marshall v. Benson, 48 Wis. 558; Johnson v. Goodridge, 15 Me. 29. See also Bangor v. Lancey, 21 Me. 472; Foxcroft v. Nevens, 4 Me. 72; Colby v. Russell, 3 Me. 227.

But a signing by one, when there are three duly qualified assessors, is not sufficient. Belfast Sav. Bank v. Kennebec Land, etc., Co., 73 Me. 404.

**The Duty to Certify Cannot Be Delegated.**—The duty of passing upon the question of a corrected assessment roll, and certifying to its accuracy and completeness as a perfected roll, is a judicial duty which cannot be delegated. Bellinger v. Gray, 51 N. Y. 610; People v. Hagadorn, 104 N. Y. 522.

5. Rowe v. Hulett, 50 Vt. 637.

But in State v. Phillips, 102 Mo. 664, it was held that the assessor could not make his affidavit to the roll after the expiration of his term of office.

In New York, the tax assessors may verify the assessment roll after it has been delivered to the supervisors, though it has not been acted upon by them. People v. Jones, 106 N. Y. 330. But the verification cannot be made

The defects or irregularities arising from failure to comply with statutory requirements may be cured, when the proceedings are otherwise valid, by subsequent enactments,<sup>1</sup> and, it has been held, by amendment.<sup>2</sup> And, in the absence of evidence, it will be presumed that the proper authentication has been made.<sup>3</sup>

(2) *The Return*.—After the completion and authentication of the assessment, it is required to be returned to some officer or body designated by law, either for inspection and correction,<sup>4</sup> or for the enforcement of the tax.<sup>5</sup> The return in the manner prescribed by law is essential to the validity of the tax.<sup>6</sup> But provisions as to the time of making the return are usually held to be directory, and failure to comply therewith will not affect the

until all the work of the assessors has been completed. *Westfall v. Preston*, 49 N. Y. 349; *Van Rensselaer v. Witbeck*, 7 N. Y. 517.

Verification before the hearing of complaints and the making of necessary changes, is a nullity. *Smith v. Mosher* (Supreme Ct.), 9 N. Y. Supp. 786.

1. *Matter of East Ave. Baptist Church* (Supreme Ct.), 11 N. Y. Supp. 113; *Matter of Byrnes* (Supreme Ct.), 11 N. Y. Supp. 113; *Smith v. Hard*, 61 Vt. 469. See also *Kent v. Warner*, 47 Hun (N. Y.) 474.

If the thing wanting or omitted constitutes the defect, or the defect is something the necessity for which the legislature might have dispensed with by prior statute, or if something has been done, or done in a particular way, which the legislature might have made immaterial, the omission or irregularity may be cured by a subsequent statute. Where an assessment roll was not signed as required, but the certificate which was written upon the roll itself and which referred to it, was signed, the defect was not jurisdictional. *Ensign v. Barse*, 107 N. Y. 329.

2. *Supplementary List*.—In *Bangor v. Lancey*, 21 Me. 472, it was held that an assessment list returned without an authentication, could be cured by a supplementary list afterwards filed. And see *Bath v. Whitmore*, 79 Me. 188.

*Reassessment*.—The absence of the assessor's affidavit to the assessment roll is merely *prima facie* evidence of the inequality or injustice of the assessment, and does not prevent the roll being used or adopted as a basis of reassessment. *Bass v. Fond du Lac County*, 60 Wis. 516.

3. *Silsbee v. Stockle*, 44 Mich. 565; *Upton v. Kennedy*, 36 Mich. 215; *Brock v. Bruce*, 58 Vt. 266.

And the burden of proof is on him who asserts the defect or irregularity. *Sherrill v. Hewitt*, 13 N. Y. Supp. 498; 59 Hun (N. Y.) 619; *Kellar v. Savage*, 20 Me. 199.

It will not be presumed that because the copy of the roll upon which the tax is extended has no certificate copied upon it, that the original roll was not properly authenticated. *Bird v. Perkins*, 33 Mich. 28.

4. See *Ferton v. Feller*, 33 Mich. 203; *Norridgewock v. Walker*, 71 Me. 181; *Clark v. Norton*, 49 N. Y. 245; *Sullivan v. Peckham*, 16 R. I. 525; *Smith v. Hard*, 61 Vt. 469; *Howard v. Shumway*, 13 Vt. 358.

The assessor who keeps the books and papers, and does the writing, will be considered the principal assessor within a provision requiring lists of assessment to be deposited with the chairman, or principal assessor, for general examination. *Sprague v. Bailey*, 19 Pick. (Mass.) 436.

5. See *Sullivan v. Peckham*, 16 R. I. 525; *People v. Burhans*, 25 Hun (N. Y.) 186.

6. *Blossom v. Cannon*, 14 Mass. 177; *Lawrence v. Zimpleman*, 37 Ark. 643; *Smith v. Hard*, 61 Vt. 469.

But in *Norridgewock v. Walker*, 71 Me. 181, it was held that the failure to return the list or a copy of it to the officer, as required, will not invalidate an assessment if the town could prove an assessment regularly made in the hands of the assessors by other legal evidence. And in *Smith v. Bradley*, 20 N. H. 117, where the return was to be made after the warrant was delivered to the collector, failure to make the return did not affect the validity of the assessment.

In *Brigins v. Chandler*, 60 Miss. 862, it was not necessary to the validity of an assessment that the roll should have

validity of the assessment;<sup>1</sup> although, in some cases, when such provisions are designed for the benefit of the taxpayer, they are deemed to be mandatory, and a strict compliance therewith is essential to the validity of the tax.<sup>2</sup>

The failure to make the return within the time required, when it is held to be imperative, cannot be cured by subsequent legislation.<sup>3</sup>

Until the official entry of his determination as to the amount to be levied against the individual is made, the assessor may revise his opinions as to values, deductions, and other matters involved in the assessment.<sup>4</sup> But when deposited with the proper authority as required, the assessor has no longer any

been actually filed, if it was delivered to the clerk of the court within the time required.

1. *Pacific R. Co. v. Franklin County*, 57 Mo. 223; *Breeze v. Haley*, 10 Colo. 5; *Moore v. Turner*, 43 Ark. 244; *Anderson v. Mayfield* (Ky. 1892), 19 S. W. Rep. 598; *State v. Western Union Tel. Co.*, 4 Nev. 338; *State v. Northern Belle Mill, etc., Co.*, 15 Nev. 385; *Oswego County v. Betts* (Supreme Ct.), 6 N. Y. Supp. 934; *People v. Adams*, 125 N. Y. 471; *People v. Haupt*, 104 N. Y. 377; *Bradley v. Ward*, 58 N. Y. 401; *People v. Jones*, 43 Hun (N. Y.) 131; *Rome, etc., R. Co. v. Smith*, 39 Hun (N. Y.) 332; *O'Neil v. Tyler* (N. Dak. 1892), 53 N. W. Rep. 434; *Russel v. Werntz*, 24 Pa. St. 337; *Waddingham v. Dickson* (Colo. 1892), 29 Pac. Rep. 177; *Burlington, etc., R. Co. v. Saline County*, 12 Neb. 396.

In *Illinois*, a revenue law provides that no assessment shall be invalid because the assessment rolls are not completed or returned within the time allowed. See *St. Louis Bridge Co. v. People*, 128 Ill. 422; *Buck v. People*, 78 Ill. 566; *Chiniquy v. People*, 78 Ill. 570; *Wright v. People*, 87 Ill. 582; *Furrington v. People*, 79 Ill. 11. Formerly it was necessary to return the roll within the time required. See *Billings v. Detten*, 15 Ill. 219; *Marsh v. Chestnut*, 14 Ill. 223; *Sanderson v. La Salle*, 57 Ill. 441.

**Presumptions.**—Upon failure to show the time when the roll was filed, it will be presumed to have been filed within the time prescribed by law after *prima facie* proof of the validity of the assessment. *Grayson v. Richardson*, 65 Miss. 222. It will be presumed to have been filed on the day of the date of the affidavit attached to it. *Moore v. Turner*, 43 Ark. 243.

Failure to find the assessment roll in the office where the law requires it to be kept, does not establish the fact that it was not regularly filed there. *Joyner v. Harrison*, 56 Ark. 276.

2. *Breeze v. Haley*, 10 Colo. 5; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Greene v. Lunt*, 58 Me. 518; *Stovall v. Conner*, 58 Miss. 138; *Mitchum v. McInnis*, 60 Miss. 945; *Pearce v. Perkins*, 70 Miss. 267; *Snell v. Fort Dodge*, 45 Iowa 564; *Ayers v. Moulton*, 51 Vt. 115; *Frost v. Flick*, 1 Dakota 131. So the failure to return the list within the time required to give an owner opportunity to appeal therefrom, renders void a sale of the property. *Watson v. Campbell*, 56 Ark. 184.

3. *Marsh v. Chestnut*, 14 Ill. 223. In *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550, a statute of *Connecticut* which provided that "when the assessors have neglected or omitted to return an abstract of the assessment list to the town clerks within a specified time, such list shall not be adjudged void, but that all taxes laid upon them may be levied and collected," referred exclusively to taxes not levied or collected, and was not given a retrospective effect.

4. *State v. Silvers*, 41 N. J. L. 505; *People v. Stockton, etc., R. Co.*, 49 Cal. 414; *People v. Wilson* (B'klyn City Ct.), 7 N. Y. Supp. 627. And see *Matter of Schell*, 16 Hun (N. Y.) 283; *San Luis Obispo County v. White*, 91 Cal. 432.

In *State v. Williamson*, 33 N. J. L. 77, it was held that after the assessor has properly assessed real estate in the name of the owner, he is not obliged to substitute the name of a subsequent owner, even though requested to do so, before the time to complete the assessment has expired.

In *Re Williamson*, 11 Pa. Co. Ct. Rep. 235, it was held that a tax which is too

power to add to or alter the assessment roll; his authority over it is terminated.<sup>1</sup>

**5. Conclusiveness and Effect.**—Where the assessors have jurisdiction both of the person and of the subject-matter, *i. e.*, the property assessed, their acts partake of a judicial character;<sup>2</sup> and though their determinations may be subject to appeal or review,<sup>3</sup> they cannot be attacked collaterally.<sup>4</sup> And their acts, like those

low may be raised at any time before the tax is paid, and if this is done after the taxpayer's death, the corrected tax may be allowed as a claim against his estate.

Under the *Iowa* statutes, the auditor has power to correct the tax books after they are placed in the hands of the county treasurer. *Ridley v. Doughty* (Iowa, 1892), 52 N. W. Rep. 350.

1. *Pratt v. Stiles*, 17 How. Pr. (N. Y.) 211; *O'Donnell v. McIntyre*, 37 Hun (N. Y.) 615; *Sullivan v. Peckham*, 16 R. I. 525; *People v. Westchester County*, 15 Barb. (N. Y.) 607; *Colonial L. Assurance Co. v. New York County*, 24 Barb. (N. Y.) 166; *People v. Greene County*, 12 Barb. (N. Y.) 217; *People v. Forrest*, 96 N. Y. 544; *Clark v. Norton*, 49 N. Y. 245; *State v. Manhattan Silver Min. Co.*, 4 Nev. 318; *Johnson v. Malloy*, 74 Cal. 430; *Gibbins v. Adamson*, 44 Kan. 203; *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206. And see *State v. Covington*, 35 S. Car. 245; *Sullivan v. Peckham*, 16 R. I. 525; *Downing v. Roberts*, 21 Vt. 441.

In *Bellows v. Weeks*, 41 Vt. 590, it was held that alterations in a tax list, made by persons other than the listers, after it is deposited in the town clerk's office, do not render it void; it remains legal and valid as originally made and deposited. See also *Willard v. Pike*, 59 Vt. 202.

In Justice's Opinion, 18 Pick. (Mass.) 575, the rule was laid down that after any general assessment of a tax has been made by the assessors, and committed to the proper officer for collection, and before another tax is committed to the assessor to assess, they have no authority to assess any tax on any person for any purpose.

2. *Williams v. Weaver*, 75 N. Y. 30; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Brown v. Smith*, 24 Barb. (N. Y.) 419; *Vail v. Owen*, 19 Barb. (N. Y.) 22; *Clark v. Norton*, 49 N. Y.

243; *Fensenthal v. Johnson*, 104 Ill. 21; *St. Louis Mut. L. Ins. Co. v. Charles*, 47 Mo. 462; *Farrington v. New England Invest. Co.*, 1 N. Dak. 102; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Wilson v. Marsh*, 34 Vt. 352; *Fairbanks v. Kittredge*, 24 Vt. 9; *Boody v. Watson*, 64 N. H. 162.

If assessors are bound to notify and hear parties, and can decide only after hearing and considering such evidence and arguments as the parties choose to lay before them, their action is judicial. *Sanborn v. Fellows*, 22 N. H. 473.

In *Auditor v. Atchison*, etc., R. Co., 6 Kan. 500; 7 Am. Rep. 575, it was held that the action of assessors in making an assessment is legislative and not judicial.

3. See *infra*, this title, *Equalization and Review*.

4. See *Mygatt v. Washburn*, 15 N. Y. 321; *Williams v. Weaver*, 75 N. Y. 30; *National Bank v. Elmira*, 53 N. Y. 53; *McLean v. Jephson*, 123 N. Y. 142; *People v. Davenport*, 91 N. Y. 574; *People v. Wemple*, 138 N. Y. 582; *Spencer v. People*, 68 Ill. 510; *People v. Lots in Ashley*, 122 Ill. 297; *Wabash*, etc., R. Co. v. *Drainage Com'rs*, 134 Ill. 384; *Com. v. New England Slate*, etc., Co., 3 Allen (Mass.) 391; *Union Invest. Co. v. Harrison County*, 67 Miss. 614; *State v. Hunter*, 98 Mo. 386; *Miller v. Hurford*, 13 Neb. 13; *State v. Metz*, 31 N. J. L. 365; *State v. Platt*, 24 N. J. L. 108; *Fuller v. Elizabeth*, 42 N. J. L. 427; *State v. Bettle*, 50 N. J. L. 132; *Taylor v. Moore*, 63 Vt. 60; *State v. Ocean Tp.*, 39 N. J. L. 75; *Camden v. Mulford*, 26 N. J. L. 49; *Den v. Carron*, 26 N. J. L. 228; *State v. Vanarsdale*, 42 N. J. L. 536; *Wagoner v. Loomis*, 37 Ohio St. 571. And see *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Henry v. Chester*, 15 Vt. 460; *Wilson v. Marsh*, 34 Vt. 352; *Bullock v. Guilford*, 59 Vt. 516; *Green Bay*, etc., Canal Co. v. *Outagamie County*, 76 Wis. 587; *Stanley v. Albany County*, 121 U. S. 535.

One who can obtain a reversal of an assessment, in a direct proceeding, can-

of all public officers, are presumed to be valid and correct until the contrary is made to appear.<sup>1</sup>

The tax will not be set aside for mere irregularities and informalities in the assessment upon which it is levied,<sup>2</sup> but if wrong

not impeach it collaterally on account of the error. *Boody v. Watson*, 64 N. H. 162.

1. *People v. Collison* (Supreme Ct.), 6 N. Y. Supp. 711; *Oswego County v. Betts*, 6 N. Y. Supp. 934; 53 Hun (N. Y.) 638; *People v. McComber* (Supreme Ct.), 7 N. Y. Supp. 71; *Hartwell v. Root*, 19 Johns. (N. Y.) 345; 10 Am. Dec. 232; *Matter of Voorhis*, 90 N. Y. 668; *People v. Davenport*, 91 N. Y. 574; *Perry County v. Selma*, etc., R. Co., 65 Ala. 390; *State Auditor v. Jackson County*, 65 Ala. 142; *Palmer v. Boling*, 8 Cal. 384; *Linton v. Athens*, 53 Ga. 588; *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *Beers v. People*, 83 Ill. 488; *Buck v. People*, 78 Ill. 560; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *Adams v. Davis*, 109 Ind. 10; *Silcott v. McCarty*, 62 Iowa 161; *Snell v. Fort Dodge*, 45 Iowa 564; *Beeson v. Johns*, 59 Iowa 166; *Francis v. Atchison*, etc., R. Co., 19 Kan. 316; *Oteri v. Parker*, 42 La. Ann. 374; *New Orleans v. New Orleans Canal*, etc., Co., 29 La. Ann. 851; *New Orleans v. Louisiana Sav. Bank*, 31 La. Ann. 826; *State v. Louisiana Sav. Bank*, 32 La. Ann. 1136; *Blossom v. Cannon*, 14 Mass. 177; *Blackwood v. Van Vliet*, 30 Mich. 118; *Yelverton v. Steele*, 36 Mich. 62; *Stockle v. Silsbee*, 41 Mich. 615; *Hunt v. Chapin*, 42 Mich. 25; *Perkins v. Nugent*, 45 Mich. 157; *Cuming v. Grand Rapids*, 46 Mich. 150; *St. Peter's Church v. Scott County*, 12 Minn. 395; *Thompson v. Tinkcom*, 15 Minn. 297; *Brigins v. Chandler*, 60 Miss. 862; *Miller v. Hurford*, 13 Neb. 13; *Dewey v. Stratford*, 42 N. H. 282; *State v. Pierson*, 47 N. J. L. 247; *State v. Hawkins*, 50 N. J. L. 122; *Newark v. State*, 32 N. J. L. 453; *State v. Manning*, 41 N. J. L. 275; *Farrington v. New England Invest. Co.*, 1 N. Dak. 102; *Louisville*, etc., R. Co. v. State, 8 Heisk. (Tenn.) 663; *McComber v. Center*, 44 Vt. 235; *Canfield v. Bayfield County*, 74 Wis. 60; *State v. Manitowoc County Clerk*, 59 Wis. 15.

In the matter of the assessment of taxes by municipal corporations, the intendments are less liberal. *State Auditor v. Jackson County*, 65 Ala. 142.

It is unnecessary to adduce evidence

to justify an assessment apparently legally made; it stands until it is shown to be erroneous by satisfactory proof. *Merchants' Mut. Ins. Co. v. Board of Assessors*, 40 La. Ann. 371.

An assessment roll is not to be pronounced invalid and a tax sale void because, many years afterwards, an error appears in the copy, the original being lost. *Chamberlain v. Taylor*, 36 Hun (N. Y.) 24.

The burden of proof is on the taxpayer to establish a charge of illegality. *Oteri v. Parker*, 42 La. Ann. 374; *Macomber v. Center*, 44 Vt. 235.

But in *Bate v. Speed*, 10 Bush (Ky.) 644, it is said that where the action of the ministerial and judicial officers whose duty it is to impose a tax, is called directly in question by the taxpayers, and their authority and jurisdiction denied, no presumption is indulged that the tax was legally imposed.

2. *Avant v. Flynn* (S. Dak. 1891), 49 N. W. Rep. 15; *San Francisco*, etc., R. Co. v. State Board of Equalization, 60 Cal. 12; *South Platte Land Co. v. Crete*, 11 Neb. 344. And see *Sioux City*, etc., R. Co. v. Osceola County, 45 Iowa 168; *Cedar Rapids*, etc., R. Co. v. Carroll County, 41 Iowa 153; *Smith v. Leavenworth County*, 9 Kan. 296; *Missouri River*, etc., R. Co. v. Morris, 7 Kan. 210; *Missouri River*, etc., R. Co. v. Blake, 9 Kan. 489; *Wood v. McGuire* (Supreme Ct.), 17 N. Y. Supp. 659; *Hayford v. Belfast*, 69 Me. 63; *Rogers v. Greenbush*, 58 Me. 390; 4 Am. Rep. 292; *Gilman v. Waterville*, 59 Me. 491; *State v. Runyon*, 41 N. J. L. 98; *State v. Cook*, 32 N. J. L. 347; *State v. Saalman*, 37 N. J. L. 156; *Beers v. People*, 83 Ill. 488; *Fisher v. People*, 84 Ill. 491; *Atkins v. Hinman*, 7 Ill. 451; *Henry v. Chester*, 15 Vt. 460; *Downing v. Roberts*, 21 Vt. 441; *Sawyer v. Gleason*, 59 N. H. 140; *George v. Dean*, 47 Tex. 73; *State v. Bishop*, 34 N. J. L. 45; *Com. v. New England Slate*, etc., Co., 13 Allen (Mass.) 391; *Wilson v. Weber*, 66 Ill. 454; *Wabash*, etc., R. Co. v. *People*, 138 Ill. 367; *Hixon v. Oneida County*, 82 Wis. 515.

So an injunction will not lie to prevent the collection of the revenues of a municipality for mere irregularities in the assessment. *Covington v. Rock-*

in principle, or based upon an erroneous application of the law, it cannot be upheld;<sup>1</sup> and an unauthorized rule of valuation,<sup>2</sup> or fraud in the assessment, invalidates the tax and all proceedings thereunder.<sup>3</sup>

**6. Liability of Assessors.**—The assessors are personally liable for all injuries resulting from assessments made in the absence of jurisdiction,<sup>4</sup> and for failure to perform, or the improper performance of, duties which are ministerial.<sup>5</sup> So if they err in deter-

ingham, 93 N. Car. 134. And see *Wilson v. Wheeler*, 55 Vt. 446.

An assessment of land as timber land, where timber has been recently cut, will not vitiate the tax. *Boorman v. Juneau County*, 76 Wis. 550. See also *supra*, this title, *The Roll; Form and Contents Generally*.

1. *People v. McComber* (Supreme Ct.), 7 N. Y. Supp. 71; *McLean v. Jephson*, 123 N. Y. 142; *People v. Davenport*, 91 N. Y. 574. And see *People v. Wemple*, 138 N. Y. 582.

The question as to whether persons or property are assessable, is a jurisdictional one and always open to inquiry when the authority to make the assessment is assailed. *McLean v. Jephson*, 123 N. Y. 142.

Nor is an assessment conclusive as to the place of residence of the person assessed. *Preston v. King*, 61 Vt. 606.

2. *Goff v. Outagamie County*, 43 Wis. 55; *Hersey v. Barron County*, 37 Wis. 75; *Marsh v. Clark County*, 42 Wis. 502; *Schettler v. Fort Howard*, 43 Wis. 48; *Salscheider v. Fort Howard*, 45 Wis. 519; *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1.

In *People v. Haren* (Supreme Ct.), 3 N. Y. Supp. 86, it was held that if the assessors disregard a decision of the court in a similar case in relation to the valuation of property, they are chargeable personally with the costs of an appeal from an order reducing the valuation fixed by them; and in *People v. Carter*, 119 N. Y. 557, that where there has been a judicial determination fixing the value of land at the sum assessed for several preceding years, the former adjudications are binding and conclusive upon *certiorari* to review the assessment, in the absence of evidence of some change affecting the value.

3. See *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535; *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *English v. People*, 96 Ill. 566; *People v. Lots in Ashley*, 122 Ill. 297.

The fact that the assessment is much larger than the one for the preceding year, does not establish fraud, especially where the preceding assessment was less than the cost of the property. *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627.

4. *Williams v. Weaver*, 75 N. Y. 30; *National Bank v. Elmira*, 53 N. Y. 53; *Obering v. Foote*, 65 N. Y. 263; *Dorn v. Backer*, 61 N. Y. 261; *Clark v. Norton*, 49 N. Y. 243; *Herriman v. Stowers*, 43 Me. 497; *Dickinson v. Billings*, 4 Gray (Mass.) 42; *Little v. Merrill*, 10 Pick. (Mass.) 543; *Judd v. Thompson*, 125 Mass. 553. And see *Ford v. McGregor*, 20 Nev. 446; *Whitmore v. McGregor*, 20 Nev. 451.

Persons acting as assessors, without having been legally elected, are liable for the acts of the collector to whom they have issued a warrant. *Allen v. Archer*, 49 Me. 346.

The burden of proof of the facts necessary to establish their jurisdiction, rests with the assessors when they are sought to be held personally liable for acts done under color of their office. *Dickinson v. Billings*, 4 Gray (Mass.) 42.

5. *Stearns v. Miller*, 25 Vt. 20; *Kellogg v. Higgins*, 11 Vt. 240; *Henry v. Edson*, 2 Vt. 497; *Howard v. Shumway*, 13 Vt. 358; *Fairbanks v. Kittredge*, 24 Vt. 9.

The taxpayer is entitled to an action for damages sustained, but not to recover his money back. *Hayford v. Belfast*, 69 Me. 63; *Gilman v. Waterville*, 59 Me. 491.

Where a highway tax which is worked out or paid, is required to be placed in the next assessment, if the assessor fails to do so and places it in a subsequent assessment, an action will lie therefor against him. *Eames v. Johnson*, 4 Allen (Mass.) 382.

If they transcend the limits of their authority, they cease to act as judges and become responsible for all consequences. *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Brown v. Smith*, 24 Barb.

mining whether a person is a taxable inhabitant of the district, they are liable to an action by the party aggrieved.<sup>1</sup>

But, where exercising discretionary powers, and having jurisdiction of the person taxed and the subject-matter, they are not personally liable when acting in good faith.<sup>2</sup> So they are not liable for mistakes in the valuation of property, except upon proof of

(N. Y.) 419; *Hilton v. Fonda*, 86 N. Y. 340; *Clark v. Norton*, 49 N. Y. 243; *Drew v. Davis*, 10 Vt. 506; 33 Am. Dec. 213.

An assessment or a change in an assessment made after the time within which the assessment is required to be made, renders the assessors liable. *Clark v. Norton*, 49 N. Y. 243; *Westfall v. Preston*, 49 N. Y. 349; *Bennett v. Buffalo*, 17 N. Y. 383; *Mygatt v. Washburn*, 15 N. Y. 316. And see *Overing v. Foote*, 65 N. Y. 263.

If, in assessing a tax, the assessors exceed the sum voted to be raised, they will be liable in trespass to a person whose goods they distrain. *Huse v. Merriam*, 2 Me. 375; *Libby v. Burnham*, 15 Mass. 144.

But in *Easton v. Calendar*, 11 Wend. (N. Y.) 90, it was held that in apportioning a tax, only the sum voted, or otherwise authorized, can be apportioned, but an assessment apportioning the percentages for collection, as well as the tax, was held not to render the assessor liable.

But one cannot maintain an action against assessors for wrongfully placing his name on their rolls, whereby he was compelled to pay a tax, if the assessment had neither been set aside nor reversed, and if the tax was voluntarily paid. *Sexton v. Pepper*, 28 Hun (N. Y.) 31.

**Misinterpretation of the Law.**—In *Lincoln v. Chapin*, 132 Mass. 470, it was held that an assessor was not liable for neglecting to commit the tax list to the collector where he commits it to himself under an erroneous view of the law.

**Liability of Two Members of Board.**—Where two listers of a town, without the consent of the third, do an act which if done by all would subject them to damages, the two may be held liable therefor. *Fuller v. Gould*, 20 Vt. 643.

**Taxpayer's Procurement.**—An erroneous assessment or a non-performance of duty will not subject the assessor, where the error was committed or the omission made at the instance of the taxpayer himself. *Hilton v. Fonda*, 86 N. Y. 352; *Pease v. Whitney*, 8 Mass.

93. But the failure of the taxpayer to appear before the board of equalization and apply for a reduction of his assessment, or the refusal of the board to reduce it, does not excuse the assessor for malicious wrong-doing. *Parkinson v. Parker*, 48 Iowa 667.

1. *People v. Chenango County*, 11 N. Y. 563; *Ware v. Percival*, 61 Me. 391; 14 Am. Rep. 565; *Agry v. Young*, 11 Mass. 220; *Inglee v. Bosworth*, 5 Pick. (Mass.) 498; *Freeman v. Kinney*, 15 Pick. (Mass.) 44.

So they are personally liable for assessing any non-resident for personal property, although the question of non-residence is doubtful. *Dorwin v. Strickland*, 57 N. Y. 493; *Mygatt v. Washburn*, 15 N. Y. 316.

They do not act judicially in deciding whether or not they have jurisdiction. *Prosser v. Secor*, 5 Barb. (N. Y.) 608. Where a farm, which lies in two adjoining towns, is assessed in the town in which the owner and occupant does not reside, the assessment and tax are illegal, and the assessors are personally liable. *Dorn v. Backer*, 61 N. Y. 261. But see *Brown v. Smith*, 24 Barb. (N. Y.) 419.

2. *Williams v. Weaver*, 75 N. Y. 30; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Clark v. Norton*, 49 N. Y. 243; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Stewart v. Case* (Minn. 1893), 54 N. W. Rep. 938; *Wall v. Trumbull*, 16 Mich. 238; *Dillingham v. Snow*, 5 Mass. 547; *Colman v. Anderson*, 10 Mass. 119; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Griffin v. Rising*, 11 Met. (Mass.) 339; *Durant v. Eaton*, 98 Mass. 469; *Odiorne v. Rand*, 59 N. H. 504; *McDaniel v. Tebbetts*, 60 N. H. 497. And see *People v. Reddy*, 43 Barb. (N. Y.) 539; *Vose v. Willard*, 47 Barb. (N. Y.) 320; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Wilson v. Marsh*, 34 Vt. 352; *Fuller v. Gould*, 20 Vt. 643.

In making assessments in all cases where the assessors have jurisdiction, the assessors act judicially. *Buffalo, etc., R. Co. v. Erie County*, 48 N. Y. 105; *Swift v. Poughkeepsie*, 37 N. Y. 511; *Barhyte v. Shepherd*, 35 N. Y. 238.

wrongful or malicious actions;<sup>1</sup> nor for an erroneous decision as to the taxability of property,<sup>2</sup> or what is covered by an exemption;<sup>3</sup> nor will they be held liable for an omission of property from the rolls through an error in judgment.<sup>4</sup>

It would seem that no liability would attach to an assessor on account of the assessment of a tax in pursuance of an unconstitutional statute or an illegal vote of a town;<sup>5</sup> but it has been held otherwise.<sup>6</sup>

**7. Compensation of Assessors.**—Compensation of assessors is governed by the rules generally applicable to public officers, and may be by the payment of a gross sum for a particular service, or period of service,<sup>7</sup> or in the form of a *percentage* on the amount

In *Vail v. Owen*, 19 Barb. (N. Y.) 22, it was held that the inquiries which assessors are required to make pertaining to their assessment, are judicial acts.

1. *Stearns v. Miller*, 25 Vt. 20; *Fairbanks v. Kittredge*, 24 Vt. 9; *Moss v. Cummings*, 44 Mich. 359; *Parkinson v. Parker*, 48 Iowa 667; *Wade v. Matheeson*, 4 Lans. (N. Y.) 158; *Vail v. Owen*, 19 Barb. (N. Y.) 22; *Barhyte v. Shepherd*, 35 N. Y. 238; *State v. Jersey City*, 24 N. J. L. 662; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701.

The overvaluation must have been made with intent to injure. *Ballerino v. Mason*, 83 Cal. 447.

In *Moss v. Cummings*, 44 Mich. 359, it was said that making an assessment on a false valuation should be punished criminally.

2. See *National Bank v. Elmira*, 53 N. Y. 53; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Robinson v. Rowland*, 26 Hun (N. Y.) 501; *Hemingway v. Machias*, 33 Me. 445; *Stickney v. Bangor*, 30 Me. 404; *Colman v. Anderson*, 10 Mass. 105; *Meade v. Haines*, 81 Mich. 261.

3. *Vail v. Owen*, 19 Barb. (N. Y.) 22; *National Bank v. Elmira*, 53 N. Y. 53; *Barhyte v. Shepherd*, 35 N. Y. 238; *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Hayes v. Hanson*, 12 N. H. 284; *Salisbury v. Merrimack County*, 59 N. H. 359.

Where the assessors have jurisdiction to assess the taxpayer for some amount, it is immaterial whether they assess him too high, in consequence of not allowing an exemption, or of an erroneous valuation of his property. *Williams v. Weaver*, 75 N. Y. 30.

Assessors of taxes who act in good faith in refusing to allow an exemption, are not chargeable with the costs of proceedings instituted to enforce it. *People v. Peterson*, 31 Hun (N. Y.) 421.

4. *Dillingham v. Snow*, 5 Mass. 547; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Meade v. Haines*, 81 Mich. 261. But see *Dunham v. Chicago*, 55 Ill. 387.

Assessors are not liable to a parish for neglecting to assess a tax equal to the amount voted, when they act under the honest belief that they are carrying out the views and directions of the parish. *First Parish v. Fisk*, 8 Cush. (Mass.) 264.

5. *Boody v. Watson*, 64 N. H. 162; *Edes v. Boardman*, 58 N. H. 580.

6. *Little v. Merrill*, 10 Pick. (Mass.) 543; *Stetson v. Kempton*, 13 Mass. 271; 7 Am. Dec. 145; *Drew v. Davis*, 10 Vt. 506; 33 Am. Dec. 213.

In *Massachusetts*, assessors were held liable for assessing and issuing a warrant for the collection of a school tax, where the school district was not legally established, even though it was certified to them by one acting as clerk of the school district that the tax had been voted by the district. *Judd v. Thompson*, 125 Mass. 553; *Dickinson v. Billings*, 4 Gray (Mass.) 42.

7. *Harrison v. Com.*, 83 Ky. 162; *Bell v. Arkansas County*, 44 Ark. 493; *State v. Ransom*, 9 S. Car. 199; *State v. Jummel*, 30 La. Ann. 235.

It cannot be intended that an assessor should receive extra compensation because of an accidental and unforeseen necessity of the county, when he performs no additional service on account thereof. *East v. Eichelberger*, 69 Ala. 187.

But persons employed to procure evidence necessary to authorize the assessor to subject omitted property to taxation, are entitled to compensation for their services. *State v. Hagerty*, 5 Ohio Cir. Ct. Rep. 22.

Under the *Arkansas* statute, the assessor is entitled to one dollar, and no more, for assessing lands of non-resi-



of taxes received by the collector in order that each tax may bear the expense of its own collection.<sup>1</sup>

**8. Equalization and Review**—*a.* PROVISION FOR.—Under various state statutes, provision is made for the correction of errors and irregularities committed by assessors in assessing property, and for the equalization of the assessments of the different parts of a taxing district, through boards of equalization or review,<sup>2</sup> for it is as important, as between the several districts of a county or state, that an equalization should be had, as that a separate valuation of estates as between individuals should be had;<sup>3</sup> and all states recognize the necessity of affording an opportunity to the taxpayer of being heard in opposition to an assessment before his liability is definitely fixed.<sup>4</sup>

dents and unknown owners in each township in which there may be any or either. *Bell v. Arkansas County*, 44 Ark. 493.

And in *South Carolina*, warrants for expenses of assessments are payable from the first collection of county funds of the fiscal year for which they were made. See *State v. Ransom*, 9 S. Car. 199.

The board of assessors actually performing the work are entitled to the appropriation made for the compensation of assessors, and not a previous board who were *functi officio* when the work of assessment was done. *State v. Jumel*, 30 La. Ann. 235.

In *Harrison v. Com.*, 83 Ky. 162, a statute allowing the assessor a certain sum for each person's list of taxable property returned, was held to entitle him to that amount for each list returned, whether it embraces property or not.

1. And, although the constitution may require the poll tax to be applied exclusively to a certain purpose, as the school fund, it must bear the expense of its own assessment. *Shaver v. Robinson*, 59 Ala. 195.

In *Alabama*, assessors are entitled only to commissions on taxes levied for general purposes or ordinary current expenses, and not on levies for special purposes. *East v. Eichelberger*, 69 Ala. 187.

2. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Stanley v. Albany County*, 121 U. S. 535; *Wabash, etc., R. Co. v. Drainage Dist.*, 134 Ill. 384; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Comstock v. Grand Rapids*, 54 Mich. 641; *Bath v. Whitmore*, 79 Me. 182; *Flax Pond Water Co. v. Lynn*, 147 Mass. 31; *Spalding v. Hill*, 86 Ky. 656; *Price v. Kramer*, 4 Colo. 546; *Weaver v. State*,

39 Ala. 535; *Wolfe v. Murphy*, 60 Miss. 1; *Smith v. Jones County*, 30 Iowa 531; *Wharton v. Birmingham*, 37 Pa. St. 371; *State v. Holmes*, 20 Ohio St. 474; *Richmond v. Crenshaw*, 76 Va. 936; *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1; *Fuller v. Elizabeth*, 42 N. J. L. 427; *Felsenthal v. Johnson*, 104 Ill. 21; *McLean v. Jephson*, 123 N. Y. 142. And such laws are held constitutional and valid, *People v. Salomon*, 46 Ill. 333; their very purpose being to equalize and make uniform the taxation of property. *Spalding v. Hill*, 86 Ky. 656.

In *Richmond v. Crenshaw*, 76 Va. 936, it was held that the *Virginia* statute providing a remedy for the correction of excessive assessments, applies to assessments in previous years.

Where, under a city charter, the assessors agree to the inventory and valuation of property returned by the owner, it cannot be disturbed; an ordinance creating a board of assessment to examine and revise the list after it has been accepted and entered as satisfactory by the assessor and collector, is illegal. *Dwyer v. Hackworth*, 57 Tex. 245.

3. *Yelverton v. Steele*, 36 Mich. 62. And see *Boyce v. Sebring*, 66 Mich. 210; *Aplin v. Roberts*, 83 Mich. 471. The failure to submit the assessment to the proper board, for the purpose of equalization, renders it void. *Henry v. Chester*, 15 Vt. 460. And see *Davis v. Vanarsdale*, 59 Miss. 367.

But it will not affect a tax not depending upon the equalization. *Chamberlain v. St. Ignace*, 92 Mich. 332.

In *Michigan*, the object of the equalization is to obtain a basis for the apportionment of the state and county taxes among the several townships. *Boyce v. Sebring*, 66 Mich. 210.

4. *Lawrence v. Janesville*, 46 Wis. 364.

b. THE PROPER AND EXCLUSIVE REMEDY.—When provision is made for an application to a board of equalization or review for the correction of errors in an assessment,<sup>1</sup> such remedy is exclusive,<sup>2</sup> and a taxpayer failing to avail himself thereof within

The assessment of property is in the nature of a judicial proceeding, and it is essential that the law authorizing it should provide for notice and an opportunity to be heard before it becomes final, or it will lack the essential ingredient of due process of law. *Santa Clara County v. Southern Pac. R. Co.*, 9 Sawy. (U. S.) 165. And see *Hagar v. Reclamation District No. 108*, 111 U. S. 701.

Assessments of property "which has escaped taxation," if complained of as excessive or illegal, should not be collected by coercive process until passed upon by the board of county commissioners. *Lehman v. Robinson*, 59 Ala. 219. But the owner must claim to have been prejudiced, or there need be no revision. *Scott County v. Hinds*, 50 Minn. 204.

1. An application to the board of equalization or review for an abatement, is the proper remedy in all cases of error in the assessment. *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Kimber v. Schuylkill County*, 20 Pa. St. 366; *Wharton v. Birmingham*, 37 Pa. St. 371; *Everitt's Appeal*, 71 Pa. St. 216; *Hutchinson v. Pittsburg*, 72 Pa. St. 320; *Carlisle School Dist. v. Hepburn*, 79 Pa. St. 159; *Central Pac. R. Co. v. Board of Equalization*, 43 Cal. 365; *Morgan v. Smithson*, 9 Ill. 368; *Macklot v. Davenport*, 17 Iowa 379; *Richards v. Wapello County*, 48 Iowa 510; *Little v. Greenleaf*, 7 Mass. 236; *Osborn v. Danvers*, 6 Pick. (Mass.) 98; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Howe v. Boston*, 7 Cush. (Mass.) 273; *Salmond v. Hanover*, 13 Allen (Mass.) 119; *Charlestown v. Middlesex County*, 101 Mass. 87; *Sherwin v. Wigglesworth*, 129 Mass. 64; *Hicks v. Westport*, 130 Mass. 480; *Richardson v. Boston*, 148 Mass. 508; *Walker v. Cochran*, 8 N. H. 166.

For instances where property might have been valued and assessed together as one estate, and the taxes as assessed were too large, see *People v. Big Muddy Iron Co.*, 89 Ill. 116; *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199; where one is improperly assessed in the wrong town, *Stickney v. Bangor*, 30 Me. 404; *Hemingway v. Machias*, 33 Me. 445; *Waite v. Prince-*

*ton*, 66 Me. 225; where one is properly taxed for real estate in a town, but improperly taxed for other real estate not in the town, *Salmond v. Hanover*, 13 Allen (Mass.) 119; *Bailly v. Buell*, 59 Barb. (N. Y.) 158; where one is taxed for the whole property, when he is taxable only for an undivided share, *Davis v. Macy*, 124 Mass. 193.

Where one holding personal property in trust for another, is improperly taxed, on account of such property in trust, for a larger amount than he otherwise would be. *Bates v. Boston*, 5 Cush. (Mass.) 93; *Bourne v. Boston*, 2 Gray (Mass.) 494.

Applies to Local Assessments.—Similarly, in the case of irregularities in regard to street improvements for which assessments are levied, application should be made to the board of supervisors. *Coulin v. Seamen*, 22 Cal. 546; *Emery v. Bradford*, 29 Cal. 75; *Nolan v. Reese*, 32 Cal. 485; *Chambers v. Satterlee*, 40 Cal. 497; *Windsor v. Field*, 1 Conn. 279; *Patterson v. Baumer*, 3 Iowa 477; *Wright v. Boston*, 9 Cush. (Mass.) 233.

For an abatement of a disproportionate assessment for a street improvement, see *Matter of Auchmutz*, 18 Hun (N. Y.) 324.

Where the taxpayer is properly assessed for one estate, the remedy for the improper assessment of another estate is by petition for abatement. *Richardson v. Boston*, 148 Mass. 508. And in *Clarke v. Stearns County*, 47 Minn. 552, it was held that the assessment to the owner at his place of residence, of property engaged in business in another taxing district, is merely erroneous, and can only be remedied by application for an abatement.

2. *Bath v. Whitmore*, 79 Me. 182; *Hemingway v. Machias*, 33 Me. 445; *Waite v. Princeton*, 66 Me. 225; *Gilpatrick v. Saco*, 57 Me. 277; *Stickney v. Bangor*, 30 Me. 404; *Comstock v. Grand Rapids*, 54 Mich. 641; *Williams v. Saginaw*, 51 Mich. 120; *Hughes v. Klien*, 30 Pa. St. 227; *Randle v. Williams*, 18 Ark. 380; *San Jose Gas Co. v. January*, 57 Cal. 614; *Jeffersonville, etc., R. Co. v. McQueen*, 49 Ind. 64; *Norcross v. Milford*, 150 Mass. 237. And see *State v. Fyler*, 48 Conn. 145; *Mon-*

the time prescribed,<sup>1</sup> cannot prevent the collection of a tax for any cause for which he might have had an abatement.<sup>2</sup> But this

roe v. New Canaan, 43 Conn. 309; Madison County v. Smith, 95 Ill. 328; Holten v. Bangor, 23 Me. 264; State v. Danser, 23 N. J. L. 552; Vose v. Willard, 47 Barb. (N. Y.) 320; Tripp v. Merchants' Mut. F. Ins. Co., 12 R. I. 435; *infra*, this title, *Remedies for Erroneous and Illegal Taxation*, subtit., *General Rights of the Taxpayer as to Remedies*.

If not corrected in the mode pointed out by statute, the judgment of the assessors is conclusive. Stanley v. Albany County, 121 U. S. 535.

But see People v. Duguid (Supreme Ct.), 22 N. Y. Supp. 988, where it was held that a failure to appear before the board, merely raised a question of laches. But in this case it was held that the statute gave a right to review the assessment by *certiorari* as a concurrent remedy with that of appeal to the board.

1. People v. Haupt, 104 N. Y. 377; People v. Tax Com'rs, 99 N. Y. 254; People v. Adams, 125 N. Y. 471; People v. Dolan, 11 N. Y. Supp. 35; 57 Hun (N. Y.) 589; New Orleans v. Canal, etc., Co., 32 La. Ann. 157; New Orleans v. Canal, etc., Co., 29 La. Ann. 851; New Orleans Gas Light Co. v. Board of Assessors, 31 La. Ann. 270, 475; State v. Louisiana Mut. Ins. Co., 19 La. Ann. 474; Leeds v. Hardy, 43 La. Ann. 810; Green v. Gruber, 26 La. Ann. 694; New Orleans v. Buckner, 28 La. Ann. 414; Frost v. New Orleans, 28 La. Ann. 417; First Nat. Bank v. St. Joseph Tp., 46 Mich. 526; Caledonia Tp. v. Rose, 46 Mich. 216. And see Republica v. Deaves, 3 Yeates (Pa.) 464.

Where objections must be filed by a certain day, they must be placed on file before that day commences. Burhans v. Norwood Park, 138 Ill. 147.

Under the Iowa statutes, no time is prescribed within which an appeal may be taken, and no bond is required to be given by the appellant. Ingersoll v. Des Moines, 46 Iowa 553. And see Porter v. Helmick, 2 Iowa 87.

But in Trust, etc., Co. v. Portsmouth, 59 N. H. 33, it was held that where the petitioner was prevented from exhibiting an account, by reason of accident, mistake or misfortune, without fault on his part, he did not lose his right of appeal.

**When the Time Begins to Run.**—The time begins to run from the time notice

of the completion of the roll is given. See People v. Adams, 125 N. Y. 471; McLean v. Jephson, 123 N. Y. 142; People v. Haupt, 104 N. Y. 377; People v. Tax Com'rs, 99 N. Y. 254; Matter of Corwin, 135 N. Y. 245; Matter of McLean (Supreme Ct.), 6 N. Y. Supp. 230; Nashville v. Weiser, 54 Ill. 245; Brunswick v. Finney, 54 Ga. 317; O'Brien v. Cogswell, 17 Can. Sup. Ct. Rep. 420.

An omission to give the notice does not affect the validity of the assessment, but simply leaves the right to review unlimited as to time. People v. Haupt, 104 N. Y. 377. And see State v. Washoe County, 14 Nev. 140.

But the published notice of the completion of the assessment rolls is intended for the information of taxpayers within the jurisdiction only, and has no operation upon non-residents having no taxable property within such locality and no reason to suppose they have been taxed. McLean v. Jephson, 123 N. Y. 142.

2. Conlin v. Seamen, 22 Cal. 546; Emery v. Bradford, 29 Cal. 75; Nolan v. Reese, 32 Cal. 484; Chambers v. Satterlee, 40 Cal. 519; Windsor v. Field, 1 Conn. 279; Peoria v. Kidder, 26 Ill. 351; Adsit v. Lieb, 76 Ill. 198; New Orleans v. Canal, etc., Co., 32 La. Ann. 157; Schmidt v. New Orleans, 28 La. Ann. 429; Deane v. Todd, 22 Mo. 90; Aldrich v. Cheshire R. Co., 21 N. H. 359; People v. Tax Com'rs, 99 N. Y. 254; Hughes v. Kline, 30 Pa. St. 230; Lincoln v. Worcester, 8 Cush. (Mass.) 55; Salmond v. Hanover, 13 Allen (Mass.) 119; Ward v. Gallatin County, 12 Mont. 23; Northern Pac. R. Co. v. Patterson, 10 Mont. 90; Stanley v. Albany County, 121 U. S. 535; Meade v. Haines, 81 Mich. 261.

If the taxpayer does not have his assessment corrected and perfected when he has power to do so, he is assumed to admit its correctness. First Nat. Bank v. St. Joseph Tp., 46 Mich. 530.

He is without equity to have the collection of the tax restrained by injunction, Van Nort's Appeal, 121 Pa. St. 118; and the court may, in its discretion, refuse to aid him, Poulson v. Matthews, 40 N. J. L. 268; and where the assessment was not fraudulent, he loses all remedy, State v. Wright, 4

rule does not apply where the tax is illegal by reason of want of power to levy or assess.<sup>1</sup>

c. COMPOSITION OF THE BOARD.—Boards of county commissioners or supervisors usually constitute the boards of equaliza-

Nev. 251; even though he was told by the assessor that the assessment would be reduced, *People v. Lots in Ashley*, 122 Ill. 297.

If one has failed to make the statutory return and to appeal to the board of equalization, he can have no remedy in the courts. *Price v. Kramer*, 4 Colo. 546.

Where a right of action to set aside taxes has been lost by failure to make objection before a board of review, the subsequent repeal of the act requiring objection before the board, does not restore the right. *Boorman v. Juneau County*, 76 Wis. 550.

Where a party files an objection to an assessment, with the county clerk, who promises to notify him when to appear before the board, but fails to do so, he has no ground for relief under the head of accident or mistake, the clerk's neglect while acting as his agent being his own. *Felsenthal v. Johnson*, 104 Ill. 21.

Nor is it any excuse that he was prevented from appearing before the county board by the fraudulent representations of the assessor that the valuation would be reduced by such board to one-third of the "fair cash value." *People v. Lots in Ashley*, 122 Ill. 297.

In *Metcalf v. Messenger*, 46 Barb. (N. Y.) 325, it was held that a taxpayer is not estopped to allege any irregularity in the assessment by reason of his non-appearance at a meeting of the assessors, when it does not appear that a meeting was held or that notice thereof was given.

A statute providing that persons dissatisfied with an assessment must file objections with the board at its August meeting, does not apply to cases where the land has been properly valued in the first instance and no objection made by the taxpayer, and if the board raises the assessment at such meeting, the right to apply for a reduction is not lost by failure to appeal within five days in accordance with the statute. *Simmons v. Scott County*, 68 Miss. 37.

1. In such case the taxpayer is not confined to proceedings before the board; as where no authority to levy or assess the tax exists. *Dickey v. Polk County*, 58 Iowa 287; *Barber v.*

*Farr*, 54 Iowa 57; *New Orleans v. McArthur*, 12 La. Ann. 47; *Davis v. Burnett*, 77 Tex. 3; *St. Paul v. Merritt*, 7 Minn. 258; *Silver v. Schuylkill*, 32 Pa. St. 356; *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *McLean v. Jephson*, 123 N. Y. 142; *Matter of Ulster County Sav. Bank*, 20 Hun (N. Y.) 481; *Paddock v. Lewis*, 55 Hun (N. Y.) 521; *Crane v. Janesville*, 20 Wis. 305; *State v. Williston*, 20 Wis. 228; *Williams v. Saginaw*, 51 Mich. 120; *McCoy v. Anderson*, 47 Mich. 502; *Judkins v. Reed*, 48 Me. 386; *Bemis v. Boston*, 14 Allen (Mass.) 366; *Charlestown v. Middlesex County*, 109 Mass. 270; *Fairbanks v. Kittredge*, 24 Vt. 9; *Babcock v. Granville*, 44 Vt. 325. Or where the assessment is fraudulent. *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535; 5 Am. St. Rep. 545; *English v. People*, 96 Ill. 566; *Mechanics' Sav. Bank v. Granger*, 17 R. I. 77. And see *Chicago v. Wright*, 32 Ill. 192; *Taylor Bros. Iron Works Co. v. New Orleans*, 44 La. Ann. 554; *Pueblo County v. Wilson*, 15 Colo. 90.

But fraud must be established by the evidence, or follow as a conclusion of law from the facts proven, and no mere discrepancy between the valuation of the property and the judgment of the court is sufficient to impeach the assessment. *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; an excessive valuation by an assessor, contrary to his official judgment, is a fraud. *State v. Central Pac. R. Co.*, 7 Nev. 99.

An assessment is not void because legal taxes are blended with illegal ones, but is merely an overvaluation which the board of equalization will correct on application. *People v. Arguello*, 37 Cal. 524.

Where the ones making the assessment were not assessors, either *de jure* or *de facto*, a writ of *certiorari* to review the assessment will be dismissed; being absolutely void, it cannot be thus reviewed. *People v. Parker*, 117 N. Y. 86.

In *Colorado*, one appealing to the county board on the ground that the tax is illegal, is not thereby precluded from resorting to the courts to test its validity. *Pueblo County v. Wilson*, 15 Colo. 90. Where property is assessed for a

tion and review,<sup>1</sup> but the assessors themselves are in some instances required to hear complaints, and review and correct their own assessments.<sup>2</sup> Sometimes the power of equalization is con-

certain amount, with the consent of the owner, and this amount is raised by the board of equalization and the owner appeals and obtains a reduction to the original amount, he cannot be heard to contend that it is not subject to assessment. *Phelps Mortgage Co. v. Board of Equalization*, 84 Iowa 610.

1. **Commissioners.**—*Sumner v. Colfax County*, 14 Neb. 524; *Weaver v. State*, 39 Ala. 535; *State v. Ormsby County*, 7 Nev. 392; *Pierre Water Works Co. v. Hughes County*, 5 Dakota 145.

**Supervisors.**—*Wolfe v. Murphy*, 60 Miss. 1; *Atty. Gen'l v. Sanilac*, 42 Mich. 72; *Meridian v. Phillips*, 65 Miss. 362.

In *Massachusetts*, the application may be made either to the county commissioners or to the assessors, and an appeal from the decision of the latter to the superior court of the county may be made within thirty days after notice of the decision and on payment of the tax under protest. See *National Bank of Commerce v. New Bedford*, 155 Mass. 313.

Under the *Iowa* statute, township trustees are constituted a board for the equalization of assessments of property taxable in every township, and have the same power as those usually conferred upon boards of supervisors. *Keck v. Keokuk County*, 37 Iowa 547.

In *Pennsylvania*, the appeal from unjust assessments for mercantile taxes is to the board of mercantile appraisers. See *Crist v. Morris*, 11 Phila. (Pa.) 357.

In *Ohio*, the board of equalization is composed of the county commissioners, county auditor, and county surveyor, *State v. Holmes*, 20 Ohio St. 474; and in *New Hampshire* and *Vermont*, the selectmen have authority to review the assessments, *Edes v. Boardman*, 58 N. H. 580; *Briggs' Petition*, 29 N. H. 547; *Leach v. Blakely*, 34 Vt. 134; while in *Kentucky*, it is the board of tax commissioners. *Slaughter v. Louisville*, 89 Ky. 112.

**Legality of Appointment.**—It is essential to the validity of the board that it be made up in the manner provided by statute. *Slaughter v. Louisville*, 89 Ky. 112. And see *Hough v. Hastings*, 18 Ill. 312. And if the board is author-

ized to alter or increase assessments, it must be elected or appointed in accordance with constitutional requirements with reference to the election of assessors. *Evansville, etc., R. Co. v. Hays*, 118 Ind. 214; *Kuntz v. Sumpston*, 117 Ind. 1; *Houghton v. Austin*, 47 Cal. 646. And see *People v. Raymond*, 37 N. Y. 428. But see *Baird v. Williams*, 49 Ark. 518, where it was held that a statute authorizing the appointment of boards of equalization, by the governor, with power to raise individual assessments, does not contravene a constitutional provision requiring assessors to be elected in each county.

2. See *Clark v. Norton*, 49 N. Y. 243; *People v. Adams*, 125 N. Y. 471; *Richardson v. Boston*, 148 Mass. 508; *Covington v. Rockingham*, 93 N. Car. 134; *New Orleans Gas Light Co. v. Board of Assessors*, 31 La. Ann. 270; *New Orleans City Gas Light Co. v. Board of Assessors*, 31 La. Ann. 475; *Louisiana Brewing Co. v. Board of Assessors*, 41 La. Ann. 565; *Gay v. Board of Assessors*, 34 La. Ann. 370.

Under the *New Jersey* Law of 1876, p. 1163, the claim for deduction from taxation can be allowed only by the assessor of the place wherein the mortgaged lands are situate. *State v. Jones*, 40 N. J. L. 105.

In *Maine*, the power is conferred upon assessors, with appeal to the county commissioners. *Bath v. Whitmore*, 79 Me. 182. And see *Stickney v. Bangor*, 30 Me. 404. And in *Illinois*, the board is composed of the assessor, town clerk and supervisor, *Hough v. Hastings*, 18 Ill. 312; while in *Oregon*, it is the assessor and county clerk. *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *Rhea v. Umatilla County*, 2 Oregon 298.

In *Massachusetts*, it has been held that the assessors may abate a tax assessed by the assessors of the preceding year. *Carleton v. Ashburnham*, 102 Mass. 348. See also *Hubbard v. Garfield*, 102 Mass. 72.

The action of a board of review of which an assessor is a member, is not invalid on the ground that he is thereby made a judge in his own cause. *Bratton v. Johnson Tp.*, 76 Wis. 430. And see *Hough v. Hastings*, 18 Ill.

ferred upon one body while the power to review is conferred upon another body.<sup>1</sup>

*d. AUTHORITY AND JURISDICTION*—(1) *In General*.—Being creatures of statute, boards of equalization and review can act only when specially authorized,<sup>2</sup> and the necessary jurisdictional facts must affirmatively appear.<sup>3</sup> The authority must be strictly pursued<sup>4</sup> by a duly qualified full board,<sup>5</sup> though a majority may

312; *Rhea v. Umatilla County*, 2 Oregon 298.

In Texas, etc., *R. Co. v. Harrison County*, 54 Tex. 119, the court refused to hold the action of a board of equalization void, upon which a deputy assessor, who was also a county commissioner, sat as a member, where the taxpayer failed to object to the deputy assessor constituting a portion of the board at the time of its action, and it was not shown that there was not a quorum without him.

1. See *DuPage County v. Jenks*, 65 Ill. 275; *State v. Tax Collector*, 39 La. Ann. 530.

The Louisiana statute constituting police juries "boards of review," does not create a board of equalization under the constitution, but confers power to correct assessments and valuations and equalize assessments on all properties of a like character only, and does not confer power to reduce the percentage of assessments by wards or otherwise. *State v. Tax Collector*, 39 La. Ann. 530.

A body having authority to exercise one of the functions only, does not lose it by assuming to exercise the other. *Paul v. Pacific R. Co.*, 4 Dill. (U. S.) 35. Equalization and review are entirely different, and an exercise of the one function does not exhaust the power or bar a subsequent exercise of the other. *State v. Ormsby County*, 7 Nev. 392.

2. *Hamilton v. State*, 3 Ind. 452; *Orr v. State Board of Equalization* (Idaho, 1891), 28 Pac. Rep. 416.

They have a special and limited jurisdiction which must be conferred in express terms. *People v. Reynolds*, 28 Cal. 113; *Case v. Dean*, 16 Mich. 12; *People v. Adams*, 125 N. Y. 471; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *Com. v. Luzerne County* (Pa. 1888), 15 Atl. Rep. 548; *Lackawanna County v. Com.*, 56 Pa. St. 477.

3. *State v. Washoe County*, 5 Nev. 317; *State v. Central Pac. R. Co.*, 17

Nev. 259; *Nixon v. Ruple*, 30 N. J. L. 58.

Though where jurisdiction appears, all reasonable presumption will be made in favor of the regularity and validity of their acts until the contrary is shown. *Tainter v. Lucas County*, 29 Wis. 375; *Wauwatosa Tp. v. Gunyon*, 25 Wis. 271; *Tierney v. Brown*, 65 Miss. 563; 7 Am. St. Rep. 679; *Hambleton v. Dempsey*, 20 Ohio 168.

4. See *State v. Hopper*, 54 N. J. L. 544; *Madison County v. Smith*, 95 Ill. 328; *State v. Allen*, 43 Ill. 456; *Orr v. State Board of Equalization* (Idaho, 1891), 28 Pac. Rep. 416.

Under authority to the selectmen to change an assessment on appeal, it was held that the assessment could not be raised. *Leach v. Blakely*, 34 Vt. 134. And see *Lowell v. Middlesex County*, 3 Allen (Mass.) 546.

**Costs.**—In the absence of statutory provision, costs cannot be allowed to either party on an appeal for an abatement of taxes, *Lowell v. Middlesex County*, 6 Allen (Mass.) 131; *Lowell v. Middlesex County*, 3 Allen (Mass.) 546; though in some states, if it appears to the court that the assessors have acted with gross negligence, costs may be awarded against them. *People v. Carter*, 119 N. Y. 654. See also *People v. Zoeller* (Supreme Ct.), 15 N. Y. Supp. 684; *Hall v. Greenwood County*, 22 Kan. 37.

**Interest.**—Nor can interest be allowed on the amount abated unless allowed by the statute. *Lowell v. Middlesex County*, 3 Allen (Mass.) 550. But in *Pennsylvania*, interest may be allowed against the complaining taxpayer upon an unsuccessful appeal. *Delaware Div. R. Co. v. Com.*, 50 Pa. St. 339; *Com. v. Wyoming Valley Canal Co.*, 50 Pa. St. 410.

5. *Hamilton v. State*, 3 Ind. 452; *Slaughter v. Louisville*, 89 Ky. 112; *People v. Parker*, 117 N. Y. 86; *Nova Ceasarea, etc., Lodge v. Haggerty* (Ohio), 28 Wkly. Law Bull. 67.

In *Hamilton v. State*, 3 Ind. 452, it was held that there being no provision

act.<sup>1</sup> Its power cannot be delegated,<sup>2</sup> though complaints may be referred to a committee of its members for determination, and their acts approved by the full board.<sup>3</sup>

(2) *Boards of Equalization*.—The duty of boards of equalization is to adjust and equalize the valuation of property among the several districts, with a view to an equitable apportionment of the burden, and for this purpose they may increase the aggregate valuation of one district and decrease that of another.<sup>4</sup> But they

that a less number than the whole should act, the board had no authority to act in the absence of one delegate.

The failure of the records to show that the members of the board took the required oath of office, has been held not to invalidate an equalization made by them. *State v. Board of Equalization*, 108 Mo. 235.

1. *People v. Lothrop*, 3 Colo. 428; *Connor v. Waxahachie* (Tex. 1889), 13 S. W. Rep. 30; *Ferris v. Kimble*, 75 Tex. 476; *Cooley v. O'Conner*, 12 Wall. (U. S.) 398. But see *Hamilton v. State*, 3 Ind. 452.

Where the assessor and town clerk met and organized as a board of review, no person appearing to object to action on the assessments without the presence of the supervisor, the action was held valid. *State v. Sullivan*, 43 Ill. 412.

In *Hough v. Hastings*, 18 Ill. 312, it was held that where one member is proved to have been absent at a meeting of the board, the burden rests with the complainant to establish that the other two were present and had complied with the law.

**Quorum**.—When a quorum is present, the fact that one member was excused from voting does not invalidate the proceedings. *State v. Gaylord*, 73 Wis. 316. And in *State v. Parker*, 32 N. J. L. 341, it was held that a member declining to vote was to be considered as assenting to the vote of the majority.

**Notice of Meeting**.—The members of the board should be notified of the meeting and given an opportunity to attend. *Pike County v. Rowland*, 94 Pa. St. 238; *People v. Parker*, 117 N. Y. 86. But a statute requiring them to meet at a stated time and place, is notice to every member. *People v. Lothrop*, 3 Colo. 428.

2. Either to third persons, *Bellinger v. Gray*, 51 N. Y. 610; *People v. Hagadorn*, 104 N. Y. 516; or to a number of its own members. *Wiley v. Flournoy*, 30 Ark. 609.

3. *Boyce v. Sebring*, 66 Mich. 210; *Beers v. People*, 83 Ill. 488; *Porter v. Rockford, etc.*, R. Co., 76 Ill. 561. See also *Yazoo Delta Invest. Co. v. Sudboth*, 70 Miss. 416.

Where the equalization of an assessment is referred to a committee of the board, whose report is accepted, it becomes the act of the board. *Halsey v. People*, 84 Ill. 89. And the adoption, after a secret session, of a schedule of equalization prepared by one of the assessors, does not affect the validity of the board's decision. *New York v. Davenport*, 92 N. Y. 604.

In *Wilson v. Weber*, 96 Ill. 454, it was held that the formal order of distribution among counties, of the share of each for local taxation of the rolling stock and capital stock of a railroad, is a ministerial act and can be done by the secretary after the adjournment of the board.

4. *Orr v. State Board of Equalization* (Idaho, 1891), 28 Pac. Rep. 416; *People v. Lothrop*, 3 Colo. 428; *People v. Nichols*, 49 Ill. 517; *Getchell v. Polk County*, 51 Iowa 107; *Challiss v. Rigg*, 49 Kan. 119; *Boyce v. Sebring*, 66 Mich. 210; *Black v. McGonigle*, 103 Mo. 192; *State v. Roe*, 36 N. J. L. 86; *Kelley v. Corson*, 11 Wis. 1; *People v. Hadley*, 76 N. Y. 337. And see *State v. Hopper*, 54 N. J. L. 544; *Buck v. People*, 78 Ill. 560.

A board of equalization may raise or lower the assessment of any township on its own motion without hearing or evidence upon the individual assessments. *Fields v. Russell*, 38 Kan. 720. And see *Hannibal, etc., R. Co. v. State Board of Equalization*, 64 Mo. 294.

**Should Be by Valuation**.—Equalization should be by valuation, and a board is not authorized to add a certain sum to each acre of land in a township, in equalizing the assessments of real estate as between the townships of a county. *State v. Allen*, 43 Ill. 456.

They should add or deduct such sum upon the hundred as may be necessary to produce equalization. *People v.*

cannot, in the absence of statute, change individual assessments,<sup>1</sup> or the valuations placed upon particular classes of property;<sup>2</sup> nor can they increase the sum of all the valuations of the several districts.<sup>3</sup> State boards are sometimes authorized to make original assessments on particular classes of property, such as that of railroad and other corporations.<sup>4</sup>

Nichols, 49 Ill. 517; Tallmadge v. Rensselaer County, 21 Barb. (N. Y.) 611. And see Orr v. State Board of Equalization (Idaho, 1891), 28 Pac. Rep. 416.

In Kelley v. Corson, 11 Wis. 1, it was held that a board of equalization cannot reduce the valuation as to a part of the land in a town, without reducing all the estates in the same proportion, unless the part not reduced consists of an incorporated village. See also Kelley v. Corson, 8 Wis. 182; Hersey v. Milwaukee County, 16 Wis. 185.

1. San Francisco, etc., R. Co. v. State Board of Equalization, 60 Cal. 12; Wells v. State Board of Equalization, 56 Cal. 194; Getchell v. Polk County, 51 Iowa 107; Royce v. Jenney, 50 Iowa 676; Paul v. Pacific R. Co., 4 Dill. (U. S.) 35. And see Cummings v. Stark (Ind. 1893), 34 N. E. Rep. 444; McConkey v. Smith, 73 Ill. 313.

The state board may increase or lower the entire assessment roll of any county, and the county board may increase or lower the individual assessments upon the rolls of their respective counties. Wells v. State Board of Equalization, 56 Cal. 194.

But it is immaterial that the action of the state board affects taxes for county purposes. Baldwin v. Ellis, 68 Cal. 495.

2. Orr v. State Board of Equalization (Idaho, 1891), 28 Pac. Rep. 416; Getchell v. Polk County, 51 Iowa 107.

But it can under the statutes of Oregon, Smith v. Kelly (Oregon, 1893), 33 Pac. Rep. 642; and Nebraska. State v. Edwards, 31 Neb. 369.

They cannot increase the valuation of improved lands in a district without also increasing the valuation of unimproved lands in the same district. People v. Nichols, 49 Ill. 517.

**Boards of Equalization also Boards of Review.**—Boards of equalization are frequently endowed with the functions of boards of review. See Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625; Indianapolis, etc., R. Co. v. Backus, 133 Ind. 609; Cleveland, etc., R. Co. v. Backus, 133 Ind. 513.

And where a county board is required

to equalize taxes, it is responsible for the correctness of the assessment, and cannot refuse to levy a tax, upon the ground that it cannot ascertain from the assessment roll, the taxable property within the county or the names of persons owning such property. State v. Yellowstone County, 12 Mont. 503.

3. People v. Lothrop, 3 Colo. 428; Kittle v. Sherwin, 11 Neb. 65; Kimball v. Merchants' Sav., etc., Co., 89 Ill. 611.

The aggregate valuation cannot be reduced below that returned by the assessors, nor can such amount be increased except in such sum as shall be actually necessary and incidental to a proper and just equalization. State v. Edwards, 31 Neb. 369.

Under the Ohio statute, if a board undertakes to reduce the valuation of certain land, without adding to other parcels an amount equal to the reduction, it exceeds its authority and its action is to be disregarded by the county auditor; and if he fails to do so, and transfers such lands to the new tax duplicate at the reduced valuation, the error is but a clerical one which he may be required to correct. State v. Raine, 47 Ohio St. 447.

4. See TAXATION (CORPORATE).

Such authority may be constitutionally conferred. Hannibal, etc., R. Co. v. State Board of Equalization, 64 Mo. 294; State v. Severance, 55 Mo. 378; Porter v. Rockford, etc., R. Co., 76 Ill. 561; Coal Run Coal Co. v. Finlen, 124 Ill. 666; Pacific Hotel Co. v. Lieb, 83 Ill. 602; Central Trust Co. v. Wabash, etc., R. Co., 27 Fed. Rep. 14; State Railway Tax Cases, 92 U. S. 575; Central R. Co. v. State Board of Assessors, 49 N. J. L. 1; Missouri River, etc., R. Co. v. Morris, 7 Kan. 210; Cleveland, etc., R. Co. v. Backus, 133 Ind. 513; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625; Indianapolis, etc., R. Co. v. Backus, 133 Ind. 609. And does not violate the rule of uniformity. Coal Run Coal Co. v. Finlen, 124 Ill. 666.

Under the Iowa statutes, boards of supervisors do not assess the railroad property lying within their respective districts; but fix the proportion of the



(3) *Boards of Review.*—As has been said, the powers of boards of review are to be strictly construed,<sup>1</sup> and it is only when author-

aggregate assessment made by the executive council which shall be subject to the local taxes of their district. *Illinois Cent. R. v. Hamilton County*, 73 Iowa 313.

**Authority Exclusive.**—The authority of the state board is, in such cases, exclusive. *People v. Sacramento County*, 59 Cal. 321.

And it has been held under the *Illinois* statutes, that local assessors cannot assess a railroad right of way, notwithstanding the company has by mistake, but without fraud, failed to return as right of way sufficient area to the state board. *Peoria, etc., R. Co. v. Goar*, 118 Ill. 134.

**Must Be Strictly Construed.**—But their power is to be strictly construed and confined to the designated classes, everything else being required to be assessed by the local assessors. *Chicago, etc., R. Co. v. Paddock*, 75 Ill. 616; *St. Louis, etc., R. Co. v. Williams*, 53 Ark. 58; *Louisville, etc., R. Co. v. Com.*, 85 Ky. 108; *Red Willow County v. Chicago, etc., R. Co.*, 26 Neb. 660. And see *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394; *California v. Central Pac. R. Co.*, 127 U. S. 1; *San Francisco v. Central Pac. R. Co.*, 63 Cal. 469; 49 Am. Rep. 98; *Atlantic, etc., R. Co. v. Yavapai County (Arizona, 1889)*, 21 Pac. Rep. 768.

An assessment by both would be a double assessment, and the one not authorized by the facts is void. *Chicago, etc., R. Co. v. People*, 99 Ill. 464.

Repair and machine shops situated upon lands other than the right of way, but connected with the main line by a side track, should, under the *Idaho* statute, be assessed by the local assessor rather than by the board of equalization. *Oregon S. L. R. Co. v. Yeates (Idaho, 1888)*, 17 Pac. Rep. 457.

**Valuation—Standard of Local Assessors.**—Boards of equalization should fix the value of property assessed by them, at a fair valuation, without reference to the valuation fixed upon other property by the local assessors. *State v. Bettie*, 50 N. J. L. 132; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602.

An assessment against railroad property, based upon a valuation a little above its admitted value, is valid, though the town assessors have assessed other property in the same township at one-

third its value. *Illinois, etc., R. Co. v. Stookey*, 122 Ill. 358. But see *Chicago, etc., R. Co. v. Livingston County*, 68 Ill. 458; *Bureau County v. Chicago, etc., R. Co.*, 44 Ill. 229.

In *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1, it was held that, under a statute providing that the state board shall accept the valuation of the local assessors as a correct standard of value, it cannot take their valuation when they have illegally taken but a small percentage of what they deem to be the true value of the property assessed by them.

But in *Law v. People*, 87 Ill. 385, where the local assessors assessed property at half its actual value, and the city board of equalization, after equalizing it, assessed the property of railroads and other corporations on the same basis, instead of at its fair cash value, as the statute required, their action was upheld as being in accordance with the constitutional mandate requiring uniformity, rather than the literal terms of the statute.

Under the *Missouri* statutes relating to taxing railroads, the board of equalization must adopt the same rates as that applied by the general assessors to property of individuals. *State v. Missouri Pac. R. Co.*, 92 Mo. 137. And see *People v. Zoeller (Supreme Ct.)*, 15 N. Y. Supp. 684.

1. *Mercier v. New Orleans*, 38 La. Ann. 958; *State v. Covington*, 35 S. Car. 245; *Indianapolis v. Sturdevant*, 24 Ind. 391; *People v. Delaware County*, 60 N. Y. 381; *Marsh v. Bowen*, 12 Abb. N. Cas. (N. Y. Supreme Ct.) 1; *Suydam v. Merrick County*, 19 Neb. 155; *State v. Hudson County*, 46 N. J. L. 93; *Williamson's Estate*, 153 Pa. St. 508.

The power to correct the tax roll does not include the power to change assessments; the words "change" and "correct" not being equivalent in meaning. *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206. Nor does power to correct and add to the assessments returned, authorize the board to remove any names it may judge to have been unlawfully placed thereon. *Biggs v. Buckingham (Del. 1892)*, 23 Atl. Rep. 858.

When a board of review is authorized to alter assessments under certain speci-

ized by statute that they have power to add to the roll property omitted by the assessors,<sup>1</sup> or to strike out assessments not properly made,<sup>2</sup> or to increase or decrease valuations.<sup>3</sup> But

fied circumstances, the existence of such circumstances is a condition precedent to its action. *People v. Goldtree*, 44 Cal. 323; *Oregon, etc., Sav. Bank v. Catlin*, 15 Oregon 342; *McGee v. State*, 32 Neb. 149; *People v. Adams*, 125 N. Y. 471; *Adriance v. New York*, 12 How. Pr. (N. Y.) 224; *Shove v. Manitowoc*, 57 Wis. 5; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535; 5 Am. St. Rep. 545.

Boards of review cannot assess additional taxes for previous years upon land, on a subsequent increased valuation, after the taxes for such years have been paid. *Sudderth v. Brittain*, 76 N. Car. 458.

1. *Poppleton v. Yamhill County*, 8 Oregon 337; *Royce v. Jenney*, 50 Iowa 676; *King v. Parker*, 73 Iowa 757. And see *Cameron v. Cappeller*, 41 Ohio St. 533; *Parker v. Van Steenburg*, 68 Iowa 174; *Connor v. Waxahachie* (Tex. 1889), 13 S. W. Rep. 30; *Ferris v. Kimble*, 75 Tex. 476.

Under the *Iowa* code, this may be done after the supervisors have fixed the rate for the year. *Parker v. Van Steenburg*, 68 Iowa 174.

When not authorized by statute, they have no such power. *Williams v. Greensburgh, etc.*, *Turnpike Co.*, 42 Ind. 171; *Pavey v. Greenburgh, etc.*, *Turnpike Co.*, 42 Ind. 400; *Manford v. Pleasant Grove, etc.*, *Turnpike Co.*, 42 Ind. 293; *Mercier v. New Orleans*, 38 La. Ann. 958; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *Paul v. Pacific R. Co.*, 4 Dill. (U. S.) 35; *Powder River Cattle Co. v. Custer County*, 45 Fed. Rep. 323; *Marsh v. Bowen*, 12 Abb. N. Cas. (N. Y. Supreme Ct.) 1.

The authority of a board, under the *Wisconsin* statute, to place upon the roll any property known by them to have been omitted, refers to tangible property and not to money or credits. *Shove v. Manitowoc*, 57 Wis. 5.

Under the *Kansas* statute, they may raise or lower the valuation placed upon personal property, but have no power to assess property not already listed. *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117; *McCrie v. Emlen*, 44 Kan. 124.

2. *Royce v. Jenney*, 50 Iowa 676; *Harris v. Fremont County*, 63 Iowa 639; *State v. Ormsby County*, 7 Nev. 392.

Under a power to correct erroneous assessments, the board may change an assessment by striking out the names of two non-resident executors, and allow it to stand against the resident executor. *People v. Coleman*, 42 Hun (N. Y.) 581.

In *Illinois*, they may give relief against the assessment of property which is exempt. *Preston v. Johnson*, 104 Ill. 625. But in *Louisiana*, tax arbitrators have no power to determine what is and what is not exempt. *State v. Board of Assessors*, 30 La. Ann. 261. And in *Mississippi*, they cannot place exempt property on the rolls. *Meridian v. Phillips*, 65 Miss. 362.

They cannot decide on the legality of a tax, *Taylor Tp. v. Moore*, 39 Iowa 605; the proper function of the board being to review the judgment exercised by the board of assessors in distributing the tax, not to judge of its legality. *Matter of Lange*, 85 N. Y. 307. And see *State v. Dowling*, 50 Mo. 134; *Babcock v. Granville*, 44 Vt. 325.

Power to "correct and add to the assessments returned," and make "addition to and corrections of the assessment list," does not authorize the board to remove names it may deem to be unlawfully thereon. And a statute prohibiting it from taking from the assessment list any name legally appearing thereon, does not by implication empower it to remove a name illegally appearing thereon. *Biggs v. Buckingham* (Del. 1892), 23 Atl. Rep. 858.

In *Florida*, the county commissioners have no power to raise or lower the valuation of railroad property assessed by the city comptroller. *Pensacola v. Louisville, etc., R. Co.*, 21 Fla. 492.

3. *Wells v. State Board of Equalization*, 56 Cal. 194; *Pulaski County v. Board of Equalization Cases*, 49 Ark. 518; *State v. Board of Assessors*, 30 La. Ann. 261; *Collier v. Morrow*, 90 Ga. 148; *Fratz v. Mueller*, 35 Ohio St. 397; *State v. Randolph*, 25 N. J. L. 427; *Tweed v. Metcalf*, 4 Mich. 579; *Smith v. Jones County*, 30 Iowa 531; *Clark v. Norton*, 49 N. Y. 245; *Lawrence v. Janesville*, 46 Wis. 364; *Shove v. Manitowoc*, 57 Wis. 5; *McIntyre v. White Creek*, 43 Wis. 630; *State v. Gaylord*, 73 Wis. 306; *State v. Ormsby County*, 7 Nev. 392; *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117; *Gillett v.*

they are usually authorized to make all proper changes and corrections.<sup>1</sup>

e. NECESSITY OF NOTICE—(1) *Of Meetings of Boards of Review*.—Whenever boards of review are authorized to alter assess-

Lyon County, 30 Kan. 166; Braden v. Union Trust Co., 25 Kan. 362; State v. New Lindell Hotel Co., 9 Mo. App. 450; State v. Hannibal, etc., R. Co., 101 Mo. 120; State Railroad Tax Cases, 92 U. S. 575; Whilbeck v. Mercantile Nat. Bank, 127 U. S. 193; Darling v. Gunn, 50 Ill. 424; International, etc., R. Co. v. Smith County, 54 Tex. 1. And see Sioux City, etc., R. Co., v. Washington County, 3 Neb. 30; Humphreys v. Safe Deposit Co., 29 Ohio St. 608.

Where property is assessed for its full value, instead of for the value of the plaintiff's interest therein, it is an overvaluation to be remedied by an application for abatement. Fall v. Marysville, 19 Cal. 391.

Where provision is made for a reference to arbitrators when the taxpayer and assessor disagree, the arbitrators have power to fix the assessment at the true valuation, regardless of the amount returned by the taxpayer or fixed by the assessor. Collier v. Morrow, 90 Ga. 148. And see Pulaski County Board of Equalization Cases, 49 Ark. 518.

An increase in the assessment will, in the absence of proof, be presumed to have been made as a correction of the valuation, and not as a penalty which the board had no right to impose. Wauwatosa v. Gunyon, 63 Wis. 271.

On a petition for abatement, the assessment cannot be raised. Lowell v. Middlesex County, 3 Allen (Mass.) 546. And in *Illinois*, the county board, in counties under township organization, can only increase the valuation on property assessed after the time fixed for reviewing assessments by the assessor, town clerk, and supervisor. Coolbaugh v. Huck, 86 Ill. 600.

Under the *Nevada* statute, the board of county commissioners is empowered to modify, equalize, or discharge any supplemental assessments, upon proper application of the party in interest. State v. Ormsby County, 7 Nev. 392. And in *New Hampshire*, the selectmen may abate a tax for good cause shown. Gove v. Newton, 58 N. H. 359; Perry's Petition, 16 N. H. 44; Briggs' Petition, 29 N. H. 547; Manchester Mills v. Manchester, 57 N. H. 309.

Under the *Massachusetts* statutes,

county commissioners, on an appeal for an abatement of taxes, are required to estimate the property at its fair cash value, irrespective of the value placed by the assessors upon similar property in the same district. Lowell v. Middlesex County, 152 Mass. 372.

In *Indiana*, an assessment cannot be increased by the auditor, even though the undervaluation be fraudulent. Williams v. Segur, 106 Ind. 368. And in *Florida*, boards of county commissioners are without power to raise or lower the valuation of railroad property assessed by the state comptroller. Pensacola v. Louisville, etc., R. Co., 21 Fla. 492.

Power to remit or reduce taxes gives no authority to exempt from taxation property which under the law is not exempt. People v. Campbell, 93 N. Y. 196.

**Erroneous Penalties.**—In case of erroneous imposition of the "four-fold tax," or any other irregularity, the court will abate as much as equity requires, leaving the rest in force. Perry's Petition, 16 N. H. 44; Cochecho Mfg. Co. v. Stafford, 51 N. H. 455. And see Walker v. Cochran, 8 N. H. 166.

**Poverty and inability to pay** have been held to constitute a proper ground for abatement by the selectmen. Briggs' Petition, 29 N. H. 547.

1. See Poppleton v. Yamhill County, 8 Oregon 337; Weaver v. State, 39 Ala. 535; Spring Valley Water Works v. Schottler, 62 Cal. 69; Darling v. Gunn, 50 Ill. 424; Smith v. Jones County, 30 Iowa 531; King v. Parker, 73 Iowa 757; Parker v. Van Steenburg, 68 Iowa 174; State v. Randolph, 25 N. J. L. 427; State v. Hannibal, etc., R. Co., 101 Mo. 120; International, etc., R. Co. v. Smith County, 54 Tex. 1; State v. Myers, 52 Wis. 628; Briggs' Petition, 29 N. H. 547; Cochecho Mfg. Co. v. Strafford, 51 N. H. 455; Melvin v. Weare, 56 N. H. 436; Carpenter v. Dallon, 58 N. H. 615.

Under a provision that if it shall appear to the board of review that there are "any lands, lots, or property not assessed, said board shall make the proper corrections," it has power to raise an assessment by adding property not included therein. Poppleton v. Yamhill County, 8 Oregon 337.

The action of commissioners of

ments, the parties affected should have notice of the time and place of meeting,<sup>1</sup> and opportunity to be heard before the proceedings become effectual;<sup>2</sup> and substantial compliance with statutory requirements on the subject, both as to the form of notice and manner of bringing it to the attention of the taxpayer, is essen-

appeal in changing an assessment by city lots to an assessment by the acre, without changing the value of the entire tract, does not invalidate the assessment. *State v. VanHorn*, 40 N. J. L. 143.

1. *Patten v. Green*, 13 Cal. 325; *Hagemeyer v. Board of Equalization*, 82 Cal. 214; *Darling v. Gunn*, 50 Ill. 424; *People v. Ward*, 105 Ill. 620; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *Alleghany County v. New York Min. Co.*, 76 Md. 549; *State v. Parker*, 34 N. J. L. 49; *State v. Carragan*, 37 N. J. L. 264; *State v. Harrison*, 39 N. J. L. 51; *Auer v. Dubuque*, 65 Iowa 650; *Avery v. East Saginaw*, 44 Mich. 587; *Thomas v. Gain*, 35 Mich. 155; 24 Am. Rep. 535; *Dool v. Cassopolis*, 42 Mich. 547; *Maurer v. Cliff*, 94 Mich. 194; *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374; *Scott v. Brackett*, 89 Ind. 413; *Kuntz v. Sumption*, 117 Ind. 1; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *French v. Edwards*, 13 Wall. (U. S.) 506; *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 179; *Exchange Bank Tax Cases*, 21 Fed. Rep. 99; *Dean v. Aiken*, 48 Vt. 541; *Alabama, etc., R. Co. v. Brennan*, 69 Miss. 103; *Kansas Pac. R. Co. v. Russell*, 8 Kan. 558; *Gibbons v. Adamson*, 44 Kan. 203; *New Orleans v. St. Romes*, 28 La. Ann. 17; *New Orleans v. Stewart*, 28 La. Ann. 180. But see *Collier v. Morrow*, 90 Ga. 148.

A statute conferring power upon a tribunal to finally dispose of the property rights of an individual, which fails to provide for notice, denies to the citizen due process of law and is unconstitutional. *Kuntz v. Sumption*, 117 Ind. 1.

The legislature may prescribe the form of notice and manner of giving it, but cannot dispense with notice altogether. *Scott v. Toledo, etc., R. Co.*, 4 Ry. & Corp. L. J. 538. And a statutory provision that no person shall be heard to question the equalization of an assessment, unless he shall have first made such objection before the board of review, is valid only when reasonable time and opportunity is

afforded for making such objection. *Bratton v. Johnson Tp.*, 76 Wis. 430.

But the notice of a proposed increase in an assessment need not specify the property to be added thereto. *Poppleton v. Yamhill County*, 18 Oregon 377.

In *McIntyre v. White Creek*, 43 Wis. 620, it was held to be the duty of the town board of review to notify a resident taxpayer before increasing the assessor's valuation of his property; but that a failure to do so is a mere irregularity not available to avoid the tax without proof of substantial injustice.

The giving of an inventory by a taxpayer is not an equivalent for a notice to him of the assessment, and the time and place for hearing complaints, and he is entitled to such notice, even though he willfully refuses to make an inventory. *Brush v. Buker*, 56 Vt. 143.

**What Constitutes Raising.**—Where the assessor makes valuations in a memorandum book, and after consultation with the other members of the board, raises them on the final assessment, it has been held not such a raising of valuation as will require a notice to be given the owners. *Kissimmee City v. Cannon*, 26 Fla. 3. And adding omitted property to the rolls is not a raising of the assessment within a statute requiring a board of equalization to give notice of the raising of an assessment. *Jackson v. Chizum*, 78 Iowa 209; *Kiehl v. Chizum*, 78 Iowa 213.

**Joint or Common Owners.**—In *Perkins v. Zumstein*, 4 Ohio Cir. Ct. Rep. 371, it was held that notice of intent to increase a valuation, served on an owner of an undivided interest, will not bind any of the other owners nor authorize the board to increase the valuation even as against the one served.

2. *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30; *Hough v. Hastings*, 18 Ill. 312; *Alleghany County v. New York R. Co.*, 76 Md. 549.

Though the notice be in due form, if the board fails to meet at the time fixed, the levy is invalid. *Slaughter v. Louisville*, 89 Ky. 112; *Nashville v. Weiser*, 54 Ill. 246. And a taxpayer has the right to assume that the board

tial.<sup>1</sup> Notice may usually be given by publication in a newspa-

will remain in session for the statutory time, and to arrange to be present on any day he may choose. *Caledonia Tp. v. Rose*, 94 Mich. 216. But a postponement at the instance of the taxpayer will not affect the action of the board. *Faribault Water Works Co. v. Rice County*, 44 Minn. 12.

The notice will not justify the alteration of one class of assessments when it states an intention to correct errors in another class only. *Dool v. Cassopolis*, 42 Mich. 547.

**Notice of Reduction Not Necessary.**—But it is not necessary to give formal notice of the reduction of a tax before proceeding to collect it. *Com. v. New England Slate Co.*, 3 Allen (Mass.) 391.

1. *Nashville v. Weiser*, 54 Ill. 245; *Alleghany County v. New York Min. Co.*, 76 Md. 549; *Cleveland County v. Atlanta, etc., R. Co.*, 86 N. Car. 541.

Service on the party's tenant is not sufficient. *State v. Drake*, 33 N. J. L. 194.

Notice posted at the city hall complies with a statute requiring "legal notice." *Brunswick v. Finney*, 54 Ga. 317. And it may be given by mail. *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

A newspaper advertisement signed by the city treasurer who is only an *ex officio* member of the board, is not a notice by the board. *Slaughter v. Louisville*, 89 Ky. 112.

In *Missouri*, it is not required that an actual personal notice be given. *State v. New Lindell Hotel Co.*, 9 Mo. App. 450. But in *Indiana*, it has been held that a general notice to the public by publication or posting, is not such notice to an individual taxpayer as is required to authorize a change in the valuation of his property. *Kuntz v. Sumption*, 117 Ind. 1.

In *New Jersey*, where notice is required and has not been given, the assessment will lie against the valuation made by the assessor, unless evidence is taken to show its insufficiency, and application is made under the act of 1881 to increase it, *State v. Love*, 47 N. J. L. 436; and an injunction will lie against the collection of the excess. *Alabama, etc., R. Co. v. Brennan*, 69 Miss. 103.

**Computation of Time.**—When notice is given to appear within a certain

time, the time for appearance is to be computed as including the day of notice. *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

**Proof of Notice.**—The testimony of the assessor that notice was duly posted, and of a person employed in his office that during that time he posted such notice, coupled with the presumption that the officers did their duty, is sufficient to sustain a finding that notice was posted. *Oswego County v. Betts*, 6 N. Y. Supp. 934; 53 Hun (N. Y.) 638.

Where no written return or special mode of proof of service of the notice is prescribed, the fact of service by mail may be established by any proper legal testimony, either oral or in writing; and the oral evidence of the clerk that notice was duly mailed is sufficient to establish the fact. *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

The absence of notice cannot be proved unless alleged. *King v. Parker*, 73 Iowa 757.

In *Stell v. Watson* (Ark. 1889), 11 S. W. Rep. 822, it was held that failure to give notice required by statute, does not affect the jurisdiction of the board. And in *Beers v. People*, 83 Ill. 488, it was held that notice need not be given for the correction of any error or informality not affecting the substantial justice of the tax itself. See also *Scammon v. Chicago*, 44 Ill. 269; *State v. Love*, 49 N. J. L. 235, *aff'g* 47 N. J. L. 436; *Marsh v. Clark County*, 42 Wis. 502; *McIntyre v. White Creek*, 43 Wis. 620.

But in the absence of provision as to its form and manner of service, any reasonable notice is sufficient. See *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *Faribault Water Works Co. v. Rice County*, 44 Minn. 12; *State v. Board of Equalization*, 108 Mo. 235; *State v. Kearney Tp.* (N. J. 1892), 25 Atl. Rep. 327; *Black v. McGonigle*, 103 Mo. 192; *Stearns v. Miller*, 25 Vt. 20.

In *People v. Tax Comr's*, 31 Hun (N. Y.) 235, a notice given to a person named as executor in a will, two days before the probate of the will, was held to have been properly given.

In *Smith v. Hard*, 61 Vt. 469, it was held that a notice of the day and place of the meeting of a board of equaliza-

per,<sup>1</sup> and a statute prescribing the time and place at which the board shall meet and hear complaints, is sufficient notice.<sup>2</sup> But

tion is sufficient, though it does not give the hour, in the absence of evidence that a person complaining has suffered injury by the omission.

**Notice after change** is sufficient if opportunity to be heard and obtain a reinstatement of the original assessment is then given. *Rockafellow v. Board of Equalization*, 77 Iowa 493.

1. In the absence of statutory provision as to the particular mode of giving it. *State v. Runyon*, 41 N. J. L. 98; *Slaughter v. Louisville*, 89 Ky. 112. And see *Brunswick v. Finney*, 54 Ga. 317; *State v. Jersey City*, 25 N. J. L. 309; *State v. Jersey City*, 28 N. J. L. 500.

**Such Notice Constitutional.**—Provision for such notice is constitutional. *Lamb v. Connolly*, 122 N. Y. 531; *Fithian v. Wheeler*, 125 N. Y. 606; *Terrel v. Wheeler*, 123 N. Y. 76; *Matter of De Peyster*, 80 N. Y. 565; *Wabash Eastern R. Co. v. Drainage Dist.*, 134 Ill. 384. And see *Serrill v. New Orleans*, 27 La. Ann. 520.

Under statutes requiring notice to non-resident landowners by publication in some newspaper, the notice need not address the landowner by name, but may simply describe the land, and an error in the number designating the town is fatal. *Miller v. Graham*, 17 Ohio St. 1.

2. *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *State Railroad Tax Cases*, 92 U. S. 575; *Hyland v. Brazil*, etc., *Coal Co.*, 128 Ind. 335; *Pittsburgh*, etc., *R. Co. v. Backus*, 133 Ind. 625; *Gillett v. Lyon County*, 30 Kan. 166; *Spalding v. Hill*, 86 Ky. 656; *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391; *O'Neal v. Virginia*, etc., *Bridge Co.*, 18 Md. 26; 79 Am. Dec. 669; *Sioux City*, etc., *R. Co. v. Washington County*, 3 Neb. 30; *People v. Lothrop*, 3 Colo. 428; *Nixon v. Ruple*, 30 N. J. L. 58; *State v. Runyon*, 41 N. J. L. 98; *St. Paul v. Merritt*, 7 Minn. 258; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *State v. Hannibal*, etc., *R. Co.*, 101 Mo. 120; *St. Louis*, etc., *R. Co. v. Worthen*, 52 Ark. 529; *Hambleton v. Dempsey*, 20 Ohio 168; *Snell v. Fort Dodge*, 45 Iowa 564; *Cleveland*, etc., *R. Co. v. Backus*, 133 Ind. 513; *Indianapolis*, etc., *R. Co. v. Backus*, 133 Ind. 609; *Smith v. Rude*, etc., *Mfg. Co.*, 131 Ind. 150. And see

*Pulaski County Board of Equalization Cases*, 49 Ark. 518; *Evans v. Gage*, 1 Ill. App. 202; *Nashville v. Weiser*, 54 Ill. 245; *Oregon*, etc., *R. Co. v. Lane County (Oregon, 1893)*, 31 Pac. Rep. 964; *Glenn v. Raine (Ohio)*, 30 Wkly. Law Bull. 30; *In re McLean (Supreme Ct.)*, 6 N. Y. Supp. 230.

In such case, the ignorance of an assessment made against a taxpayer does not excuse him for failure to appear before the board to have it corrected, if erroneous. *Nugent v. Bates*, 51 Iowa 77; 32 Am. Rep. 117.

Many cases hold that such provisions are sufficient to authorize the board either to raise, lower, or otherwise alter assessments as it may deem just, without further notice. *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *Baird v. Williams*, 49 Ark. 518; *Collier v. Morrow*, 90 Ga. 148; *Scammon v. Chicago*, 44 Ill. 269; *Gillett v. Lyon County*, 30 Kan. 166; *State Railroad Tax Cases*, 92 U. S. 575; *Hallo v. Helmer*, 12 Neb. 87; *Suydam v. Merrick County*, 19 Neb. 155. And see *State v. Bonnell*, 49 N. J. L. 317; *State Railroad Tax Cases*, 92 U. S. 575.

But some of the states have adopted the rule that additions cannot be made or valuations increased, without direct notice to the person whose rights and interests are thereby affected. *Sioux City*, etc., *R. Co. v. Washington County*, 3 Neb. 30; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *Patten v. Green*, 13 Cal. 325; *Glassford v. Dorsey*, 2 Ill. App. 521; *Cleghorn v. Postlewait*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *McConkey v. Smith*, 73 Ill. 313; *Coolbaugh v. Huck*, 86 Ill. 600; *Henkle v. Keota*, 68 Iowa 334; *Leavenworth County v. Lang*, 8 Kan. 284; *Kansas Pac. R. Co. v. Russell*, 8 Kan. 558; *Allegheny County v. Union Min. Co.*, 61 Md. 545; *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374; *State v. Northern Belle Mill*, etc., *Co.*, 12 Nev. 89; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *Appar v. Hayward*, 53 N. Y. Super. Ct. 357; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *Avant v. Flynn (S. Dak. 1891)*, 49 N. W. Rep. 15; *Matheson v. Mazomanie*, 20 Wis. 191; *Lawrence v. Janesville*, 46 Wis. 364. And see *State v. Kearney Tp. (N. J. 1892)*, 25 Atl. Rep. 327.

a party, by appearing before the board and objecting to an assessment, waives notice.<sup>1</sup>

(2) *Of Meetings of Boards of Equalization.*—A board of equalization may raise or lower the entire assessment of any particular district without notice to the individual taxpayers or the people of the district.<sup>2</sup>

*f. PROCEEDINGS OF BOARDS.*—A board of equalization or review can act in the equalization or correction of assessments, only when sitting as a board for that purpose<sup>3</sup> at the time and

In any event, if the board meets at any other time or place than that appointed by law, notice of the time and place must be given. *Nixon v. Ruple*, 30 N. J. L. 38; *Slaughter v. Louisville*, 89 Ky. 112.

Before the enactment of the *Kansas* statutes of 1876, assessments of personal property could not be changed except on notice to the owner, *Gillett v. Lyon County*, 30 Kan. 166; *Leavenworth County v. Lang*, 8 Kan. 287; *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 587; *St. Joseph, etc., R. Co. v. Smith*, 19 Kan. 225; though a board of equalization had power to change those of real estate without such personal notice. *Kansas Pac. R. Co. v. Russel*, 8 Kan. 558. But under that statute, power was given to such boards to also change assessments of personal property without notice. *Gillett v. Lyon County*, 30 Kan. 166.

1. *Henkle v. Keota*, 68 Iowa 338; *Hutchinson v. Board of Equalization*, 66 Iowa 35; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *Jewell v. Van Steenburgh*, 58 N. Y. 85; *Taber v. Wilson*, 34 Mo. App. 89; *Brown v. Weatherby*, 71 Mo. 152; *State v. Board of Equalization*, 108 Mo. 235; *McGee v. State*, 32 Neb. 149; *State v. Gaylord*, 73 Wis. 306; *State v. Western Union Tel. Co.*, 4 Nev. 338.

In *Collier v. Morrow*, 90 Ga. 148, it was held that a taxpayer availing himself of the benefit of a statute providing for the selection of arbitrators to decide as to the propriety of his assessment, cannot complain that the mode of assessment is unconstitutional because the statute fails to make provision for notice or hearing.

One cannot complain that he had no legal notice of the proceeding when it appears that it had previously been twice continued at his instance. *Tillis v. Covington County*, 91 Ala. 396. And see *Faribault Water Works Co. v. Rice County*, 44 Minn. 12.

**Special Appearance.**—A taxpayer does not waive his right to object, however, by merely appearing in court and resisting an entry of judgment against his property for the tax. *Nashville v. Weiser*, 54 Ill. 245.

An appearance waives defects in the notice, *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318; and if objection is not then made, the sufficiency of the acts of the board cannot be afterwards impeached. *Hamilton v. Ames*, 74 Mich. 298. And a defect in a notice may be waived by taking an extension of time for payment, or by a voluntary payment. *Louden v. East Saginaw*, 41 Mich. 18.

**Presence at Time of Change.**—If the owner or his agent is present at the time the change is made and knows of such change, his knowledge is equivalent to notice. *Avant v. Flynn* (S. Dak. 1891), 49 N. W. Rep. 15; *State v. Board of Equalization*, 108 Mo. 235; *Faribault Water Works Co. v. Rice County*, 44 Minn. 12.

2. *Hallo v. Helmer*, 12 Neb. 87; *State v. Edwards*, 26 Neb. 701; on rehearing, 31 Neb. 369; *Dundy v. Richardson County*, 8 Neb. 508; *Fields v. Russell*, 38 Kan. 720; *Spalding v. Hill*, 86 Ky. 656.

3. *Sumner v. Colfax County*, 14 Neb. 524.

The fact that the county clerk recorded the proceedings of the board of equalization in a journal containing also the proceedings of the board of county commissioners, will not invalidate the action of the board of equalization; especially where the irregularities are not such as could mislead a taxpayer. *Fowler v. Russell*, 45 Kan. 425.

Under the *Nevada* statutes, action may be taken by the assessors to modify, equalize, or discharge assessments, irrespective of the character of the session of the board. *State v. Ormsby County*, 7 Nev. 392.

place provided by law,<sup>1</sup> though statutes, fixing the time of meeting of boards of equalization before whom no contest by parties interested is contemplated, are usually considered merely direct-

1. *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30; *Tierney v. Brown*, 67 Miss. 109; 7 Am. St. Rep. 679; *Yazoo Delta Invest. Co. v. Sud-doth*, 70 Miss. 416; *Powers v. Larabee* (N. Dak. 1891), 49 N. W. Rep. 724. And see *Atchison, etc., R. Co. v. Wil-son*, 35 Kan. 175; *St. Joseph Lead Co. v. Simms*, 108 Mo. 222; *Hyland v. Brazil, etc., Coal Co.*, 128 Ind. 335; *Wiley v. Flournoy*, 30 Ark. 609. And see *Wolfe v. Murphy*, 60 Miss. 1.

A provision requiring boards of review to meet upon certain specified days, is mandatory. *Caledonia Tp. v. Rose*, 94 Mich. 216. And in *Nebraska*, the power of the county commissioners to hold sessions as a board of equaliza-tion, is limited to the period of ten days, commencing on the third Mon-day of June of each year. *Sumner v. Colfax County*, 14 Neb. 524.

But the failure of the board to re-main in session from day to day until objections to the assessments have been determined and the proper cor-rections made, will not render the as-sessment illegal, where sufficient time was given for hearing and determining objections, and the rolls were subse-quently approved by the board. *Wolfe v. Murphy*, 60 Miss. 1.

In *People v. Queens County*, 82 N. Y. 275, it was held that the jurisdiction of a board of supervisors to amend an assessment roll, terminates with the levy of the tax and a delivery of the roll and warrant to the proper officer for its collection.

Though the first attempt by a board to approve an assessment roll is made at an unauthorized meeting, the assess-ment will be valid if regularly approved afterwards. *Cato v. Gordon*, 63 Miss. 320.

But when the board has met and acted and the prescribed time has expired, any further action by it will be void. *Wiley v. Flournoy*, 30 Ark. 609; *Phillips v. New Buffalo Tp.*, 64 Mich. 683. And see *State v. Central Pac. R. Co.*, 21 Nev. 172. But see *Nova Ceasarea, etc., Lodge v. Haggerty* (Ohio), 28 Wkly. Law Bull. 67.

After an assessment roll is equalized and completed and certified as required by law, it cannot be tampered with or changed, either by the board of equal-

ization itself or by its members. *Weston v. Monroe*, 84 Mich. 341. And see *Peo-ple v. Schenectady County*, 35 Barb. (N.Y.) 408.

**Adjournment from Day to Day.**—In *Halsey v. People*, 84 Ill. 89, it was held that where the board meets upon the day prescribed by law and adjourns from time to time, an equalization after-wards made will be regarded as made at the meeting held on the prescribed day. See also *Challiss v. Rigg*, 49 Kan. 119. And where the statute authorizes the board to meet and adjourn from day to day until the hearing of all cases is finished, the sickness and death of a member of the board, and the pendency of proceedings for the elec-tion of his successor, are sufficient rea-sons for an adjournment from day to day. *St. Louis Bridge Co. v. People*, 128 Ill. 422.

But where it is provided that they shall not sit after a certain day, and they adjourn until a day subsequent to that date, their power ceases for the year. *State v. Central Pac. R. Co.*, 21 Nev. 270.

**Meeting Presumed Legal.**—In *Tierney v. Brown*, 65 Miss. 563; 7 Am. St. Rep. 679, it was held that the meeting of the board of supervisors not held at an au-thorized time, will be presumed to have been an adjourned meeting, and there-fore legal, in the absence of proof that it was not such a meeting as might have been legally called and held at that time.

**Waiver of Error as to Time.**—An ap-pearance before a board at a time or place other than that fixed by law is a waiver of the defect. *State v. Thomas*, 17 N. J. L. 160; *State v. Cooper*, 59 Wis. 666. And see *Wolfe v. Murphy*, 60 Miss. 1; *Atlantic, etc., R. Co. v. Yavapai County* (Arizona, 1889), 21 Pac. Rep. 768; *O'Neil v. Tyler* (N. Dak. 1892), 53 N. W. Rep. 434.

**Sundays Not Included.**—A statutory requirement that the assessors fix a day for their meeting for the revision and correction of assessments, declaring that they shall continue in session during the business hours of each and every secular day, for a period of twenty successive days, means twenty successive secular days. *Walker v. Chicago*, 56 Ill. 277.



ory.<sup>1</sup> A method of procedure prescribed by statute is exclusive of all other modes,<sup>2</sup> but, in proceedings before such boards, the rules of practice in civil actions do not usually apply,<sup>3</sup> and provision for trial by a jury may be constitutionally omitted.<sup>4</sup>

It is usually necessary, in order to give a board jurisdiction to review an assessment, that a complaint, either oral or in writing, be filed,<sup>5</sup> which may be done by anyone liable to assess-

1. *State Auditor v. Jackson County*, 65 Ala. 142; *Perry County v. Selma*, etc., R. Co., 65 Ala. 391. And see *St. Louis Bridge Co. v. People*, 128 Ill. 422; *Halsey v. People*, 84 Ill. 89; *Silsbee v. Stockle*, 44 Mich. 561; *Nashville Sav. Bank v. Nashville*, 3 Tenn. Ch. 362; *Faribault Water Works Co. v. Rice County*, 44 Minn. 12.

2. *Sioux City*, etc., R. Co. v. Washington County, 3 Neb. 30; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450.

When a board has power to adjourn, it may do so for the purpose of correcting errors in the previous proceedings. *Black v. McGonigle*, 103 Mo. 192.

In the absence of statutory provision, the board has implied power to make such reasonable rules and regulations as it may deem best. *Porter v. Rockford*, etc., R. Co., 76 Ill. 561.

3. *Poppleton v. Yamhill County*, 18 Oregon 377; *People v. State Assessors*, 47 Hun (N. Y.) 450; *Gager v. Prout*, 48 Ohio St. 89.

Under the Oregon statutes, where a taxpayer appears before a board of equalization in pursuance of notice, and files an answer, it is not necessary that a reply to such answer be filed. *Poppleton v. Yamhill County*, 18 Oregon 377.

4. *Ross v. Crawford County*, 16 Kan. 411; *Cochecho Mfg. Co. v. Strafford*, 51 N. H. 455; *Davis v. Clinton*, 55 Iowa 549. And see *Dunleith*, etc., *Bridge Co. v. Dubuque County*, 55 Iowa 558.

The court may, in its discretion, send an issue to a jury. *Cochecho Mfg. Co. v. Strafford*, 51 N. H. 455.

5. *State v. Northern Belle Mill*, etc., Co., 12 Nev. 89; *State v. Washoe County*, 14 Nev. 140; *State v. Central Pac. R. Co.*, 17 Nev. 259; *Griswold v. Union School Dist.*, 24 Mich. 262; *People v. Goldtree*, 44 Cal. 323; *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638; *State v. Dodge County*, 20 Neb. 595; *Suydam v. Merrick County*, 19 Neb. 155; *Slaughter v. Louisville*, 89 Ky. 112; *People v. Lots in Ashley*, 122 Ill. 297; *People v. Forrest*, 30 Hun (N. Y.) 240.

A written complaint is necessary in *Nebraska*. *State v. Dodge County*, 20 Neb. 595; *Suydam v. Merrick County*, 19 Neb. 155. And in *California* the application must not only be written, but also verified. *Garretson v. Santa Barbara County*, 61 Cal. 54.

But in *Arkansas* the board may act without complaint being made against the assessors' returns. *Pulaski County Board of Equalization Cases*, 49 Ark. 518.

Where a party appears and moves to set aside an order increasing his assessment made without a complaint being filed, such appearance does not confer jurisdiction by relation; and the refusal to set aside the order does not make it valid. *People v. Goldtree*, 44 Cal. 323.

In *State v. McClurg*, 27 N. J. L. 253, it was held that if an insufficient affidavit is presented to the commissioners of appeal, the party presenting it has the right to make an amended affidavit, and the commissioners are bound to receive it.

The statement and affidavits must clearly entitle the taxpayer to the desired relief. *People v. Tax Com'rs*, 33 Barb. (N. Y.) 116. And see *State v. Thompson*, 2 N. H. 236; *Slaughter v. Louisville*, 89 Ky. 112; *Bratton v. Johnson Tp.*, 76 Wis. 430. In *New Hampshire*, an applicant to the selectmen for abatement, is not bound to show cause before the hearing; and if they neglect unreasonably to afford him a hearing, he may apply by petition to the circuit court. *Melvin v. Wear*, 56 N. H. 436.

The complaint may be amended so as to limit it to certain parcels of property. *Lowell v. Middlesex County*, 146 Mass. 403.

When a list or return is required, its rendition in the prescribed manner and form is a condition precedent to the right to relief, and when rendered it is conclusive upon the taxpayer. See *infra*, this title, *Remedies for Erroneous and Illegal Taxation*, sub-title, *General Rights of the Taxpayer as to*

ment,<sup>1</sup> whether the injustice is caused by overvaluation of his own property or undervaluation of that of others.<sup>2</sup> Boards may generally act upon their own knowledge or personal examination, or any other information or evidence satisfactory to themselves,<sup>3</sup> though some statutes only authorize boards of review to

*Remedies.* And see also *supra*, this title, *Listing*.

1. Dundee Mortgage, etc., Co. v. Charlton, 32 Fed. Rep. 192. And see Dewey v. Stratford, 40 N. H. 203; Carpenter v. Dalton, 58 N. H. 615; State v. Edwards, 26 Neb. 701.

In Griswold v. Union School Dist., 24 Mich. 262, it was held that a board of review can examine the assessment roll, and review a valuation of property thereon, only on application of a party concerned. See also People v. Forrest, 96 N. Y. 544; Thatcher v. People, 79 Ill. 599.

Non-resident taxpayers are entitled to apply for the abatement of an illegal or unjust tax, equally with residents, upon complying with the requisitions of the statute; and such compliance will be presumed where there is no palpable violation of such requisitions. Winnimmet County v. Chelsea, 6 Cush. (Mass.) 477; Hicks v. Westport, 130 Mass. 480; Dewey v. Stratford, 40 N. H. 203.

A conveyance of land to trustees to secure an indebtedness is only a mortgage, and does not preclude the owner from claiming the title in fee, and seeking relief against an illegal tax. Flint, etc., R. Co. v. Auditor Gen'l, 41 Mich. 635.

A bank and its receiver have no such interest in the stock as to warrant an application by them for an abatement of the tax on the shares. People v. Wall St. Bank, 39 Hun (N. Y.) 525. But where, under a state law, the bank furnishes the assessor with a list of its shareholders, and practically itself makes the return, it may petition for an abatement. National Bank of Commerce v. New Bedford, 155 Mass. 313; Price v. Kramer, 4 Colo. 546.

2. Dundee Mortgage, etc., Co. v. Charlton, 32 Fed. Rep. 192. And see Walsh v. King, 74 Mich. 354; Auditor Gen'l v. Jenkinson, 90 Mich. 523; Merrill v. Humphrey, 24 Mich. 170; State v. Edwards, 26 Neb. 701; State v. Randolph, 25 N. J. L. 427.

Under a provision permitting any person whose property is assessed, on sufficient cause shown, to apply for

relief, a mortgagor can ask for a correction of the assessment of the mortgagee's interest as well as his own. Detroit v. Board of Assessors, 91 Mich. 48.

In Re Des Moines Water Co., 48 Iowa 324, it was held that no one has a right to appear before a board of equalization as a party to a proceeding, and have another's assessment corrected or raised. See also Gilkey v. Merrill, 67 Wis. 459.

A city interested on account of its revenues may make the application through its mayor. St. Louis Bridge Co. v. People, 128 Ill. 422.

**Assessments for Benefits.**—One against whom benefits are assessed, but whose land is not taken, cannot show an excessive valuation upon lands which are taken, but only that his property was not benefited to the amount of the assessment. St. Louis v. Speck, 67 Mo. 403.

3. Griswold v. Union School Dist., 24 Mich. 262; Case v. Dean, 16 Mich. 12; Grand Rapids v. Welleman, 85 Mich. 234; Republic L. Ins. Co. v. Polak, 75 Ill. 292; St. Louis, etc., R. Co. v. Surrall, 88 Ill. 535; Pulaski County Board of Equalization Cases, 49 Ark. 518; Grimes v. Burlington, 74 Iowa 123; Smith v. Jones County, 30 Iowa 531; Hannibal, etc., R. Co. v. State Board of Equalization, 64 Mo. 294; State v. Hannibal, etc., R. Co., 101 Mo. 120; McIntyre v. White Creek, 43 Wis. 620; Shove v. Manitowoc, 57 Wis. 7; State v. Roe, 36 N. J. L. 86; Fields v. Russell, 38 Kan. 720; New York v. Davenport, 92 N. Y. 604; People v. Hadley, 76 N. Y. 337.

They may avail themselves of such means of information as they deem necessary. Kansas Pac. R. Co. v. Riley County, 20 Kan. 141; Baird v. Williams, 49 Ark. 518; Nova Ceasarea, etc., Lodge v. Haggerty (Ohio), 28 Wkly. Law Bull. 67. But they cannot act arbitrarily without any evidence or knowledge of the facts. Fratz v. Mueller, 35 Ohio St. 397; Dundy v. Richardson County, 8 Neb. 508; People v. Reddy, 43 Barb. (N. Y.) 539; People v. Howland, 61 Barb. (N. Y.) 273; People v. Dykes (Supreme Ct.),

act upon evidence formally taken.<sup>1</sup> The burden of proof rests with the taxpayer to establish facts entitling him to relief.<sup>2</sup>

g. THE DETERMINATION.—An assessment will be modified or altered only to the extent that it is unlawful or unjust,<sup>3</sup> and, as a

19 N. Y. Supp. 78; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322.

If a board of review, arbitrarily and against all evidence before it, fixes the valuation of land beyond its real value, an injunction will lie to restrain the sale of the land for the tax. *Tainter v. Lucas County*, 29 Wis. 375.

In *McMorran v. Wright*, 74 Mich. 356, it was held that a board cannot make a rule prohibiting proof of erroneous assessment, unless the plaintiff appears in person and submits to oral examination.

In *Hagenmeyer v. Board of Equalization*, 82 Cal. 214, an order of the board was held conclusive that it acted upon proper evidence, unless its record showed affirmatively that it did not. And a complaint merely stating the plaintiff's testimony, and that the board refused to reduce the valuation therefrom, without stating that it was the only evidence presented, does not show that the board acted in disregard of all evidence. *Tainter v. Lucas County*, 29 Wis. 375. See also *La Salle, etc., R. Co. v. Donoghue*, 127 Ill. 27.

The affidavit of a taxpayer is not conclusive under the *New York* statute. *People v. Tax Com'rs*, 40 Barb. (N. Y.) 334.

1. A determination not based upon evidence being void. *Shove v. Manitowoc*, 57 Wis. 5; *Phillips v. Stevens' Point*, 25 Wis. 594; *State v. Dodge County*, 26 Neb. 595. And see *State v. McClurg*, 27 N. J. L. 253. See also as to a former *Wisconsin* rule, *McIntyre v. White Creek*, 43 Wis. 620; *Wilson v. Heller*, 32 Wis. 457.

The fact that the board of equalization fixes the same valuation for the property of a railroad company that it did for preceding years, does not raise such a presumption that it acted arbitrarily and without evidence as will overcome the legal presumption that it honestly discharged its duties. *State v. Hannibal, etc., R. Co.*, 101 Mo. 120.

Under the *Oregon* statutes, a deduction in indebtedness claimed before a board of equalization, in order to be allowed, must be presented, and the particular indebtedness must be specified and sworn to. *Oregon, etc., Sav. Bank v. Catlin*, 15 Oregon 342.

Under the *Nevada* statutes, the statement of the assessor before the board of equalization as to the value of property, is competent evidence, upon which it is authorized to act. *State v. Northern Belle Mill, etc., Co.*, 12 Nev. 89.

The evidence is required to be confined to the value of the property in question; comparison with the valuations on other property similarly situated is not admissible. See *Chicopee v. Hampden County*, 16 Gray (Mass.) 38; *Haven v. Essex County*, 155 Mass. 467; *Lowell v. Middlesex County*, 152 Mass. 372; *White v. Portland (Conn.)*, 1893, 26 Atl. Rep. 342; *Alabama Mineral Land Co. v. Perry County*, 95 Ala. 105; *State v. Bienville Water Supply Co.*, 89 Ala. 325; *Redd v. St. Francis County*, 17 Ark. 416. *Contra*, *Manchester Mills v. Manchester*, 58 N. H. 38. And see *Lowell v. Middlesex County*, 146 Mass. 403.

2. *People v. Davenport*, 91 N. Y. 574; *New Orleans Cotton Exchange v. Board of Assessors*, 37 La. Ann. 423; *State v. Abbott*, 42 N. J. L. 109; *State v. Hudson County*, 46 N. J. L. 93; *Jones v. Tiffin*, 24 Iowa 190; *People v. Adams (Supreme Ct.)*, 10 N. Y. Supp. 295.

An affidavit that the deponent has no property in the ward subject to taxation, is sufficient and conclusive, unless controlled by other evidence. *State v. McClurg*, 27 N. J. L. 253.

3. *State v. Randolph*, 25 N. J. L. 427; *Cochecho Mfg. Co. v. Strafford*, 51 N. H. 455; *Pensacola v. Louisville, etc., R. Co.*, 21 Fla. 492. And see *infra*, this title, *Remedies for Erroneous and Illegal Taxation*, sub-tit., *General Rights of the Taxpayer as to Remedies*.

Where a person is overtaxed for some of his property, and undertaxed to an equal or greater extent for other property, in the same assessment, he is not entitled to an abatement, but only to a correction of the erroneous form of the assessment when it is injurious to him. *Edes v. Boardman*, 58 N. H. 580. And see *Lowell v. Middlesex County*, 152 Mass. 372; *State v. Cincinnati, etc., R. Co.*, 13 Lea (Tenn.) 500.

If taxable and non-taxable property are joined in one assessment, but the whole amount is not greater than the

general rule, the property should be estimated at its fair cash value, irrespective of the value placed by assessors upon other property,<sup>1</sup> though, where other assessments are too low, some decisions hold that a reduction will be made if the taxpayer is thereby compelled to pay more than his just share of the aggregate tax.<sup>2</sup> Usually the board is authorized merely to determine what alterations should be made and to direct the assessors to make them;<sup>3</sup> and, if the assessors refuse or fail to act, they

value of the taxable, it will be sustained. *State v. Haight*, 35 N. J. L. 178.

Executors cannot demand that an assessment be reduced because claims have been presented against the estate, which are not admitted, but contested. *People v. Tax Com'rs*, 34 Hun (N. Y.) 506.

In *Boston, etc., R. Co. v. State*, 64 N. H. 490, it was held that where a tax is reduced on appeal, the amount abated is to be allowed on a subsequent tax.

Where any alteration is made in the aggregate valuation, the additions or deductions so made may be expressed in any form which may by calculation be reduced to a percentage. *Case v. Déan*, 16 Mich. 12.

1. *Ives v. Goshen* (Conn. 1893), 26 Atl. Rep. 845; *Lowell v. Middlesex County*, 152 Mass. 372; *People v. Lots in Ashley*, 122 Ill. 297; *Illinois, etc., R., etc., Co. v. Stookey*, 122 Ill. 358; *Georgia Midland, etc., R. Co. v. State*, 89 Ga. 597. And see *Canfield v. Bayfield County*, 74 Wis. 60.

But if they reduce it to the rate of valuation at which other property has been assessed, their action cannot be objected to. *Darling v. Gunn*, 50 Ill. 424.

Where the statute prescribes a rule for the valuation of a certain class of property, it cannot be varied from, although the assessors have wrongfully assessed other descriptions of property at less than their value. *People v. Delaware County*, 60 N. Y. 381.

In *People v. Lots in Ashley*, 122 Ill. 297, an assessment at the fair cash value of the property was held not excessive, even though assessments were made by other assessors on adjoining lands at only one-third their value. See also *Challiss v. Rigg*, 49 Kan. 119.

In *New Fersey*, the taxpayer must apply to have the low assessments raised, but he cannot have a reduction of his own. See *State v. Randolph*, 25 N. J. L. 427; *State v. Taylor*, 35 N. J. L. 189; *State v. Koster*, 38 N. J. L. 308; *State v. Segoin*, 53 N. J. L. 339.

**Reduction Must Be Uniform.**—In equalizing the assessment roll of the county the board is not authorized to reduce the valuation as to part of the land in a town, and not reduce all the real estate in the same town, unless the portion not reduced consists of an incorporated village. *Kelley v. Corson*, 11 Wis. 1.

2. *People v. Carter*, 109 N. Y. 576; *People v. Ganley*, 8 N. Y. Supp. 563; 56 Hun (N. Y.) 639; *People v. Keator*, 67 How. Pr. (N. Y. Supreme Ct.) 277; *Manchester Mills v. Manchester*, 57 N. H. 309. And see *Cummings v. National Bank*, 101 U. S. 153; *Phillips v. Stevens' Point*, 25 Wis. 594.

But in order to authorize the reduction, the average rate of other assessments must be lower. *People v. Badgley*, 138 N. Y. 314.

In *People v. Ganley*, 8 N. Y. Supp. 563; 56 Hun (N. Y.) 639, it was held that an assessment will be reduced to one-fifth of its actual value where all other property is assessed at that rate, even though such reduced assessment is prohibited by law. See also *People v. Zoeller* (Supreme Ct.), 15 N. Y. Supp. 684.

3. *Keck v. Keokuk County*, 37 Iowa 547; *Weaver v. State*, 39 Ala. 535; *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318; *State v. Board of Assessors*, 30 La. Ann. 261. And see *Connor v. Waxahachie* (Tex. 1889), 13 S. W. Rep. 30; *Ferris v. Kimble*, 75 Tex. 476; *Duck v. Peeler*, 74 Tex. 268; *Gay v. Board of Assessors*, 34 La. Ann. 370; *People v. Clapp* (Supreme Ct.), 19 N. Y. Supp. 531; *People v. Zoeller* (Supreme Ct.), 15 N. Y. Supp. 684. But see *Boody v. Watson*, 64 N. H. 162.

Where a board of equalization exceeds its authority in correcting an error by its own judgment, instead of directing it to be done, it is immaterial, when the error is such that its correction is a mere ministerial duty. *Weaver v. State*, 39 Ala. 535.

Statutes prohibiting the enjoining or otherwise preventing the collection of

may be compelled to do so by the court, under a writ of *mandamus*.<sup>1</sup>

*h.* CONCLUSIVENESS AND EFFECT.—The acts of boards of equalization and review, in passing upon assessments, are judicial in their nature,<sup>2</sup> and their determination is conclusive and cannot be attacked collaterally,<sup>3</sup> unless their action or determination

taxes, do not prevent the issuance of an order to the county auditor to correct his tax lists by deducting the amount of an unauthorized increase in the valuation of property. *State v. Cromer*, 35 S. Car. 213; *State v. Boyd*, 35 S. Car. 233.

1. *State v. Board of Assessors*, 30 La. Ann. 261. And see *State v. Cromer*, 35 S. Car. 213; *Wood v. McGuire* (Supreme Ct.), 17 N. Y. Supp. 659.

The officers required to make the corrections act ministerially and can justify a refusal only upon the ground that to do so would violate the constitution of the state. *Mix v. People*, 72 Ill. 241.

In *People v. Ontario County*, 85 N. Y. 323, it was held that where a decision of the state assessors equalizing and correcting an assessment roll, is forwarded to the clerk of the board of supervisors within the time prescribed by law, the board is bound to enforce the decision, and may be compelled to do so by *mandamus*, even though the annual session of the board has been adjourned.

**Certiorari.**—On the assessors' failure to act, the proper correction may be ordered in a *certiorari* proceeding. *Keck v. Keokuk County*, 37 Iowa 547.  
2. *Stanley v. Albany County*, 121 U. S. 535; *People v. Goldtree*, 44 Cal. 323; *Moore v. Taylor*, 147 Pa. St. 481; *Griswold v. Union School Dist.*, 24 Mich. 262; *State v. Dowling*, 50 Mo. 134; *St. Louis Mut. L. Ins. Co. v. Charles*, 47 Mo. 462; *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *East St. Louis, etc., R. Co. v. People*, 119 Ill. 182; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *New York v. Davenport*, 92 N. Y. 604; *Bellinger v. Gray*, 51 N. Y. 610; *People v. Hagadorn*, 104 N. Y. 516. But see *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625.

3. *Stanley v. Albany County*, 121 U. S. 535; *Weaver v. State*, 39 Ala. 535; *New York v. Davenport*, 92 N. Y. 604; *People v. Kingston*, 101 N. Y. 82; *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *Preston v. Johnson*, 104

Ill. 625; *Illinois, etc., R., etc., Co. v. Stookey*, 122 Ill. 358; *People v. Lots in Ashley*, 122 Ill. 297; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *People v. Big Muddy Iron Co.*, 89 Ill. 116; *Morgan v. Smithson*, 9 Ill. 368; *West Bend Tp. v. Brown*, 47 Iowa 25; *Grand Rapids v. Wellesman*, 85 Mich. 234; *Case v. Dean*, 16 Mich. 12; *Atty. Gen'l v. Sanilac County*, 42 Mich. 72; *Williams v. Saginaw*, 51 Mich. 120; *Kittle v. Shervin*, 11 Neb. 65; *Ward v. Beale*, 91 Ky. 60; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *State v. Central Pac. R. Co.*, 26 Nev. 172; *State v. Randolph*, 25 N. J. L. 427; *Pickens v. Henderson County*, 112 N. Car. 698; *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Moore v. Taylor*, 147 Pa. St. 481. And see *Canfield v. Bayfield County*, 74 Wis. 60; *People v. Goldtree*, 44 Cal. 323; *San Jose Gas Co. v. January*, 57 Cal. 614; *Monroe v. New Canaan*, 43 Conn. 309; *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391; *Com. v. Cary Imp. Co.*, 98 Mass. 19; *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372; *Rhoads v. Cushman*, 45 Ind. 85; *Center, etc., Road Co. v. Black*, 32 Ind. 468; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 633; *International, etc., R. Co. v. Smith County*, 54 Tex. 1; *Houston, etc., R. Co. v. Presidio County*, 53 Tex. 518; *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587.

Where a question of valuation for taxation has once been regularly referred to the proper board of equalization, the valuation of that tribunal is final. *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119. The courts cannot substitute their judgment for that of the board. *State Railroad Tax Cases*, 92 U. S. 575. And money collected on an assessment which has been passed upon by a board of review cannot be recovered back in an action at law any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed. *Stanley v. Albany County*, 121 U. S. 535.

is impeached on the ground of fraud<sup>1</sup> or because of a want of jurisdiction.<sup>2</sup>

i. RECORD OF PROCEEDINGS.—Boards of equalization and review should keep a record of their proceedings, showing with clear-

In *North Carolina*, the determination of the county commissioners is conclusive, unless made upon a wrong principle. *Wilmington, etc., R. Co. v. Brunswick County*, 72 N. Car. 10; *Wade v. Craven County*, 74 N. Car. 81.

Under the *Ohio* statutes, the proceedings had before a board of equalization cannot be pleaded as an adjudication in bar of proceedings before a county auditor for a correction of returns. *Gager v. Prout*, 48 Ohio St. 89.

In *Lackawanna County v. Com.*, 156 Pa. St. 477, it was held that a transfer of a credit by the board of equalization, which is not within its jurisdiction, is not conclusive on the state, even though it takes no appeal.

Errors of judgment and mistakes in their conclusions are remediable only in direct proceedings established for the purpose of review. *New York v. Davenport*, 92 N. Y. 604; *State v. Fish*, 4 Nev. 216; *Louisville Water Co. v. Clark* (Ky. 1893), 21 S. W. Rep. 246; *Orr v. State Board of Equalization* (Idaho, 1891), 28 Pac. Rep. 416; *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Grand Rapids v. Welleman*, 85 Mich. 234; *State v. Hannibal, etc., R. Co.*, 101 Mo. 120; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *Stanley v. Albany County*, 121 U. S. 536. And see *Ward v. Beale*, 91 Ky. 60; *McGee v. State*, 32 Neb. 149; *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1.

In *Griswold v. Union School Dist.*, 24 Mich. 262, it was held that a determination of a board of review changing an assessment, must stand as final until changed upon a rehearing after reasonable notice.

**Notice of Determination.**—In *Lowell v. Middlesex County*, 146 Mass. 403, it was held that notice should be given by assessors refusing to abate a tax to the taxpayer, and the time within which a complaint must be made to the county commissioners for an abatement will begin to run from the date of such notice. See also *Simmunds v. Scott County*, 68 Miss. 37. But see *State Railroad Tax Cases*, 92 U. S. 575.

1. *Tainter v. Lucas County*, 29 Wis. 375; *People v. Lots in Ashley*, 122 Ill. 297; *Republic L. Ins. Co. v. Pollak*, 75

Ill. 292; *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *Illinois, etc., R., etc., Co. v. Stookey*, 122 Ill. 358; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *State v. Central Pac. R. Co.*, 26 Nev. 172; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625; *People v. Kingston*, 101 N. Y. 82. And see *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *East St. Louis, etc., R. Co. v. People*, 119 Ill. 182.

But fraud on the part of the assessor is no ground for disturbing a valuation, where no fraud appears on the part of the board which confirmed the valuation. *State v. Central Pac. R. Co.*, 26 Nev. 172.

In attacking the action of a board of equalization, facts showing fraud should be stated, and an important if not essential fact to make out the fraud is, that they acted arbitrarily and against evidence. *Tainter v. Lucas County*, 29 Wis. 375.

The judgment of the board is conclusive, unless the inequalities are so gross as to show bad faith or arbitrary judgment. *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 586. But the fact that several business men differ considerably from the judgment of the assessor and board of review as to the value of certain property, is not sufficient to impeach the assessment or show an intentional undervaluation. *Hixon v. Oneida County*, 82 Wis. 515.

2. *Stanley v. Albany County*, 121 U. S. 535; *People v. Lots in Ashley*, 122 Ill. 297; *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *East St. Louis, etc., R. Co. v. People*, 119 Ill. 182; *People v. Wilson*, 119 N. Y. 515; *Pueblo County v. Wilson*, 15 Colo. 90.

When no appeal is provided for, an assessment cannot be assailed upon any ground other than fraud or want of jurisdiction. *State v. Bettie*, 50 N. J. L. 132; *East St. Louis, etc., R. Co. v. People*, 119 Ill. 182.

A recital in a certificate of equalization, that due notice was given to the party whose assessment is to be increased, is not conclusive, but may be contradicted in a suit brought to test the legality of the proceedings. *State v. Warford*, 32 N. J. L. 207.

One who seeks equitable relief by

ness and certainty what steps were taken,<sup>1</sup> as well as all facts necessary to give jurisdiction;<sup>2</sup> and statutes requiring a record

injunction against an alleged unauthorized action by a board of equalization, must establish facts showing that the board had acted illegally and without authority. *International, etc., R. Co. v. Smith County*, 54 Tex. 1.

Their decision is not final as to claims of exemption under statutory or constitutional provisions. *Horne v. Green*, 52 Miss. 452.

In cases of overvaluation, the decision of the board of review is final, but where overtaxation is claimed, it is not essential to apply to them, nor is their decision refusing an abatement final because the claim denies the jurisdiction of the assessor over the property assessed. *Goddard v. Seymour*, 30 Conn. 394; *Phelps v. Thurston*, 47 Conn. 477.

If, however, a taxpayer, admitting that he was taxable on certain property, has claimed and obtained an abatement, he cannot appeal on the ground that he should not have been assessed at all. *Phelps Mortgage Co. v. Board of Equalization*, 84 Iowa 610.

The action of boards, either of equalization or of review, without jurisdiction or in excess of their authority, does not affect the original assessment. *State v. Allen*, 43 Ill. 456; *Mix v. People*, 72 Ill. 241; *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638; *Dickey v. Polk County*, 58 Iowa 287; *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210; *Avery v. East Saginaw*, 44 Mich. 587; *Paul v. Pacific R. Co.*, 4 Dill. (U. S.) 35. And see *People v. Nichols*, 49 Ill. 517; *Kimball v. Merchants' Sav., etc., Co.*, 89 Ill. 611.

In *Marsh v. Bowen*, 12 Abb. N. Cas. (N. Y. Supreme Ct.) 1, it was held that the members of a board of supervisors may be charged in trespass for an unauthorized addition of property or names to the assessment roll. See also, *supra*, this title, *The Assessment; Conclusiveness and Effect*.

1. *State v. Central Pac. R. Co.*, 17 Nev. 259; *State v. Warford*, 32 N. J. L. 207. And see *Bowler v. Brown*, 84 Me. 376; *Louisville v. McKegney*, 7 Bush (Ky.) 651.

The record should be intelligible and certain as to its meaning, so that a taxpayer who chooses to examine it can know what action was taken. *Paldi v. Paldi*, 84 Mich. 346.

A record of equalization which fails

to show the assessed valuation of the several townships, and the amounts added to or deducted therefrom for the purposes of the equalization, is entirely defective and voids the entire levy for the year in which it is made. *Aplin v. Roberts*, 83 Mich. 471.

But mere irregularities will not vitiate it when the entire record is sufficient to indicate the proper steps. *Fowler v. Russell*, 45 Kan. 425.

A requirement that a board shall state the facts upon its journal upon which a change of assessment is made, is satisfied by an entry that, in view of the facts, the return was insufficient and below the actual value of the property. *Fratz v. Mueller*, 35 Ohio St. 397. And see *Hambleton v. Dempsey*, 20 Ohio St. 168. But, as a general rule, the evidence upon which a board of equalization bases its valuation is not required to be preserved in the record. *State v. Hannibal, etc., R. Co.*, 101 Mo. 120. And see *Becker v. Malheur County (Oregon)*, 1893, 33 Pac. Rep. 543.

The record need not show that changes were made, if the fact of equalization appears. *Chamberlain v. St. Ignace*, 92 Mich. 332.

Where the record has been mutilated, its failure to show that there was an equalization will not affect the validity of the tax. *Easton v. Savery*, 44 Iowa 654.

To constitute a record it is not necessary that the proceedings should be kept in a book; a writing or written memoranda is sufficient. *State Auditor v. Jackson County*, 65 Ala. 142.

The fact that the proceedings of a board of equalization are recorded in a journal containing the proceedings of the same board sitting as county commissioners, will not invalidate its action. *Fowler v. Russell*, 45 Kan. 425.

2. *State v. Central Pac. R. Co.*, 17 Nev. 259; *State v. Board of Equalization*, 7 Nev. 83; *Finch v. Tehama County*, 29 Cal. 453; *Plummer v. Wativerville*, 32 Me. 566; *Nixon v. Ruple*, 30 N. J. L. 58; *Hecht v. Boughton*, 2 Wyoming 368; *Rhode v. Davis*, 2 Ind. 53; *Rosenthal v. Madison, etc., Plank Road Co.*, 10 Ind. 358.

Where the records of the board of equalization are required to show a complaint, a mere recital that a complaint was made is not enough. *State v. Dodge County*, 20 Neb. 595.

or prescribing its form are considered mandatory, and must be strictly complied with.<sup>1</sup> The record, when required to be kept, is the proper evidence of the official acts of the board;<sup>2</sup> though, upon proof of its loss or destruction, secondary evidence of its contents may be received.<sup>3</sup> The board may amend its record,

In *State v. Board of Equalization*, 108 Mo. 235, it was held that an equalization of taxes is not invalidated by the failure of the record to show that the members of the board took the oath of office required by law. See also *Taber v. Wilson*, 34 Mo. App. 89.

1. *Perry County v. Selma, etc.*, R. Co., 65 Ala. 391; *State Auditor v. Jackson County*, 65 Ala. 142; *State v. Warford*, 32 N. J. L. 207; *Paldi v. Paldi*, 84 Mich. 346; *Yelverton v. Steele*, 36 Mich. 62; *Gilchrist v. Dean*, 55 Mich. 244; *Batterman v. Neihaus*, 4 Ohio Cir. Ct. Rep. 502.

But the *Iowa* statute has been held merely directory. *Hutchinson v. Board of Equalization*, 66 Iowa 35.

A provision that the record shall be signed by all the members of the board is also mandatory. *State Auditor v. Jackson County*, 65 Ala. 142; *Weston v. Monroe*, 84 Mich. 341; *Pearsall v. Eaton County*, 71 Mich. 438. But see *Burt v. Wadsworth*, 39 Mich. 126. But such a requirement is substantially complied with by the signature of a certificate which is pasted to the roll, accompanied by a certificate that they have completed the review, and corrected and approved the roll. *Darmstaetter v. Moloney*, 45 Mich. 621. See also *Hixon v. Oneida County*, 82 Wis. 515.

Under the *Kansas* statutes, the clerk is required to file in his office a statement of the facts, or the evidence upon which the correction is made, and when he files a statement of the evidence and the order is supported by it, although he adds to his statement something in the nature of a finding of facts which is not sufficiently precise and complete of itself to sustain the order, it is not ground for setting it aside. *Ross v. Crawford County*, 16 Kan. 411.

Where the statute requires the board to render its judgment concerning additions to an assessment within ten days after the hearing thereon, the certificate of their proceedings must show on its face that their judgment was rendered within that time. *State v. Warford*, 32 N. J. L. 207.

Where a certificate of equalization is required to be attached to the roll, no steps can be taken in its absence for the enforcement of the tax. *Maxwell v. Paine*, 53 Mich. 30. But when not required, it may be omitted. *Burt v. Wadsworth*, 39 Mich. 126; *Tweed v. Metcalf*, 4 Mich. 579. And see *Perry County v. Selma, etc.*, R. Co., 65 Ala. 391.

In *Dickison v. Reynolds*, 48 Mich. 158, it was held that the fact that a supervisor's certificate to an assessment roll is dated before the day of review, and while the parties have still a right to appear and be heard on their assessment, is not important, as the date may be an error, and if not the review may nevertheless have taken place. See also *Yelverton v. Steele*, 36 Mich. 62.

2. *State v. Central Pac. R. Co.*, 17 Nev. 259; *Timberlake v. Brewer*, 59 Ala. 108; *St. Louis Bridge Co. v. People*, 128 Ill. 422. And see *Haven v. Essex County*, 155 Mass. 467; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Yelverton v. Steele*, 36 Mich. 62. The assessor's original list need not be produced. *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349.

The record of a town clerk showing that he and the local assessor met to review the assessment and adjourned the hearing to a subsequent day, is the best evidence of the fact of such meeting and adjournment. *St. Louis Bridge Co. v. People*, 128 Ill. 422.

In an action of ejectment against the holder of a tax title, its validity, especially if it be of long standing, cannot be impeached by parol evidence to show the falsity of the supervisor's certificate of valuation attached to the assessment roll. *Blanchard v. Powers*, 42 Mich. 619.

In *Oteri v. Parker*, 42 La. Ann. 374, an entry on the minutes of an assessment board to the effect that it had adjourned, there being no further business to transact, was held conclusive evidence that the assessment of each district was subject to the action of the board as required by law.

3. *State Auditor v. Jackson County*, 65 Ala. 142.



while it still has jurisdiction, so as to make it conform to the truth.<sup>1</sup>

*j.* APPEAL AND REVIEW.—The appraisal of property is an act of such a *quasi* judicial nature that it can be constitutionally performed by courts on appeal,<sup>2</sup> provision for which is made by statute in some of the states.<sup>3</sup> But, unless authorized by statute,

1. *State v. Central Pac. R. Co.*, 17 Nev. 259; *Boyce v. Auditor Gen'l*, 90 Mich. 314; *Black v. McGonigle*, 103 Mo. 192.

It may be compelled by *mandamus* to correct its record so as to conform to the facts. *State v. Dodge County*, 20 Neb. 595.

2. *Edes v. Boardman*, 58 N. H. 584; *Pierre Water Works Co. v. Hughes County*, 5 Dakota 145; *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30. But see *Kansas Pac. R. Co. v. Riley County*, 20 Kan. 141; *Auditor Gen'l v. Atchison, etc., R. Co.*, 6 Kan. 500; *Rhoads v. Cushman*, 45 Ind. 85.

Courts of general jurisdiction, in the city of Chicago, may examine into the proceedings of the common council, as to all matters connected with a tax or assessment, without a resort to the common-law writ of *certiorari*. *Pease v. Chicago*, 21 Ill. 500.

If assessors place property upon the tax roll not liable to taxation, and refuse, upon the application of the persons aggrieved, to strike it off, their action is reviewable by *certiorari*. *People v. Ogdensburg*, 48 N. Y. 390. And it is essential, in such case, for the board to return a full record of their proceedings. *Haven v. Essex County*, 155 Mass. 467.

**Right to Jury Trial.**—Where a jury is demanded and refused, and the finding by the court is the same as under the evidence, the verdict must be sustained; the issue being really one of law, the refusal to grant a jury does not justify a reversal of the judgment. *Bremer County Bank v. Bremer County*, 42 Iowa 394.

3. *Matter of Des Moines Water Co.*, 48 Iowa 324; *Grimes v. Burlington*, 74 Iowa 123; *Johnson v. People*, 84 Ill. 377; *Fowler v. Perkins*, 77 Ill. 261; *Preston v. Johnson*, 104 Ill. 625; *Simmons v. Scott County*, 68 Miss. 37; *Lowell v. Middlesex County*, 146 Mass. 403; *Bradley v. Laconia* (N. H. 1890), 20 Atl. Rep. 331; *State v. North Plainfield*, 43 N. J. L. 349; *Knisella v. Auburn*, 54 Hun (N. Y.) 634; *Kissim-*

*me City v. Cannon*, 26 Fla. 3; *Randle v. Williams*, 18 Ark. 380; *Lehman v. Robinson*, 59 Ala. 219; *Albert v. Board of Revision*, 139 Pa. St. 467; *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Pringle's Appeal*, 6 Kulp. (Pa.) 525; *New Orleans Gas Light Co. v. Board of Assessors*, 31 La. Ann. 270, 475; *Louisiana Brewing Co. v. Board of Assessors*, 41 La. Ann. 565.

Under the *Illinois* statute, where the town board improperly increases an assessment, the owner of the property assessed may apply for relief to the county board. *St. Louis Bridge Co. v. People*, 128 Ill. 422.

In *New Jersey*, power is conferred upon the supreme court to correct an assessment for taxes, if it can be shown that the amount or valuation of the taxable property for which any person is therein assessed is too large. *State v. Elizabeth*, 39 N. J. L. 249; *State v. Metz*, 31 N. J. L. 365; *State v. Parker*, 34 N. J. L. 49.

Where there are two affirmative statutes authorizing an appeal from the determination of a board of equalization, one does not repeal the other unless they are directly inconsistent, and courts will seek for such a construction as will reconcile them. *Fowler v. Perkins*, 77 Ill. 271.

In *Pierre Water Works Co. v. Hughes County*, 5 Dakota 145, it was held that where the county commissioners constitute a board of equalization, a statute providing for appeal from all decisions of the board of county commissioners gives the right to appeal from their decisions fixing the value of property for taxation, made when acting as a board of equalization.

But in *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30, it was held that an appeal from a decision of the county commissioners, sitting as a board of equalization, did not lie, the two boards being separate tribunals; the right of appeal allowed by statute from one board, did not necessarily imply a right to appeal from the other.

no appeal can be taken,<sup>1</sup> and, when allowed, it can be taken only in the manner prescribed;<sup>2</sup> and the amount in controversy must equal the amount required to give jurisdiction in ordinary appeals, unless the statute otherwise provides.<sup>3</sup> On appeal by a taxpayer, the assessment cannot be increased,<sup>4</sup> and the burden of proof rests with the plaintiff.<sup>5</sup> The county or district, for

1. Ohio, etc., *R. Co. v. Lawrence County*, 27 Ill. 50; *People v. Lots in Ashley*, 122 Ill. 297; *Worthington v. Pike*, 23 Ill. 363; *East St. Louis, etc., R. Co. v. People*, 119 Ill. 182; *Ward v. Beale*, 91 Ky. 60; *General Custer Min. Co. v. Van Camp* (Idaho, 1884), 3 Pac. Rep. 22; *Rhoads v. Cushman*, 45 Ind. 85; *Durham v. Thompson*, 2 N. H. 166; *Stewart v. Maple*, 70 Pa. St. 221; *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *State v. Bettie*, 50 N. J. L. 132; *Tomlinson v. Board of Equalization*, 88 Tenn. 1. And see *Gilpatrick v. Saco*, 57 Me. 277; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Bell v. Pierce*, 48 Barb. (N. Y.) 51; *Genesee Valley Nat. Bank v. Livingston County*, 53 Barb. (N. Y.) 223; *Kimber v. Schuylkill County*, 20 Pa. St. 366; *Silver v. Schuylkill County*, 20 Pa. St. 369; *McDonald v. Escanaba*, 62 Mich. 555.

The courts cannot substitute their judgment as to the valuation of property for that of the board of assessors or of equalization, *State Railroad Tax Cases*, 92 U. S. 575; and will not interfere on the ground that the assessors erred in judgment by assessing too high or too low, if they acted honestly. *People v. Lots in Ashley*, 122 Ill. 297. And see *People v. Haupt*, 104 N. Y. 377; *Monroe v. New Canaan*, 43 Conn. 309.

In *Boody v. Watson*, 64 N. H. 162, it was held that an erroneous judgment of a court of assessment is reversible by the common-law power of general superintendence for correcting errors of courts of inferior jurisdiction, where no other remedy is expressly provided for. And in Ohio, etc., *R. Co. v. Lawrence County*, 27 Ill. 50, it was held that if any remedy existed, it was by *certiorari*. See also *Durham v. Thompson*, 2 N. H. 166.

2. See *People v. Lots in Ashley*, 122 Ill. 297; *Lowell v. Middlesex County*, 146 Mass. 403; *Albert v. Board of Revision*, 139 Pa. St. 467; *People v. Carter*, 109 N. Y. 557. In *Bremer County Bank v. Bremer County*, 42 Iowa 394, it was held that where the statute does not provide the formalities of an appeal,

a court of record will be presumed to have acquired jurisdiction when proper notices of appeal have been served.

A petition on appeal must distinctly aver that the board have increased the assessment without any reasonable evidence. *King v. Parker*, 73 Iowa 757.

In *People v. Carter*, 119 N. Y. 557, it was held that an allegation that the taxpayer appeared before the assessor on grievance day and asked to have the assessment corrected, which is not denied, and put in issue by the return, must be admitted in proceedings to review the assessment.

But when allowed, the fact that a city council irregularly exercised the authority conferred upon it as a board of equalization, will not deprive a property holder of the right of appeal to the circuit court. *Ingersoll v. Des Moines*, 46 Iowa 553.

And where a taxpayer prosecuted his case by an original action, when he should have sought his remedy for an improper assessment by an appeal from the action of the board, and no objection was made to the course of procedure by the defendant, who was defeated in the court below, he cannot make the objection for the first time in the appellate court. *Babcock v. Board of Equalization*, 65 Iowa 110.

3. *Henkle v. Keota*, 68 Iowa 334; *Babcock v. Board of Equalization*, 65 Iowa 110.

4. *Matter of Des Moines Water Co.*, 48 Iowa 324. And see *King v. Parker*, 73 Iowa 757; *State v. Randolph*, 25 N. J. L. 427. In *Leach v. Blakely*, 34 Vt. 134, it was held that the word "appeal," denotes an application for relief, and that therefore the board is limited to granting the relief by reducing the assessment or to the denial of any relief.

In *Edes v. Boardman*, 58 N. H. 580, it was held that an appeal from a determination of a board of equalization is an equitable proceeding, and that, however erroneous the law, or in fact the assessment, may be, only so much of the tax is avoided as in equity the appellant ought to pay.

5. *King v. Parker*, 73 Iowa 757; *State*

which the act of equalization or review is performed, should be made a party on appeal and given an opportunity to be heard.<sup>1</sup>

**XII. THE TAX LIEN**—1. **Nature of the Tax Lien.**—The tax lien owes its existence wholly to statute. Its duration and limitations, the character of the property to which it attaches, and its priority over existing charges against the property, must be determined by legislative enactment.<sup>2</sup> The lien does not arise by implication from the power to tax.<sup>3</sup> Nor, when expressly created, can it be enlarged by construction;<sup>4</sup> but, on the contrary, the statute providing for it is to be construed strictly.<sup>5</sup> The lien may be given for taxes delinquent at the time of the passage of the act creating

*v. Bettle*, 50 N. J. L. 132; *People v. Williams* (Supreme Ct.), 20 N. Y. Supp. 350.

A determination will not be disturbed unless clearly erroneous. *People v. Campbell*, 70 Hun (N. Y.) 599.

**Admission of Evidence on Appeal.**—As a general rule, evidence may be admitted in addition to the facts shown by the record, the object of the appeal being to secure a new trial on the merits. *Grimes v. Burlington*, 74 Iowa 123.

In *New York, on certiorari* to review a tax assessment, the court may appoint a referee to take such testimony as it may direct. *People v. Zoeller* (Supreme Ct.), 15 N. Y. Supp. 684. And see *Hutchinson v. Board of Equalization*, 66 Iowa 35.

1. *Oregon, etc., Sav. Bank v. Catlin*, 15 Oregon 342. And see *Wood v. Riddle*, 14 Oregon 254.

2. *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Tompkins v. Little Rock, etc., R. Co.*, 18 Fed. Rep. 344; *U. S. v. Pacific R. Co.*, 4 Dill. (U. S.) 71; *Morrow v. Dows*, 28 N. J. Eq. 463; *State v. Van Horn*, 45 N. J. L. 136; *Camden v. Allen*, 26 N. J. L. 398; *Garrettson v. Scofield*, 44 Iowa 37; *Jaffray v. Anderson*, 66 Iowa 719; *Hedman v. Anderson*, 8 Neb. 180; *Otoe County v. Matthews*, 18 Neb. 466; *Meyer v. Burritt*, 60 Conn. 122; *Albany Brewing Co. v. Mereden*, 48 Conn. 243; *Philadelphia v. Greble*, 38 Pa. St. 339; *Burgwin v. Burchfield*, 28 Pittsb. L. J. (Pa.) 13; *Allegheny City's Appeal*, 41 Pa. St. 60; *Brigg's Appeal*, 38 Leg. Int. (Pa.) 262; *Board of Education v. Old Dominion Iron, etc., Co.*, 18 W. Va. 441; *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64; *Miller v. Anderson*, 1 S. Dak. 539; *Tousey v. Post*, 91 Mich. 631; *Lyon v. Guthard*, 52 Mich. 271; *Bailey v. Fuqua*, 24 Miss. 497; *Anderson v. State*, 23 Miss. 459; *Barker v. Smith*, 10 S. Car. 226.

The obligation to assess taxes does not give a lien on the property on which they ought to be assessed. *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Rees v. Watertown*, 19 Wall. (U. S.) 107. Right of prior payment given by statute does not operate as a lien. *Anderson v. State*, 23 Miss. 459; *U. S. v. Hooe*, 3 Cranch (U. S.) 73.

3. *Philadelphia v. Greble*, 38 Pa. St. 339.

In *Barker v. Smith*, 10 S. Car. 226, the court, in discussing the question whether, under a certain state of facts, a lien existed, said: "In order to create a lien on land, for the payment of a tax, it is necessary that there should be either a declaration to that effect by some act of legislature, or necessity for such lien, in order to render effective means provided for the enforcement of such tax;" and again, "It follows, therefore, that while the legislature may, as an incident of the enforcement of a tax, create, in terms, a lien that may subsist with or without defined modes of converting such property into money, yet, failing to raise such lien directly, it can only be raised as incidental and subservient to such means as may be authorized for the enforcement of the tax, in which case it becomes an accessory to the power of disposition in respect thereto;" intimating that there might be cases in which the existence of the lien might be inferred from the necessity of the case.

4. *Cooley on Taxation* (2d ed.), p. 444; *New England L. & T. Co. v. Young*, 81 Iowa 738; *Jaffray v. Anderson*, 66 Iowa 719.

5. *Miller v. Anderson*, 1 S. Dak. 539; *State v. Newark*, 42 N. J. L. 38; *Howell v. Essex County*, 32 N. J. Eq. 672.

The statute must be strictly construed as against the party in whose favor the lien is created, *U. S. v. Pacific R. Co.*, 4 Dill. (U. S.) 71; conse-

it, as well as for those subsequently assessed;<sup>1</sup> but the statute will not be given this retroactive effect unless it is clearly so intended.<sup>2</sup>

The tax lien upon real estate attaches to the land itself and not to any particular interest therein,<sup>3</sup> and may be valid, although the tax is assessed to the wrong person.<sup>4</sup>

**2. The Lien of Municipal Taxes.**—The tax lien of the municipality does not conflict with the lien of the state, but they may exist as current privileges upon the same property.<sup>5</sup> The municipality, however, has no power to create a lien for its taxes without express legislative authority such as may be conferred by charter or statute.<sup>6</sup> The power given to a city to levy the tax does not

quently, in favor of innocent purchasers of the property subject to the lien. *U. S. v. Pacific R. Co.*, 1 McCrary (U. S.)

1. So a lien created upon land upon which whisky was distilled, was held not to apply to a case where the distillation was made by one upon the land of another without his knowledge or consent. *Gudger v. Bates*, 52 Ga. 285.

The proceedings authorized by the statute to create and enforce the lien must be followed as directed. *Lyon v. Alley*, 130 U. S. 177; *Creighton v. Manson*, 27 Cal. 614.

It was held in *Hayden v. Foster*, 13 Pick. (Mass.) 492, that the provision in the *Massachusetts* Tax Act of 1824, "whenever any tax shall be assessed on any real estate liable to taxation, such tax shall be a lien on said estate," extended to county and city taxes as well as to state taxes, and that the lien continued in force until the tax was paid.

1. *Kansas v. Hannibal, etc., R. Co.*, 77 Mo. 180.

2. *Pittsburgh's Appeal*, 40 Pa. St. 455. See also *Dallam v. Oliver*, 3 Gill (Md.) 445; *Smith v. Auditor Gen'l*, 20 Mich. 398; *Clark v. Hall*, 19 Mich. 356.

3. *Osterberg v. Union Trust Co.*, 93 U. S. 424; *New England L. & T. Co. v. Young*, 81 Iowa 740; *Parker v. Baxter*, 2 Gray (Mass.) 185; *Spratt v. Price*, 18 Fla. 289.

The lien is upon the land itself and not merely upon the interest of one who has a life interest therein. *Cooper v. Holmes*, 71 Md. 20. And upon the title as well as the land. *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458.

The lien attaches without regard to ownership, *Dunlap v. Gallatin*, 15 Ill. 7; so it matters not whether the owner be a resident or a non-resident. *Edwards v. Baird*, 1 Ill. 70.

4. *Union Trust Co. v. Weber*, 96 Ill. 346; *Vanarsdalen's Appeal*, 3 W. N. C. (Pa.) 463.

An assessment on the bank stock in the name of the bank, instead of in the names of the individual stockholders, does not invalidate the lien. *Small v. Lawrenceburgh*, 128 Ind. 231.

Taxes which are a lien upon land may be paid out of the proceeds of a sheriff's sale of an interest in the land, although the person whose title is sold never held title to the land in his own name, and the title, both legal and equitable at the time of the sale, was in a third person. *Dungan's Appeal*, 88 Pa. St. 414.

When, by a change of county boundaries made after land has been assessed for taxes, the land falls into another county, the lien of the tax on such land still continues, and the tax collector of the old county may enforce the collection of the tax by a sale. *Moss v. Shear*, 25 Cal. 38; *Devor v. McClintock*, 9 W. & S. (Pa.) 80.

5. *Bellocq v. New Orleans*, 31 La. Ann. 471; *Justice v. Logansport*, 101 Ind. 326.

Where land is sold for state, county, and municipal taxes, and the proceeds are insufficient to pay all, the state cannot assert a prior right to satisfaction, if no special priority is given it by statute. *Nashville v. Lee*, 12 Lea. (Tenn.) 454.

6. 2 Dill. Mun. Corp., § 821; *Kansas v. Payne*, 71 Mo. 159; *Schmidt v. Smith*, 57 Mo. 135; *Jefferson v. Whipple*, 71 Mo. 519; *Philadelphia v. Greble*, 38 Pa. St. 339; *Howell v. Philadelphia*, 38 Pa. St. 471; *Mix v. Ross*, 57 Ill. 125.

The want of a tax lien, however, does not deprive a city of the right to recover its taxes by action. *Jefferson v. McCarty*, 74 Mo. 55. See also *Jef-*

of itself confer the power to create the lien therefor.<sup>1</sup> But it has been held that the power to sell for taxes confers the power to make them a lien.<sup>2</sup>

**3. Validity of the Lien—Essentials.**—In order that there may be a valid lien there must be a valid tax and a proper assessment.<sup>3</sup> All prerequisites of the law creating the lien must be complied with strictly.<sup>4</sup> To create a lien for taxes on real estate there

person *v. Mock*, 74 Mo. 61. In *New Haven v. Fair Haven, etc.*, R. Co., 38 Conn. 422; 9 Am. Rep. 399, the lien given to the city by its charter was held to be a security in addition to, and not interfering with, the remedy at law.

1. Where a statute provided that "if any person fails to pay any tax levied on his real and personal property, the town collector may recover the same by a civil action in the name of the corporation before any court of competent jurisdiction," it was held that the tax after assessment did not become a lien, and the collector could not, before a personal judgment, obtain levy upon the property. *Alexander v. Helber*, 35 Mo. 334; *Ham v. Miller*, 20 Iowa 450.

In *Merriam v. Woody*, 25 Iowa 163, it was held that in the charter of a municipal corporation, the grant of the power to levy and collect a special tax on lots within the corporation for the improvement of the walks in front thereof, does not include the power to sell and convey in case of the non-payment of the tax. Nor would such power be inferred from an express provision in the charter to the effect that the collection of the taxes provided for shall be enforced as may be provided by ordinances of the city.

The state may retain the tax lien although it has delegated the power to tax. *Cook v. Auditor Gen'l*, 79 Mich. 100.

2. Where, by the language of the legislative enactment, a city was empowered to "provide by ordinance or otherwise for the prompt collection of taxes due to the city, and to that end the city shall have power to sell both real and personal property," it was held that this language was sufficiently broad in its scope to allow the city to make its taxes a lien upon the property. *Eschbach v. Pitts*, 6 Md. 71. See *Dallam v. Oliver*, 3 Gill (Md.) 445. See also *Dill. Mun. Corp.*, vol. 11, § 821, n. 2.

3. *People v. Hastings*, 29 Cal. 450; *People v. Pearis*, 37 Cal. 259; *Worth-*

ington *v. Whitman*, 67 Iowa 190; *North Carolina R. Co. v. Alamance*, 77 N. Car. 4; *Bell v. Barnard*, 37 Ill. App. 275.

A city cannot create a valid municipal lien for improving a street, unless the improvement is made in pursuance of law. *Hershberger v. Pittsburgh*, 115 Pa. St. 78; *Western Pa., etc., R. Co. v. Allegheny*, 92 Pa. St. 100.

4. *U. S. v. Pacific R. Co.*, 1 McCrary (U. S.) 1; *Bryn Mawr v. Anderson*, 10 Pa. Co. Ct. Rep. 442. See also *Thurston v. Little*, 3 Mass. 429; *Louisville v. Bank of Kentucky*, 3 Metc. (Ky.) 148; *Judevine v. Jackson*, 18 Vt. 470.

The list must strictly follow the statute. *Graves v. Bruen*, 11 Ill. 431. Listing in one class will not authorize the charging of the land with the tax of another class. *Tibbetts v. Job*, 11 Ill. 453.

A failure of the assessor to swear to the assessment roll when required to do so by statute, renders the tax invalid, and, consequently, no lien can be created therefor. *Morrill v. Taylor*, 6 Neb. 236; *Lynam v. Anderson*, 9 Neb. 367; *Hallo v. Helmer*, 12 Neb. 87; *McNish v. Perrine*, 14 Neb. 582.

In *Dows v. Dale*, 74 Iowa 108, where delinquent taxes were not carried forward on the regular tax list as provided by statute, but were entered in a book kept by the treasurer, which was unknown to the law, it was held that there was no valid lien.

When the purchaser of real estate obtains a certificate from the treasurer that there are no delinquent taxes upon the property, and the tax books do not show any tax to be due, but it is found afterwards that there were delinquent taxes due thereon at the time, which had not been brought forward in the tax books, he is an innocent purchaser and takes the estate free from all liens for taxes. *Jiska v. Ringgold County*, 57 Iowa 630. And if the delinquent taxes are brought forward in the tax books after the purchase, they will not be a lien upon the property, as against the purchaser. *Cummings v. Easton*, 46 Iowa 183.

**Record.**—In *Pennsylvania*, the lien

must be a description thereof sufficient to show its location and extent.<sup>1</sup> Actual demand for the tax is not necessary,<sup>2</sup> unless made so by statute.<sup>3</sup>

**4. Time When Lien Attaches.**—When there is no provision made by statute as to when a lien attaches to real estate, it is the general rule that it takes effect from the moment when the land becomes charged with the payment of a certain fixed sum;<sup>4</sup> but the statute creating the lien usually specifies the time when it shall attach. In the notes will be found a judicial construction of the provisions in the statutes of several of the states.<sup>5</sup> As to

for taxes cannot exist unless a certified copy has been entered of record as required by the law creating it, *Wilson's Estate*, 150 Pa. St. 285; *Anspach's Appeal* (Pa. 1886), 2 Cent. Rep. 532; although, under a prior act of 1824, such a provision of record was held to be simply directory. *Parker's Appeal*, 8 W. & S. (Pa.) 449; *Wallace's Estate*, 59 Pa. St. 401.

In *Louisiana*, registry is essential to preserve the lien of the state for taxes as against third persons, *New Orleans Sav. Inst. v. Leslie*, 28 La. Ann. 496; *Jacob v. Preston*, 31 La. Ann. 516; but not as against the person assessed. *Adams v. Wakefield*, 26 La. Ann. 592. Taxes of the city of New Orleans are required to be registered. *Cochran v. Ocean Dry Dock Co.*, 30 La. Ann. 1365.

**Remedy.**—But a defective levy may be remedied and the lien enforced by retrospective legislation authorizing the levy and collection in subsequent years upon the assessment of the proper year, 1 Kent's Com. (12th ed.) 455; *Fairfield v. People*, 94 Ill. 244; and for this purpose the assessment roll of the previous year is used. *Cowgill v. Long*, 15 Ill. 202.

1. *State v. Miles*, 48 N. J. L. 450; *People v. Chicago, etc., R. Co.*, 96 Ill. 369. See also *Woodside v. Wilson*, 32 Pa. St. 52; *Richardson v. State*, 5 Blackf. (Ind.) 51.

Where a lot was assessed as "lot number 5 in the assessor's subdivision of the west half of section 1, township 13, etc.," no number of acres being given, and it appearing that no plot of such described lot was ever made or recorded, such description was held to be totally insufficient, and no lien could be had against the premises for the taxes assessed thereon. *Sanford v. People*, 102 Ill. 374. But the fact that property subject to taxation is imperfectly described, will not preclude the purchaser at the tax sale from maintaining an action to enforce a lien against the land

intended to be leased and sold. *Cooper v. Jackson*, 71 Ind. 244; *Sloan v. Sewall*, 81 Ind. 180.

A lien will hold if the purchaser can show what property was intended to be taxed. *State v. Casteel* (Ind. 1887), 8 West. Rep. 893.

**Personal Property.**—An assessment upon personal property located by a street and number is not a sufficient description to create a lien against the property. *Bell v. Barnard*, 37 Ill. App. 275.

The identification, it is said, is a question arising for the jury on the evidence. *Stewart v. Shoenfelt*, 13 S. & R. (Pa.) 360; *Thompson v. Fisher*, 6 W. & S. (Pa.) 520.

2. *Hart v. Tiernan*, 59 Conn. 521.

3. *Brown v. Goodwin*, 75 N. Y. 409.

In *U. S. v. Pacific R. Co.*, 4 Dill. (U. S.) 72, it was held that under U. S. Rev. Stat., § 3186, which provides that "if any person liable to pay any tax, neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the *United States* from the time it was due until paid," etc., demand is necessary to constitute a valid lien. See also *U. S. v. Pacific R. Co.*, 1 McCrary (U. S.) 1.

4. *Black on Tax Titles*, p. 181; *Blackwell on Tax Titles*, § 478; *Eaton v. Chesbrough*, 82 Mich. 214; *Webb v. Bidwell*, 15 Minn. 479; *Bennett v. Hunter*, 9 Wall. (U. S.) 326. See also *Hutchins v. Moody*, 30 Vt. 655. This time is generally the time of the assessment of the tax. *Lyon v. Alley*, 130 U. S. 177.

In *Cooley on Taxation* (2d ed.), p. 448, it is said that the lien should attach at the time of the extension of the tax upon the roll; and this is the rule in *Michigan*. *Harrington v. Hilliard*, 27 Mich. 271.

5. In *Massachusetts*, taxes upon real estate constitute a lien thereon for two years after they are committed to the collector, and this lien relates back to

personal property there can be no lien until seizure, unless it is given by statute.<sup>1</sup>

the day on which they were assessed, *Cochran v. Guild*, 106 Mass. 59; 8 Am. Rep. 296; *Hill v. Bacon*, 110 Mass. 387; *Davis v. Bean*, 114 Mass. 358; and is not secondary or collateral to any personal liability of the person to whom it is assessed. *Swan v. Emerson*, 129 Mass. 289.

In *Missouri*, state and county taxes are made a lien on real estate from and after the first Monday in September, and the owner at that time will be liable to a subsequent purchaser for them, on his covenant of warranty, even though the sale is prior to the assessment. *McLaren v. Sheble*, 45 Mo. 130; *Blossom v. Van Court*, 34 Mo. 390; 86 Am. Dec. 114.

The lien relates back and takes effect from the inception point of the assessment, although the assessment may not be consummated until a later day or month in the year. Thus, where the statute required the assessment to date from the first Monday of September and to include the taxable property of the taxpayers respectively owned by them on that day, it was held that the taxes became a lien on that date by relation, although not actually assessed until December. It is immaterial that the rights of a third person who purchased for value and without notice, have intervened. *McLaren v. Sheble*, 45 Mo. 130.

In *New York*, no lien or incumbrance is created by the tax until after the list containing it is confirmed. *Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 399; 20 Am. Rep. 547; *Fisher v. New York*, 67 N. Y. 73; *Washington Heights M. E. Church v. New York*, 20 Hun (N. Y.) 297; for the amount of the tax is not ascertained and determined until confirmation. *Dowdney v. New York*, 54 N. Y. 186.

In *Illinois*, taxes upon real estate become a lien upon the land charged from and after the first day of May in each year; that being the day on which owners of land are required to list it for taxation, see *Cooper v. Corbin*, 105 Ill. 224; *Almy v. Hunt*, 48 Ill. 45; but personal property taxes do not become a lien on real estate until the collector, on failure to collect the tax on personal property, charges a sum on such real estate in his application for judgment for delinquent taxes. *Parsons v. East St. Louis Gas Light*,

etc., Co., 108 Ill. 384; *Carter v. Rodenwald*, 108 Ill. 351.

No lien is created upon personal property until the tax books are placed in the hands of the collector, *Schaeffer v. People*, 60 Ill. 179; *Gaar v. Hurd*, 92 Ill. 315; *Binkert v. Wabash R. Co.*, 98 Ill. 206; *Belleville Nail Co. v. People*, 98 Ill. 399; and if the collector fails to make any levy on the personal property until after the return day of the warrant, the warrant then being dead, all liens that might have been, but were not, perfected by a levy are lost. *Ream v. Stone*, 102 Ill. 359.

In *California*, a judgment rendered to enforce a lien on particular property assessed is made a lien upon all the real estate of the person assessed, and the lien is held to relate back to the time of the assessment. *Reeve v. Kennedy*, 43 Cal. 643.

In *Indiana*, the aggregate amount of taxes upon poll, personal and real estate, is a lien upon all real estate of the taxpayer within the county, and such lien attaches on the first day of January in each year. *Cones v. Wilson*, 14 Ind. 465; *Isaacs v. Decker*, 41 Ind. 410; *Veit v. Graff*, 37 Ind. 254. A warrantor before such date does not covenant against them. *Overstreet v. Dobson*, 28 Ind. 256.

It is also a lien upon personal property for all taxes, but no time is fixed by statute for it to attach. As between the state and the owner at the time of settlement, the lien attaches as soon as the duplicate is issued to the treasurer. *Cones v. Wilson*, 14 Ind. 465. See *McNeil v. Fareman*, 37 Ind. 203; *Barker v. Morton*, 19 Ind. 146.

In *Vermont*, the lien for taxes becomes a fixed incumbrance when the officer by some official act manifests his intention to pursue the land for the purpose of enforcing the collection of the taxes; and in the case of a non-resident proprietor, taxes become a lien when the constable has made a list of the land and the taxes assessed thereon, and deposited the same in the town clerk's office for record. *Hutchins v. Moody*, 34 Vt. 433.

In *Iowa*, taxes on personal property do not become a lien on the real estate of the owner until they are due, and they do not become due by the mere assessment of the property for taxation. *Castle v. Anderson*, 69 Iowa 428.

1. *McKay v. Batchellor*, 2 Colo.

The lien attaches at the earliest moment of the day fixed, as there is no point of time less than a day at which the tax may be regarded as attaching.<sup>1</sup>

**5. To What Property the Lien Attaches.**—The statutes creating liens determine what property shall be subject to them.<sup>2</sup> The lien for taxes upon real estate attaches to each particular tract for the portion of the tax assessed against it;<sup>3</sup> otherwise as to the lien upon personal property, where the statute gives such a lien; here the aggregate amount of the taxes may be a lien upon all the personal property of the person assessed.<sup>4</sup>

Taxes upon personal property may be made a lien upon the

593; *State v. Rowse*, 49 Mo. 586; *Maish v. Bird*, 22 Fed. Rep. 180. See also *George v. St. Louis Cable, etc.*, R. Co., 44 Fed. Rep. 117.

A collector's warrant is not a lien on property for taxes, before actual seizure. *Parsons v. Allison*, 5 Watts (Pa.) 72; *Baskin v. Kontz*, 5 Watts (Pa.) 76, note; *Moore v. Marsh*, 60 Pa. St. 46.

In *Stevens v. Lake Shore, etc.*, R. Co., 82 Mich. 426, the general lien of the state against all the property of a railroad company for taxes assessed against it, was held to attach from the time the commissioner of the railroad filed a computation of the amount of the tax as required by statute.

1. In *Hill v. Bacon*, 110 Mass. 387, the grantor of a deed with covenant of warranty dated April 30th, was in possession of the land conveyed till one o'clock in the afternoon of May 1st, when he executed and delivered the deed, and the grantee immediately took possession. The tax on the land for the year beginning May 1st, was assessed to the grantor, who did not pay it, and the land having been sold for such non-payment, it was held that there was a breach of the covenant.

2. *Meyer v. Burritt*, 60 Conn. 123; *Albany Brewing Co. v. Meriden*, 48 Conn. 243.

3. *Hayden v. Foster*, 13 Pick. (Mass.) 492. And this is usually recognized by statute. Under the constitution of *Texas*, art. 10, § 20, a lien is a charge merely against each separate tract for the tax assessed against it. See *State v. Baker*, 49 Tex. 763. And a judgment against the owner of several tracts, declaring a lien upon all for the aggregate amount of taxes due upon all, is invalid, whether the taxes are due to the state or to a municipal corporation. *Edmonson v. Galveston*, 53 Tex. 157; *Jordon v. Brenham*, 57 Tex. 655.

*Connecticut Gen. Stat.*, § 3889, empowers the collector, in the event of any person's failure to pay a tax, to enforce by levy and sale any lien upon real estate which exists at the date of the levy. The following section (3890) declares that the estate of any person in any portion of real estate which is by law set in his list for taxation shall be subject to a lien for that part of his taxes which is levied upon the valuation of said real estate as found in said list. It was held that under this statute, where the lien was filed against the owner of mortgaged land, the lien therefor takes precedence of the mortgage only so far as the valuation of the particular tract is concerned, and not as to taxes on other property of the mortgagor. *Meyer v. Burritt*, 60 Conn. 117.

So in *Illinois*, taxes due on one tract are no lien on others of the person against whom they are assessed. *Binkert v. Wabash R. Co.*, 98 Ill. 215; *Kepley v. Jansen*, 107 Ill. 80. And in *Missouri*, *State v. Sargent*, 76 Mo. 557. See also *State v. Hand*, 41 N. J. L. 517. But under the *Indiana* statute, the aggregate amount of taxes is a lien upon all the real estate of the taxpayer which is within the county. *Cones v. Wilson*, 14 Ind. 645. This is the law in *Louisiana* also. *Geren v. Gruber*, 26 La. Ann. 697.

4. *Hill v. Figley*, 23 Ill. 364; *Gaar v. Hurd*, 92 Ill. 330; *Barker v. Morton*, 19 Ind. 146.

But in *Arkansas*, under the statute which declares "taxes assessed upon real or personal property shall bind the same," and that "all taxes assessed shall be a lien upon and bind the property assessed," it is held that the taxes on each class of personal property are a lien only upon the property of that class, but the whole tax of each class is a lien upon every item of that class. *Bridewell v. Morton*, 46 Ark. 73.



realty as well as upon the personalty;<sup>1</sup> but, unless it is expressly so provided by statute, no such lien exists.<sup>2</sup> And so taxes levied on land do not constitute a lien on personal property in the absence of a statute to that effect.<sup>3</sup>

**6. Priority of Lien.**—It is within the constitutional power of the legislature to make the tax a lien prior to other rights and incumbrances, whether the same arise before or after the assessment of the tax;<sup>4</sup> but this extraordinary effect will not be given

1. *Isaacs v. Decker*, 41 Ind. 410; *Peckham v. Millikan*, 99 Ind. 352; *Carter v. Rodewald*, 108 Ill. 351; *State v. Newark*, 42 N. J. L. 38; *Miller v. Anderson*, 1 S. Dak. 539; *New England L. & T. Co. v. Young*, 81 Iowa 732; *Paulson v. Rule*, 49 Iowa 576; *Garrettson v. Scofield*, 44 Iowa 35.

Under such a statute, land held by a husband and wife as tenants of the entirety is not subject to a lien for taxes upon the husband's personal estate. *Morrison v. Seybold*, 92 Ind. 298. Such a lien is not affected by the fact that the owner had other and personal property which might be taken on a tax warrant. *Albany Brewing Co. v. Meriden*, 48 Conn. 343. The lien may be made to attach to real estate acquired subsequently to the assessment of the tax on personal property. *Cummings v. Easton*, 46 Iowa 183.

Taxes upon the capital stock of a railroad, constitute a lien on the real property of the company. *Union Trust Co. v. Weber*, 96 Ill. 346.

In *Illinois*, in order to make taxes on personalty a lien on the realty, the collector must select some particular tract, and charge the lien against it in his application for judgment. If the person against whom a tax is assessed, parts with a tract of land before steps are taken by a collector with respect to it, the lien of the tax will not attach to that particular tract, but does not necessarily prevent its attachment against the others. *Carter v. Rodewald*, 108 Ill. 351; *Parsons v. East St. Louis Gas Light, etc., Co.*, 108 Ill. 380; *Bellville Nail Co. v. People*, 98 Ill. 399.

2. *Lynn v. O'Neill*, 55 N. J. L. 58; *State v. Powell*, 44 Mo. 436.

3. *Parker's Appeal*, 5 Pa. St. 390; *Anderson v. Mississippi*, 23 Miss. 459; *Bailey v. Fuqua*, 24 Miss. 497.

The lien of the state for taxes cannot follow severed fixtures as personal property. *State v. Goodnow*, 80 Mo. 271.

Under a statute providing that the state shall have a lien upon a railroad

and all appurtenances thereof, the personal property of the railroad is clearly within the description. *Stevens v. Lake George, etc., R. Co.*, 82 Mich. 426.

4. *Albany Brewing Co. v. Meriden*, 48 Conn. 243; *Hopper v. Malleson*, 16 N. J. Eq. 386; *Lydecker v. Palisade Land Co.*, 33 N. J. Eq. 415; *Hand v. Startup*, 38 N. J. Eq. 115; *Hardenbergh v. Converse*, 31 N. J. Eq. 500; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Parker v. Baxter*, 2 Gray (Mass.) 185; *In re Douglas*, 41 La. Ann. 765; *Jenkins v. Newman*, 122 Ind. 99; *New England L. & T. Co. v. Young*, 81 Iowa 732; *Keating v. Craig*, 73 Mo. 507; *Rhoads v. Given*, 5 Houst. (Del.) 183; *Verdery v. Dotterer*, 69 Ga. 198; *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729.

The power of the legislature to make a tax lien superior to that of a mortgage, is not disputed, *Paterson v. O'Neill*, 32 N. J. Eq. 386; even after the rights of the mortgagee are fully vested. *Howell v. Essex County*, 32 N. J. Eq. 675.

In *Pennock v. Hoover*, 5 Rawle (Pa.) 291, a lien of an assessment for paving was declared superior to the claim of mechanics and material-men.

In *Titusville's Appeal*, 108 Pa. St. 600, where the tax was declared a lien prior to all incumbrances, an additional sum added as a penalty for non-payment was held to have the same incident of prior lien.

The tax lien, being paramount to all other liens, is privileged from marshaling, by reason of its absolute and peremptory character. *People's Sav. Bank v. Tripp*, 13 R. I. 621.

A tax warrant issued and delivered to the collector, before *fi. fa.* to the sheriff, and not levied until after levy under the *fi. fa.*, has priority over it. *Evans v. Walsh*, 41 N. J. L. 281; 32 Am. Rep. 201. And the lien acquired by the issue of a warrant for personal taxes takes precedence of the equitable claim of creditors who subsequently bring the property into the custody of the law. *In re Receivership of Columbian, Ins.*

by implication,<sup>1</sup> unless it is clearly shown to have been within the legislative intent.<sup>2</sup> The mere declaration that taxes shall be a lien on the property assessed is not sufficient to give precedence to the lien.<sup>3</sup> The law creating the lien may give it precedence over all liens and incumbrances existing prior to the passage of the law.<sup>4</sup> This retrospective effect, however, will not be given, in the absence of clear legislative intent.<sup>5</sup>

Co., 3 Abb. App. Dec. (N. Y.) 239. But a tax levied on the debtor after a sale of personal property on execution issued on a voidable judgment, constitutes no lien on the property. *Roraback v. Stebbins*, 4 Abb. App. Dec. (N. Y.) 100.

**Municipal Taxes.**—The priority may be conferred on municipal taxes and assessments. *Allen v. Allen*, 34 N. J. Eq. 493; *Keating v. Craig*, 73 Mo. 507.

By the charter of the city of Newark, taxes assessed upon real estate have priority over mortgages, but taxes assessed upon personal property of the owners of land have no such priority. *State v. Newark*, 42 N. J. L. 38.

But the lien of municipal taxes when given priority over prior mortgages and other incumbrances, will not, as a rule, supersede mortgages made to the state or its representatives, on the ground that the state is not to be included within the operation of the statute, except by express mention or necessary implication. *U. S. v. Hoar*, 2 Mason (U. S.) 314. So the provision of the charter of the city of Trenton preferring the lien for taxes over prior mortgages and other incumbrances, does not apply to mortgages made to the state to secure the funds of the state invested on the mortgage. *Trustees of Public Schools v. Trenton*, 30 N. J. Eq. 667.

1. *Trustees of Public Schools v. Trenton*, 30 N. J. Eq. 679; *Howell v. Essex County*, 32 N. J. Eq. 676; *Rhein Bldg. Assoc. v. Lee*, 100 Pa. St. 214.

In *State v. Newark*, 42 N. J. L. 45, under the charter of the city of Newark, it was held that the lien for taxes on real estate was, by necessary implication, paramount to existing mortgages thereon; but that the lien on real estate for personal property taxes did not have that priority.

2. Where, in addition to the declaration that the tax should be a lien upon the land, the law authorized a sale, severance, and removal of something which constitute part of the land, it was held that there was a sufficient manifestation of the purpose to make the tax a lien paramount to all prior

estates in, and liens upon the land, to the extent of a power to sever and remove. *Morrow v. Dows*, 28 N. J. Eq. 459.

And where a statute makes taxes a lien on land, and gives a mortgagee the right to redeem and attack the money paid in redemption of his mortgage debt, and also provides that his rights under his mortgage shall not be divested without notice that the mortgaged premises have been sold for taxes, a tax lien is, by the statute, the first charge upon the land, and overrides all prior mortgages. *Howell v. Essex County*, 32 N. J. Eq. 677; virtually overruling *O'Neill v. Dringer*, 31 N. J. Eq. 507.

In *Paterson v. O'Neill*, 32 N. J. Eq. 386, the fact that the right of redemption given to the mortgagee, together with the facts that his mortgage was exempt from taxation, and that the mortgaged premises were directed to be assessed to the owner to their full and fair value, made it clear that it was the intention of the legislature that the tax lien should take precedence over a mortgage charged upon the property prior to the levy of the tax. See also *Pennington v. Mendes*, 38 N. J. Eq. 336; *Dosemus v. Cameron*, 49 N. J. Eq. 1.

3. *Miller v. Anderson*, 1 S. Dak. 539. And, when not given precedence, the lien of taxes is marshaled according to the general law determining the rank of liens. *Gormley's Appeal*, 27 Pa. St. 49. But in *Iowa* a contrary doctrine seems to prevail. There it is held that when taxes are made a lien upon real estate they become prior and superior to all mortgage and judgment liens. *New England L. & T. Co. v. Young*, 81 Iowa 740.

4. *Cooley on Taxation* (2d ed.), p. 445; *Black on Tax Titles*, § 185; *Lydecker v. Palisade Land Co.*, 33 N. J. Eq. 415; *O'Brien v. Cogswell*, 17 Can. Sup. Ct. Rep. 420. See also *State v. Newark*, 42 N. J. L. 45. See *STATUTES*, vol. 23, p. 447.

5. *Finn v. Haynes*, 37 Mich. 62.

7. **Termination of the Lien**—*a*. **IN GENERAL**.—The tax lien is generally held to be discharged by payment or tender of the amount due to the proper officer.<sup>1</sup> The lien may be terminated by abandonment on the part of the taxing power,<sup>2</sup> or by the statutory limitation of the term of the lien,<sup>3</sup> or by the repeal of the statute under which the taxes are levied, unless there is a clear intention to continue the lien.<sup>4</sup>

*b*. **STATUTORY LIMITATION**.—As the lien owes its existence to the statute, it cannot be extended beyond the time fixed by the statute for its duration.<sup>5</sup> Statutes provide sometimes that land may be sold for taxes after the expiration of the statutory term of the lien, unless the land has been alienated in the meantime.<sup>6</sup>

A statute giving, in general terms, to a tax lien superiority over "liens, mortgages, conveyances and incumbrances," has no application to incumbrances created before the act. See also *Harrison v. Metz*, 17 Mich. 377.

A municipal claim filed in 1857 by the city of Pittsburgh for grading and paving, was not entitled to payment out of the proceeds of sale of the property against which the lien was filed, in preference to a mortgage of the same premises entered and recorded in 1848. *Pittsburgh's Appeal*, 40 Pa. St. 455; *Cadmus v. Jackson*, 52 Pa. St. 295; *Allegheny City's Appeal*, 41 Pa. St. 60.

1. *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Chaffie v. Ludeling*, 34 La. Ann. 962. See *infra*, this title, *Payment*.

As to one's right to subrogation of the state for the benefit of those who are entitled to make the payment, see *SUBROGATION*, vol. 24, p. 187.

2. In *Bradley v. Hintrager*, 61 Iowa 337, a tax was levied by the city of Dubuque on the lot in question in 1857, and the lot was sold therefor in 1871. A deed was made in 1879 pursuant to such sale, but it appeared that the tax of 1857 had not been carried forward on the tax books of the city for any of the subsequent years, and that the taxes levied for such subsequent years had all been paid. It appeared also that the city had adopted as a guide for the treasurer a "history of delinquent taxes," in which the lot in controversy appeared with no tax of any year entered against it. It was held that the city had abandoned the tax for 1857 on said lot, and that the sale of the lot, and the deed pursuant thereto, vested no title in the purchaser.

3. See *infra*, this title, *Statutory Limitations*.

4. *McQuilkin v. Doe*, 8 Blackf. (Ind.)

581; *Mount v. State*, 6 Blackf. (Ind.) 25; *Bryan v. Harvey*, 11 Tex. 311. In *Gardenhire v. Mitchell*, 21 Kan. 83, the lien was not destroyed by the repeal of the statute, under a general law providing that the repeal of a statute should not affect any right accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under and by virtue of the statute repealed.

The substantial re-enactment furnishes ground for inferring that the legislature intended to reserve and continue the lien for taxes which had accrued under prior laws. *Gorley v. Sewell*, 77 Ind. 316.

5. *Isaac v. Swift*, 10 Cal. 80; 70 Am. Dec. 698; *State v. Van Horn*, 45 N. J. L. 136; *Field v. West Orange Tp.*, 37 N. J. Eq. 434.

Where a municipal charter provided that taxes assessed on lands within the city should remain a lien thereon for two years from a designated day, "notwithstanding any devise, descent, alienation, mortgage or other incumbrance, and notwithstanding any mistake or omission as to the owner's name," it was held that the limitation of the lien included the owner of the premises as well as his alienee, etc., and that it could not be extended by the inaction of the municipal authorities in enforcing the lien within the prescribed time. *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46. And in *Dubois v. Poughkeepsie*, 22 Hun (N. Y.) 117, it was held that a sale made subsequent to the two years prescribed for the continuance of a tax lien, was invalid, although preliminary proceedings and the advertisement commenced within that period.

6. As in *Rhode Island*, see *Bull v. Griswold*, 14 R. I. 22; and in *Massachusetts*. In *Russell v. Deshon*, 124

The tax lien is not merged into a judgment lien so as to continue during the limitation of the general judgment lien.<sup>1</sup>

c. EFFECT OF ALIENATION.—The tax lien is not defeated by alienation, but overrides any title acquired by a purchaser of the land, whether with or without notice; and in however good faith the purchase may have been made, and for whatever value; the lien is like a covenant running with the land and follows the land into the hands of all successive owners, until discharged by payment, lapse of time, or otherwise.<sup>2</sup>

Mass. 342, it was held that a sale of land by a collector of taxes, more than two years after a warrant for the collection of the tax thereon was committed to his predecessor, is void, although made within two years after the warrant was committed to the collector making the sale, if the land was alienated by the owner after the tax was assessed to him and before the sale.

In *Kelso v. Boston*, 120 Mass. 297, it was held that where a city ordinance limited the lien of a street assessment to one year, if the land was not alienated in the meantime, it might be sold after the expiration of a year, to satisfy the assessment.

An entry upon land by a mortgagee for the purpose of foreclosing a mortgage between the date of an assessment of the tax upon the land and the date of a reassessment of the same tax, the original tax having been assessed to the wrong person, is not an alienation of the land between the first and second assessment, within the meaning of the statute. *Market Nat. Bank v. Belmont*, 137 Mass. 407.

In *Holden v. Eaton*, 7 Pick. (Mass.) 15, it was held that a sale of land for direct taxes laid under *United States* act of 1815, giving a lien upon the land for the taxes for two years, was valid, although made after the expiration of that period, providing the owner had not alienated or incumbered the land. See also *Gove v. Newton*, 58 N. H. 359; *Mason v. Bilbruck*, 62 N. H. 440.

In *Louisiana*, it is held that liens securing city taxes are prescriptible, yet the taxes are not, *Stewart's Succession*, 41 La. Ann. 128; *Leeds v. Treasurer*, 43 La. Ann. 811; *Mercer's Succession*, 42 La. Ann. 1135; but that, notwithstanding the tax privileges have been barred, the taxes remain due and may be collected as ordinary debts. *Oteri v. Parker*, 42 La. Ann. 374; *State v. Meyer*, 41 La. Ann. 436.

In *Pennsylvania*, the perpetual lien given under former acts is not repealed by the act of 1889. Under its provisions, the lien of the taxes is limited to two years, unless entered of record, and limited to five if recorded, unless revived and continued by writ of *scire facias* within said period and duly prosecuted to judgment. *Philadelphia v. Hiester*, 142 Pa. St. 39. See also *Philadelphia v. Kates*, 150 Pa. St. 30; *Philadelphia v. Scott*, 93 Pa. St. 25.

1. *Boyd v. Ellis*, 107 Mo. 394. See also *Riley v. McCord*, 21 Mo. 285.

The lodgment of an execution within the year prescribed for the continuance of the tax lien will not extend the lien; but such execution has a lien of its own not possessing priority belonging to the tax lien. *State v. Guerry*, 15 Rich. (S. Car.) 353.

So in *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64, it was held that a simple money judgment for taxes, though the limitation of the judgment was fifteen years, could not extend the lien of the taxes which was limited by statute to five years.

2. *U. S. v. Stoltz*, 18 Int. Rev. Rec. 5; *Alkan v. Bean*, 8 Biss. (U. S.) 83; *Ewing v. Robeson*, 15 Ind. 26; *Oldham v. Jones*, 5 B. Mon. (Ky.) 465; *Driggers v. Cassidy*, 71 Ala. 529; *Doe v. Deavors*, 8 Ga. 479; *Dunlap v. Gallatin*, 15 Ill. 7; *Hogle v. Cohan*, 30 Ohio St. 436; *Morris v. Lalaurie*, 39 La. Ann. 47.

In *Freeman v. Atlanta*, 66 Ga. 617, it was held that where the lien for taxes attached on the fifth day of April of each year, the fact that the holder at that time sold the property, and upon failure of the purchaser to pay the purchase-money, made a sale, under judicial proceedings, of the lands, as the property of the vendee, did not divest the lien of the municipal authorities for the taxes. "The sheriff's sale conveyed what the defendant had; the lien attached to what the vendor had."

In *Doe v. Deavors*, 8 Ga. 479, it was

The lien is not discharged by an assignment for the benefit of creditors.<sup>1</sup> An assignee in bankruptcy takes subject to the lien, and the state may follow the property into the hands of the purchaser at an assignee's sale, even though the assignee was directed to sell free of incumbrances.<sup>2</sup>

*d. EFFECT OF JUDICIAL SALE.*—Nor is the lien, as a rule, discharged by a judicial sale; but the purchaser takes subject thereto.<sup>3</sup> So the lien is not affected by a foreclosure sale of a mortgage upon lands,<sup>4</sup> unless it is directed that the tax shall be paid from the proceeds of the sale.<sup>5</sup>

But the sale of land for delinquent taxes of one year destroys the lien of all unpaid taxes of previous years; for the lien of each year's tax is paramount to all previous liens.<sup>6</sup>

held that where property liable to taxation was sold under execution, subsequent to the levy of the tax, but prior to the giving in or return of the same, and was sold afterwards under execution to pay the taxes due by the defendant in execution, the purchaser at the tax sale obtained a good title.

In *Schmidt v. Smith*, 57 Mo. 135, it was held that a trustee holding the naked title to land cannot, on a sale of the property, use part of the purchase-money to satisfy taxes or prior incumbrances, unless he is empowered to do so in the instrument creating the trust. "In such cases," the court said, "the purchaser takes the land subject to the incumbrances." See also *Scott v. Shy*, 53 Mo. 478.

1. *State v. Rowse*, 49 Mo. 586. And so, in the case of personal property, where the levy is before an actual change of possession. *Cones v. Wilson*, 14 Ind. 465.

2. *Weeks v. Whatley*, 48 Miss. 337; *Stokes v. State*, 46 Ga. 412; 12 Am. Rep. 588; *In re Brand*, 2 Hughes (U. S.) 334. Where one bought from a bankrupt firm, property subject to the lien of taxes charged to the owners in the county in which it was situated, notwithstanding the sale, the lien continued, and the treasurer was authorized to enforce it by selling the property. *Mesker v. Koch*, 76 Ind. 68.

3. *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Atlanta, etc., R. Co. v. State*, 63 Ga. 483.

A partition sale cannot have the effect of discharging the lien. *Morris v. Lalaurie*, 39 La. Ann. 47.

4. *Isaacs v. Decker*, 41 Ind. 410; *Bodertha v. Spencer*, 40 Ind. 353; *Vaughn v. Clark*, 5 Neb. 238; *Iler v. Colson*, 8 Neb. 331.

5. *Annelly v. DeSasseur*, 12 S. Car. 488.

In *Pennsylvania*, upon a judicial sale of the property upon which the lien for taxes exists, the lien is thereby discharged, and the duty of the taxing authorities is to proceed upon the fund. And a taxpayer who has sought in vain the aid of a court of equity to restrain the collection of a tax, by a sheriff's sale of the real estate taxed, the lien of which has been diverted by a prior sheriff's sale, does not become a volunteer in the payment of said tax; he may maintain an action to recover the tax thus paid. *Shaw v. Allegheny*, 115 Pa. St. 46. See also *Smith v. Simpson*, 60 Pa. St. 169.

In *Auspach's Appeal*, 112 Pa. St. 27, it was held that upon a sheriff's sale of premises subject to a mortgage, as well as to tax liens, the taxes were entitled to be paid out of the proceeds, before the mortgage, though in point of time the mortgage was superior to the lien, and though there might have been personal property on the premises out of which the collector could levy and collect the taxes. The court said: "The lien of the assessment cannot be defeated by the neglect and want of judgment of the collector."

The fact that the judicial sale was of but a portion of the land liable for the tax, will not prevent the discharge of the lien, since the tax is not apportionable, but rests on the entire tract. *Mellon's Appeal*, 114 Pa. St. 564. See also *City v. McGonigle*, 4 Phila. (Pa.) 351.

6. See *infra*, this title, *Tax Sales*. See also *Langley v. Chapin*, 134 Mass. 82; *McFadden v. Goff*, 32 Kan. 415; *Robbins v. Barron*, 32 Mich. 36; *Irwin v. Frego*, 22 Pa. St. 368; *Wass v. Smith*, 34 Minn. 304; *Brewer v. District of Columbia*, 5 Mackey (D. C.) 274; *Huzzard*

**XIII. PAYMENT—1. Voluntary Payment—*a.* OPPORTUNITY TO PAY.**—The taxpayer, before his property is levied upon or before steps are taken to enforce the collection of the tax, is entitled to an opportunity to make a voluntary payment.<sup>1</sup> If the statute provides for demand or notice, demand or notice is an essential prerequisite to the validity of steps taken to enforce collection.<sup>2</sup>

*v. Trego*, 35 Pa. St. 9; *Buckley v. Osburn*, 8 Ohio 180; *Bradford v. Lafargue*, 30 La. Ann. 432; *Bowman v. Thompson*, 36 Iowa 505; *Preston v. Van Gorder*, 31 Iowa 250; *Shoemaker v. Lacey*, 38 Iowa 277; *Jarvis v. Peck*, 19 Wis. 74; *Sayles v. Davis*, 22 Wis. 225.

The rule operates as well in favor of the owner who redeems from the sale as of a purchaser at a tax sale. *Hough v. Easley*, 47 Iowa 330; *Kessey v. Connell*, 68 Iowa 430. But see *Gray v. Coan*, 30 Iowa 536; *Gray v. Coan*, 40 Iowa 329.

A valid tax deed extinguishes and destroys all other titles and liens existing or based upon anything existing at the time of the levying of the tax upon which the tax deed is founded. *McFadden v. Goff*, 32 Kan. 415; *Board of Regents v. Linscott*, 30 Kan. 240; *Belz v. Bird*, 31 Kan. 141. In *Law v. People*, 116 Ill. 246, it was held that when the state sells land in satisfaction of a tax judgment, it cannot turn round and defeat the purchaser's title by reselling the same land for taxes which were due and owing when the judgment was rendered, and might have been included in it, but that such a sale must be regarded as an abandonment of all back taxes.

The title acquired under a tax sale for taxes of a subsequent year must prevail over a title founded on a sale for taxes of the previous year, *Chandler v. Dunn*, 50 Cal. 15; even if the sale for the oldest tax has been made after the sale for the later tax. *Anderson v. Ryder*, 46 Cal. 135. See also *Dougherty v. Henarie*, 47 Cal. 10. But see *Cowell v. Washburn*, 22 Cal. 520, which held that a lien for taxes under the revenue law of 1854, continued until the taxes were paid, and was not divested by a sale for taxes levied in the subsequent year.

In *Keen v. Sheehan*, 154 Mass. 208, it was held that if land is advertised for sale at the same time in the same newspaper by the same collector for the tax of two successive years, and at the time and place appointed is sold by him to one for the tax of the earlier year, and

later at the same sale to another for the tax for the year following, the second sale is valid and the purchaser thereof is entitled to the land.

But in *Tennessee*, it is held that under the revenue laws of that state, the purchaser of land at a tax sale acquires only the interest of the owner of the land in whose name the land is or ought to have been assessed, subject to other existing statutory liens for taxes previously assessed. *Nashville v. Cowan*, 10 Lea (Tenn.) 209.

**Mistake.**—In *Bowman v. Eckstien*, 46 Iowa 583, where a part of the delinquent taxes were by mistake omitted from the sale, it was held that the sale did not operate as a discharge of the lien of the prior delinquent taxes.

1. *Cones v. Wilson*, 14 Ind. 465; *Atkinson v. Amick*, 25 Mo. 404; *St. Anthony Falls, etc., Co. v. Greeley*, 11 Minn. 324; *Thompson v. Gardner*, 10 Johns. (N. Y.) 404; *Lockhart v. Houston*, 45 Tex. 317. And see *State v. Redwood County*, 40 Minn. 512.

Until he has such opportunity he is not in default. *State v. Western Union Tel. Co.*, 4 Nev. 338. But a demand by the collector is not necessary to make the tax due. Such a demand is necessary before a levy; but it is not a condition precedent to the duty of the taxpayer to pay. *Goddard v. Seymour*, 30 Conn. 394. See also *Den v. Helmes*, 3 N. J. L. 600.

**Non-Resident Owners.**—No demand is necessary in case of non-resident owners. *New York, etc., R. Co. v. Lyon*, 16 Barb. (N. Y.) 651. See also *Smith v. Ryan*, 88 Ky. 636.

2. See *Hoozer v. Buckner*, 11 B. Mon. (Ky.) 183; *Julian v. Stephens* (Ky. 1889), 11 S. W. Rep. 6; *Hickman v. Kempner*, 35 Ark. 505; *Lathrop v. Howley*, 50 Iowa 39; *Hier v. Rullman*, 22 Kan. 606; *Villey v. Jarreau*, 33 La. Ann. 291; *Wiggin v. Temple*, 73 Me. 380; *Prince George's County v. Clarke*, 36 Md. 206; *Langdon v. Stewart*, 142 Mass. 576; *Reed v. Crapo*, 127 Mass. 39; *State v. West Hoboken*, 40 N. J. L. 109; *Parker v. Rule*, 9 Cranch (U. S.) 65. But see *Noland v. Busby*, 28

b. WHEN MADE.—The taxpayer should attend for payment at the time and place provided therefor,<sup>1</sup> though the right to make payment continues until the property is sold for the taxes.<sup>2</sup>

c. BY WHOM MADE.—(1) *Generally*.—Payment may be made by a co-owner or co-tenant, and, when so made, inures to the benefit of all.<sup>3</sup> Payment may be made by the agent of the person liable.<sup>4</sup> So it may be made by one having an interest or claim in the property, and whose interest will be divested by

Ind. 154; *Virden v. Bowers*, 55 Miss. 1. As to what is a sufficient demand, see *Himmelman v. Booth*, 53 Cal. 50. The collector is the proper person to make the demand. *York v. Goodwin*, 67 Me. 260.

The *Kentucky* statute requires the officer to deliver or offer to the person from whom the taxes are due, a statement of such taxes, and to tender a receipt. Unless this is done, he is not authorized to distrain. *Hoozer v. Buckner*, 11 B. Mon. (Ky.) 183.

Under the *Louisiana* statute, a written notice to pay is a prerequisite to a tax sale. *Villey v. Jarreau*, 33 La. Ann. 291.

In *Wheelock v. Archer*, 26 Vt. 380, it was held that where a collector calls for a tax, and the taxpayer absolutely refuses to pay, the collector may levy at once.

An error in the notice as to amount, etc., will not avoid the assessment, but only the tax warrant. *State v. Perkins*, 24 N. J. L. 409.

**How Notice May be Given.**—Notice of a tax due and in arrears may be given by posting it at the courthouse door and at three other of the most public places in the county. *Prince George's County v. Clarke*, 36 Md. 206. See also *Himmelman v. Townsend*, 49 Cal. 150. And in *Connecticut*, the publication may be on the sign-post in the town where the land lies, and in a newspaper printed in the same county. But a personal demand is necessary before real estate can be sold to satisfy a tax on personality. *Ives v. Lynn*, 7 Conn. 505.

**Proof of Demand.**—A demand of payment of a tax may be proved by parol evidence. *Gossett v. Kent*, 19 Ark. 602.

1. *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541; *Breisch v. Cox*, 81 Pa. St. 336.

In *Iowa*, payment made after a sale for taxes is of no avail, though made in ignorance of the sale. *Jones v. Welsing*, 52 Iowa 220. And payment at a time when the collector is not authorized to

receive it will not avoid a subsequent sale. *Thornton v. Smith*, 36 Ark. 508.

The taxes of one year cannot be compensated by an overpayment of a tax of a previous year. *New Orleans v. Davidson*, 30 La. Ann. 541; 31 Am. Rep. 228; *New Orleans v. Davidson*, 30 La. Ann. 554.

2. *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Huber v. Pickler*, 94 Mo. 382. And see *Mathews v. Buckingham*, 22 Kan. 166; *Leizbach v. Jackman*, 28 Kan. 524. See also *infra*, this title, *Redemption from Tax Sale*.

In *Drennan v. Beierlein*, 49 Mich. 272, it was held that a taxpayer's right to make payment after the return of taxes, is the same after an extension of the time for making the return as before.

3. *Den v. Terrell*, 3 Hawks (N. Car.) 283; *Chickering v. Faile*, 38 Ill. 342; *Loomis v. Pingree*, 43 Me. 299.

In *Brown v. Day*, 78 Pa. St. 129, the fact that an assessment against one of several property owners was placed upon the land as unseated land, and the assessment against the interest of another as seated land, was held not to disserve the joint ownership, so as to prevent one claimant from paying taxes on the whole.

The *Illinois* revenue act, in force in that state in 1877, provided that the collector should receive taxes on part of any parcel of land, if a particular specification of the part was furnished. It was held, therefore, in *Lawrence v. Miller*, 86 Ill. 502, that, such specification having been made, it was the duty of the collector to receive that part of the taxes so due and to give a receipt therefor. So in *Winter v. Atkinson*, 28 La. Ann. 650, it was held that the tender of a *pro rata* share of the tax by one of several co-tenants was sufficient as to him.

4. *Hills v. Exchange Bank*, 105 U. S. 319; *Hawkins v. Dougherty* (Del. 1890), 18 Atl. Rep. 951. Tax commissioners have no right to establish a rule

a sale for taxes;<sup>1</sup> in case of payment by such a one, he is entitled to be reimbursed by the party primarily liable.<sup>2</sup> A writ of *man-*

that they will receive taxes from no one but the owner in person, and thus cut off the title by a sale which would not have been necessary had the owner's agent made tender of the amount of the tax, which he refrained from doing because of the rule. *U. S. v. Lee*, 106 U. S. 196; *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Tracey v. Irwin*, 18 Wall. (U. S.) 549; *Atwood v. Weems*, 99 U. S. 183.

A principal can claim the benefit of a tax paid by his agent without reference to the state of accounts between them. *Rand v. Scofield*, 43 Ill. 167.

1. *U. S. v. Tilden*, 9 Ben. (U. S.) 368; *Cole v. Wright*, 70 Ind. 179; *Blackwood v. Van Vleet*, 30 Mich. 118; *Brown v. Day*, 78 Pa. St. 129.

The payment of taxes by any person extinguishes them. *Morrison v. Kelly*, 22 Ill. 610. And see *Wilbert v. Michel*, 42 La. Ann. 853. See also *Mason v. Chicago*, 48 Ill. 420, where taxes on land were paid by mistake by one not the owner, who, on discovering the error got the money refunded, but it was nevertheless, held to operate as a payment.

As the duties of tax officers are ministerial, they cannot decide upon the claim of one offering to pay a tax and claiming to have an interest in the land, but must accept payment. *Iowa R. Land Co. v. Guthrie*, 53 Iowa 383.

A mortgagee may presume taxes to have been legally assessed and pay them without inquiry as to their validity, unless notified to the contrary. *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729.

2. *Cole v. Wright*, 70 Ind. 179; *Brown v. Evans*, 15 Kan. 88; *Lillie v. Case*, 54 Iowa 177; *Erwin's Succession*, 16 La. Ann. 132; *Rundell v. Lakey*, 40 N. Y. 513.

A lien is sometimes given upon the property to secure such reimbursement. *Peay v. Field*, 30 Ark. 600; *Borthell v. Syverson*, 54 Iowa 160; *Lillie v. Case*, 54 Iowa 177; *Cole v. Wright*, 70 Ind. 179; *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729.

When taxes have been paid by a surety, the lien may be kept alive for his benefit, and a tenant or stranger whose goods have been taken to pay taxes, will be treated as a surety. *Wallace's Estate*, 59 Pa. St. 401. But the

right exists only against the owner at the time of the assessment, or some other person primarily liable for its payment. See *Henry v. Horstick*, 9 Watts (Pa.) 412.

**Reimbursement of Mortgagee.**—Where mortgaged premises are assessed in connection with other premises of the mortgagor, and the mortgagee, to prevent a forfeiture, pays the whole tax, he can have the whole amount included in his judgment upon the mortgage. *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729. But in *Savage v. Scott*, 45 Iowa 130, it was held that there must be an agreement between the parties to that effect, in the absence of facts and equities which would require a court of chancery to make such a provision. But see also *Borthell v. Syverson*, 54 Iowa 164, where that decision is strictly confined to the facts of that case.

**Right to Contribution of Co-tenant Paying Tax.**—Where payment is made by one co-tenant, he can look to the others for contribution. *Chickering v. Faile*, 38 Ill. 343. But under the *New Hampshire* statute he cannot call on the others for contribution, unless the sheriff, acting as collector, has first delivered a copy of his tax list to the deputy secretary. *Homer v. Cilley*, 14 N. H. 85.

A mere volunteer who pays the taxes of another can acquire no lien or other right against the property. *Peay v. Field*, 30 Ark. 600. And see *Hoffman v. Bell*, 61 Pa. St. 444; *Crum v. Burke*, 25 Pa. St. 377. And tax officers may doubtless refuse to receive taxes from a mere volunteer who claims no interest in the lands, and as such, offers to pay them for the purpose of acquiring a right against the owner. *Iowa R. Land Co. v. Guthrie*, 53 Iowa 383.

Payments made for the purpose of sustaining tax titles or to bar a redemption thereof, must be under claim and color of title. *Chickering v. Faile*, 38 Ill. 342; *Cofield v. Furry*, 19 Ill. 183; *Dawley v. Van Court*, 21 Ill. 460; *Darst v. Marshall*, 20 Ill. 227. And see *Hardin v. Coate*, 78 Ill. 533.

As a rule, every taxpayer has the right, as between himself and third persons, to pay his own taxes, and to pay them to the county in which they are due, and not be compelled to run after a self-substituted creditor and



*damus* may issue to compel a tax collector to accept payment from one who has the right to make it, in case of an unlawful refusal on the part of such collector.<sup>1</sup>

(2) *As Between Owners of Different Estates*.—As between the owners of different estates in the same property, it may be said generally that he who is in the present enjoyment ought to discharge the present impost.<sup>2</sup> Thus, the tenant for life is required to preserve the remainder by paying taxes, if the estate is sufficient therefor,<sup>3</sup> and it is the duty of a mortgagor to discharge all taxes upon the mortgaged premises as long as possession is retained by him.<sup>4</sup> So, a vendee in possession under a contract of sale is liable, as between himself and his vendor, for taxes assessed

make payments to him. *Goodnow v. Stryker*, 61 Iowa 261.

1. *Clementi v. Jackson*, 92 N. Y. 591. But see *Hawkins v. Dougherty* (Del. 1890), 18 Atl. Rep. 951, where it was held that under the constitution and laws of *Delaware*, payment by the taxpayer in person was contemplated, and that, while the collector could, if he chose, accept payment from a duly authorized agent, he could not be compelled by *mandamus* to do so.

2. *Willard v. Blount*, 11 Ired. (N. Car.) 624; *Spangler v. York County*, 13 Pa. St. 322.

3. *Clark v. Middlesworth*, 82 Ind. 240; *Pike v. Wassell*, 94 U. S. 711; *Waldo v. Cummings*, 45 Ill. 421; *Olleman v. Kelgore*, 52 Iowa 38; *Holmes v. Taber*, 9 Allen (Mass.) 246; *Arnold v. Smith*, 3 Bush (Ky.) 163; *Varney v. Stevens*, 22 Me. 334; *Garland v. Garland*, 73 Me. 98; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 363; *Wade v. Malloy*, 16 Hun (N. Y.) 226; *De Witt v. Cooper*, 18 Hun (N. Y.) 67; *Carter v. Youngs*, 42 N. Y. Super. Ct. 418; *Ex p. McComb*, 4 Bradf. (N. Y.) 151; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 129; *Spangler v. York County*, 13 Pa. St. 322; *McDonald v. Heylin*, 4 Phila. (Pa.) 73; *Peirce v. Burroughs*, 58 N. H. 302; *Weaver v. Arnold*, 15 R. I. 53; *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *Cadmus v. Combes*, 37 N. J. Eq. 264; *Anderson v. Hensley*, 8 Heisk. (Tenn.) 834. And see *Sheldon v. Ferris*, 45 Barb. (N. Y.) 124; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Pinckney v. Pinckney*, 1 Bradf. (N. Y.) 269; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *Deraismes v. Deraismes*, 72 N. Y. 154.

In case of his neglect, a receiver will be appointed. *Cairns v. Chabert*, 3 Edw. Ch. (N. Y.) 312; *Sidenberg v.*

*Ely*, 11 Abb. N. Cas. (N. Y.) 358; 90 N. Y. 264; *King v. King*, 41 N. Y. Super. Ct. 516. And he is liable to an action for waste. *Phelan v. Boyle*, 25 Wis. 679. If in consequence of his failure, the estate is sold, he will be liable to the remainderman for the loss sustained. *Wade v. Malloy*, 16 Hun (N. Y.) 226. See also *Stetson v. Day*, 51 Me. 436; *McMillan v. Robbins*, 5 Ohio 31.

The burden of proof to show that the income is sufficient to keep down the taxes and incumbrances, rests with the remainderman. *Clark v. Middlesworth*, 82 Ind. 241.

**Apportionment of Assessments for Permanent Improvements**.—Assessments for permanent improvements are apportionable between the life tenant and the remainderman, the general rule being that the tenant for life should pay the annual interest on the assessment and the principal be charged against the remainderman. *Plympton v. Boston Dispensary*, 106 Mass. 544; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 363; *Peck v. Sherwood*, 56 N. Y. 615; *Thomas v. Evans*, 105 N. Y. 612; *Stillwell v. Doughty*, 2 Bradf. (N. Y.) 312; *Fleet v. Dorland*, 11 How. Pr. (N. Y. Supreme Ct.) 489; *Miller's Estate*, 1 Tuck. (N. Y.) 346.

4. *Williams v. Hilton*, 35 Me. 547; 58 Am. Dec. 729; *Gormley's Appeal*, 27 Pa. St. 49.

The court, in rendering its judgment, should order that taxes be paid first out of the proceeds of the sale of the mortgaged property. *Opdyke v. Crawford*, 19 Kan. 604.

But a mortgagor who has conveyed his interest in the premises before a tax accrues, is not liable for its payment. *Gormley's Appeal*, 27 Pa. St. 49.

A clause in a mortgage that payment

after the commencement of his possession;<sup>1</sup> taxes upon property held in trust should be paid by the trustee and allowed him from the income of the trust estate;<sup>2</sup> and a tax may be recovered against an executor or administrator,<sup>3</sup> or an assignee for the benefit of creditors.<sup>4</sup>

As between landlord and tenant, the duty to pay taxes rests usually with the landlord.<sup>5</sup>

*d.* TO WHOM MADE.—Payment of a tax must be made to the officer authorized by law to collect it,<sup>6</sup> or to his duly authorized

shall be "without any deduction or abatement for taxes," is a stipulation to pay the taxes on the land mortgaged, not on the debt secured. *Clopton v. Philadelphia, etc., R. Co.*, 54 Pa. St. 356.

1. *Lillie v. Case*, 54 Iowa 177; *Sackett v. Osborn*, 26 Iowa 146; *Cole v. Wright*, 70 Ind. 179; *Farber v. Purdy*, 69 Mo. 601; *Francis v. Washburn*, 5 Hayw. (Tenn.) 294; *Sherman v. Savery*, 2 Fed. Rep. 505. But see *Wilson v. Tappan*, 6 Ohio 172. And payment of taxes by the purchaser while in possession, but before the deed is executed, will inure to the benefit of his title when consummated. *Russell v. Mandell*, 73 Ill. 136.

But taxes previously assessed and remaining unpaid are a personal charge against the vendor. *Rundell v. Lakey*, 40 N. Y. 513; *Biggins v. People*, 96 Ill. 381; *Blodgett v. German Sav. Bank*, 69 Ind. 153; *Desmond v. Babbitt*, 117 Mass. 233; *Smirch v. York County*, 68 Pa. St. 439; *Henry v. Horstick*, 9 Watts (Pa.) 412; *Alexandria v. Preston*, 8 Cranch (U. S.) 53; *Greer v. McCarter*, 5 Kan. 17.

Where an owner conveys land with covenants against incumbrances after assessment, but before the tax has been extended, he is not liable for the tax, the assessment constituting no incumbrance before it is extended. *Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 399; 20 Am. Rep. 547; *Dowdney v. New York*, 54 N. Y. 186. But compare *Rundell v. Lakey*, 40 N. Y. 513.

In *Tennessee*, the vendee of land is required to pay the tax imposed on sales. *Guthrie v. South Western Iron Co.*, 8 Heisk. (Tenn.) 826.

2. *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *Holmes v. Taber*, 9 Allen (Mass.) 246.

But where a farm was devised to trustees, who were directed to pay the rents to one whom they allowed to occupy it instead, it was held that the taxes should be paid by the occupant

and not allowed in the executors' accounts as a charge against the estate. *Bates v. Underhill*, 3 Redf. (N. Y.) 365.

3. See *Brown v. Evans*, 15 Kan. 88; *Sohier v. Eldredge*, 103 Mass. 345; *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *Fleet v. Dorland*, 11 How. Pr. (N. Y. Supreme Ct.) 489; *Lawrence v. Holden*, 3 Bradf. (N. Y.) 142; even though the assessment was completed and the tax became an existing demand before the death of the decedent. *McMahon v. Beekman*, 65 How. Pr. (N. Y. Supreme Ct.) 427.

In *Whittaker v. Wright*, 35 Ark. 511, it was held to be the duty of an executor, upon the neglect of the mortgagor, to pay the taxes on property mortgaged to the estate, and if he omits to do so, or if there is no representative, a creditor of the estate may pay them, and be reimbursed out of the proceeds of the sale upon foreclosure.

But it is not the duty of an administrator to pay taxes accumulating on the lands after the death of the intestate, where he does not sell or need them for the payment of debts of the intestate. *Reading v. Wier*, 29 Kan. 429. And in *Henry v. Horstick*, 9 Watts (Pa.) 412, a purchaser of real estate sold by order of the orphans' court, in a proceeding in partition by the administrator, who had been compelled to pay taxes assessed before the sale, was not allowed to recover them from the administrator.

4. *Brooks v. Eighthmeys*, 53 Iowa 276. Taxes due from a dissolved insurance company are payable from its funds by the state superintendent of insurance. *In re Life Association of America*, 12 Mo. App. 40.

5. See LANDLORD AND TENANT, vol. 12, p. 692.

6. *Young v. King*, 3 R. I. 196; *Marshall v. Baldwin*, 11 Phila. (Pa.) 403.

In *Dean v. Wills*, 21 Tex. 642, it was held that the fact that a person

deputy,<sup>1</sup> and must be made in the town, county, or district where the land is located.<sup>2</sup>

e. HOW MADE—(1) *Generally*.—The payment or tender of taxes must be absolute and unconditional,<sup>3</sup> and must include the whole amount due, in order to discharge the lien;<sup>4</sup> but a *bona*

signing a tax receipt acts as tax collector, is *prima facie* evidence of his authority.

1. Jones v. Welsing, 52 Iowa 220.

Where taxes are paid to the person authorized by the county treasurer to receive them, the fact that the receipt is signed only by a stamp, with the *fac simile* of the treasurer's signature, will not affect the rights of a taxpayer as against a subsequent purchaser at a sale for the non-payment of the tax. Randall v. Dailey, 66 Wis. 285.

2. Where real estate and personal property have been assessed in a doubtful or disputed territory, by two counties, payment of taxes in the county where the land is actually located will bar an action for the taxes brought in the other county. People v. Wilkerson, 1 Idaho 619. And see Patton v. Long, 68 Pa. St. 260.

In Hilliard v. Griffin, 72 Iowa 331, a sale of land by the treasurer of a newly organized town, for taxes levied before the organization, and while it was attached to another town for revenue purposes, was held void, such taxes being payable to the treasurer of the county to which it was formerly attached.

3. State v. Carson City Sav. Bank, 17 Nev. 146; Stiles v. Hitchcock, 47 Vt. 419; State Railroad Tax Cases, 92 U. S. 575. And where the treasurer made out a receipt for the taxes, and entered them on his books as "paid," it was held not to operate as a discharge, unless followed by actual payment. Ambler v. Clayton, 23 Iowa 173.

Where upon a payment of taxes, the statute requires the tax receiver to give a receipt, a tender is not rendered invalid because such a receipt is demanded. State v. Central Pac. R. Co., 17 Nev. 259.

No arrangement can be made between the collector and taxpayer whereby he is discharged from liability by anything except absolute payment. Reutcher v. Huckle, 3 Ill. App. 144; Conway v. Cable, 37 Ill. 83; 87 Am. Dec. 240; Ambler v. Clayton, 23 Iowa 173; Merriam v. Dovey (Neb. 1888), 36 N. W. Rep. 382.

Though in some states the collector

has been permitted to satisfy a tax by payment to the treasurer and then enforce his claim against the person upon whom the tax is a charge. Shriver v. Cowell, 92 Pa. St. 262; Wallace's Estate, 59 Pa. St. 401; White v. State, 51 Ga. 252; Schaum v. Showers, 49 Ind. 285; Jacks v. Dyer, 31 Ark. 334; Gove v. Newton, 58 N. H. 359; Smith v. Messer, 17 N. H. 420; Mittenberger v. Cooke, 18 Wall. (U. S.) 421.

In Elson v. Spraker, 100 Ind. 374, an agreement between a taxpayer and a collector, by which the collector delivered the receipt and marked the tax paid when no payment was made, was held equivalent to an advancement of so much money by the collector at the request of the taxpayer, rendering the latter personally liable for the money advanced.

4. Flynn v. Edwards, 36 Fed. Rep. 873; Hunt v. McFadgen, 20 Ark. 277; State v. Carson City Sav. Bank, 17 Nev. 146; Tracey v. Irwin, 18 Wall. (U. S.) 549; Laffin v. Herrington, 16 Ill. 301; Driggers v. Cassady, 71 Ala. 529; Crum v. Burke, 25 Pa. St. 377; Heft v. Gephart, 65 Pa. St. 510; Auld v. McAllaster, 43 Kan. 162.

The treasurer may decline to receive a tender of a part of the tax or to give any receipt therefor, unless the entire amount of the tax is paid. Julien v. Ainsworth, 27 Kan. 446.

But the application of a part payment to a particular portion of the real estate will relieve that portion from liability to sale until the remainder is exhausted. Cones v. Wilson, 14 Ind. 465.

**Penalties and Expenses Included.**—Penalties for default and expenses incurred in an effort to collect, are included with the tax and must also be paid to discharge the lien. Bracey v. Ray, 26 La. Ann. 710; Joslyn v. Tracy, 19 Vt. 569. But the taxpayer cannot be compelled to pay a penalty in excess of that allowed by law. Chicago, etc., R. Co. v. Hartshorn, 30 Fed. Rep. 541.

**May Pay Any One Separate Tax.**—Where several assessments are united for convenience of collection, the full amount of any one or more of them

*fide* attempt to pay, frustrated by the fault of the taxing officers, is equivalent to actual payment, and will bar a sale.<sup>1</sup> It is the duty of the officer receiving the tax to give a receipt for all payments properly made,<sup>2</sup> and upon his refusal, *mandamus* will lie to compel him.<sup>3</sup>

(2) *Medium of Payment*.—Generally speaking, the medium of payment must be legal tender money, or at least money which passes current,<sup>4</sup> though the legislature may provide for the acceptance

may be paid, and the rest refused or contested. *Iowa R. Land Co. v. Carroll County*, 39 *Iowa* 151; *Olmsted County v. Barber*, 31 *Minn.* 256. And see *Lawrence v. Miller*, 86 *Ill.* 502; *Auld v. McAllaster*, 43 *Kan.* 162.

**Payment of Taxes Upon Realty Includes Appurtenances**.—The mains and pipes of a gas company are mere appurtenances of realty whereon the works are situated, and when erroneously assessed as personal property and the company has paid the taxes upon its realty, the treasurer cannot advertise and sell the realty for the alleged delinquent taxes upon the personality. *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51 *Iowa* 31.

1. *Breisch v. Cox*, 81 *Pa. St.* 336; *Baird v. Cahoon*, 5 *W. & S. (Pa.)* 540; *Neeley v. Wise*, 44 *Iowa* 544; *Corning Town Co. v. Davis*, 44 *Iowa* 629; *Lewis v. Withers*, 44 *Fed. Rep.* 165; *Griffing v. Pintard*, 25 *Miss.* 173; *Doe v. Burford*, 26 *Miss.* 194; *Jones v. Dils*, 18 *W. Va.* 759.

Where the owner applies for the taxes assessed against him and pays the amount stated, he has performed his duty, whether the information given him is correct or not. *Laird v. Hiester*, 24 *Pa. St.* 452; *Philadelphia v. Anderson*, 142 *Pa. St.* 357; *Freeman v. Cornwell* (*Pa.* 1888), 15 *Atl. Rep.* 873; *Jiska v. Ringgold County*, 57 *Iowa* 630; *Moon v. March*, 40 *Kan.* 58; *People v. Brooklyn*, 114 *N. Y.* 19. And see *Cummings v. Easton*, 46 *Iowa* 183; *Hickman v. Kempner*, 35 *Ark.* 505; *Randall v. Dailey*, 66 *Wis.* 285.

And a statement of a tax and the receipt therefor, unassailed, have been held clear evidence that the taxpayer applied to the treasurer for the taxes assessed against him and paid all that was demanded. *Breisch v. Cox*, 81 *Pa. St.* 336.

But the mistake of an officer in stating the amount of taxes due on property to a party who, unknown to him, was about to become a purchaser, will not prevent their subsequent collection. *El-*

*liot v. District of Columbia*, 3 *McArthur* (*D. C.*) 396. And see *Gow v. Tidrick*, 48 *Iowa* 284.

In *Kahl v. Love*, 37 *N. J. L.* 5, it was held that a tax collector is not required to give certificates that property is discharged from the taxes, and if his receipts are used for that purpose it is at the peril of those relying upon them. See also *Alkan v. Bean*, 8 *Biss.* (*U. S.*) 83.

2. *Hawkins v. Dougherty* (*Del.* 1890), 18 *Atl. Rep.* 951; *Law v. People*, 84 *Ill.* 142; *Lawrence v. Miller*, 86 *Ill.* 502. And see *Julian v. Stephens* (*Ky.* 1889), 11 *S. W. Rep.* 6.

Where land is assessed in such a way as to render the description uncertain, the owner can tender to the collector the amount of the tax, and demand the receipt with the proper description of the land. *Lawrence v. People*, 84 *Ill.* 142. But see *Stiles v. Hitchcock*, 47 *Vt.* 419, where it was held that a tax collector is under no obligation to give a receipt for taxes paid him.

3. *Law v. People*, 84 *Ill.* 142; *Perry v. Washburne*, 20 *Cal.* 318. And see *Lawrence v. Miller*, 86 *Ill.* 502.

4. *McLanahan v. Syracuse*, 18 *Hun* (*N. Y.*) 259; *Orange County Bank v. Wakeman*, 1 *Cow.* (*N. Y.*) 446; *Mumford v. Armstrong*, 4 *Cow.* (*N. Y.*) 553; *Dickson v. Gamble*, 16 *Fla.* 687; *Sawyer v. Springfield*, 40 *Vt.* 305; *McWilliams v. Phillips*, 51 *Miss.* 196; *Craig v. Smith*, 31 *Mo.* App. 286; *Elliott v. Miller*, 8 *Mich.* 132; *Doran v. Phillips*, 47 *Mich.* 228; *Fuller v. Chicago*, 89 *Ill.* 282; *Crutcher v. Sterling*, 1 *Idaho* 307; *Wells v. Cole*, 27 *Ark.* 603; *State v. Sneed*, 9 *Baxt.* (*Tenn.*) 472.

Payment or tender in any other medium will not discharge the lien of the tax. *Coit v. Claw*, 28 *Ark.* 516; *Loftin v. Watson*, 32 *Ark.* 414.

Where the collector accepts a bank check and gives a receipt for the taxes, the property may afterwards, on the dishonor of the check, be sold for the tax, although the owner had since sold it, showing the collector's receipt as

of scrip, etc., in payment of taxes,<sup>1</sup> and, in such case, the collector will be compelled to receive it.<sup>2</sup>

*f.* HOW ESTABLISHED.—Payment of taxes may be proved by the record,<sup>3</sup> by the original receipt of the tax collector,<sup>4</sup> or by

an evidence that the taxes were paid. *Kahl v. Love*, 37 N. J. L. 5. See also *Koones v. District of Columbia*, 4 Mackey (D. C.) 339.

In *Dickson v. Gamble*, 16 Fla. 687, it was held that a tax collector cannot enforce a note given him for taxes, particularly where it does not appear that he paid or discharged the taxes at the request of the maker. And in *Thorn-dike v. Camden*, 82 Me. 39, it was held that a township cannot impose a tax to reimburse a collector who has taken a note in payment of a tax and failed to collect it.

In *Trenholm v. Charleston*, 3 S. Car. 347; 16 Am. Rep. 732, it was held that plaintiff could not compel the municipality to accept a debt due by it, in payment of taxes. And in *Sawyer v. Springfield*, 40 Vt. 305, it was held that where a tax collector takes a town order in payment of taxes, it must be regarded as a personal matter, and not as a payment of the order.

Though payment in an illegal and void currency is a nullity, the collector does not thereby acquire any personal right of action for the recovery of the amount. *Richards v. Stogsdel*, 21 Ind. 74.

**Payment in Coin Alone.**—Sometimes, taxes have been made payable in coin alone. *Whiteaker v. Haley*, 2 Oregon 140; *People v. Shearer*, 30 Cal. 645; *Prescott v. McNamara*, 73 Cal. 236.

1. *English v. Oliver*, 28 Ark. 317; *Askew v. Columbia County*, 32 Ark. 270; *Lea v. Memphis*, 9 Baxt. (Tenn.) 103; *Marinette v. Oconto County*, 47 Wis. 216; *Lee v. Harlow*, 75 Va. 22.

Under the *Arkansas* statutes, the orders of school trustees are receivable for school taxes of the district for which they were issued, but not for county taxes; and county warrants are receivable for county taxes, but not for district school taxes. *Wallis v. Smith*, 29 Ark. 354. And the legislature cannot make the certificates of state indebtedness and auditor's warrants receivable in payment of county or school district taxes. *Wells v. Cole*, 27 Ark. 603.

Where county warrants are made receivable for taxes by the constitution, they are not receivable in payment of a tax levied to pay an indebtedness ex-

isting prior to the adoption of the constitution. *Loftin v. Watson*, 32 Ark. 415.

Where county orders are received by a town treasurer for county taxes, it operates as a payment of the orders as well as the tax, and when so received they belong to the county and not to the town. *Marinette v. Oconto County*, 47 Wis. 216.

In *Askew v. Columbia County*, 32 Ark. 271, it was held that a collector who collects a tax in currency and pays it to the treasurer in county warrants, releases himself from official liability.

Under the *California* statute of 1868, levee taxes might be paid either with warrants of the district drawn upon by the levee fund, or with money. *Prescott v. McNamara*, 73 Cal. 736.

2. *Virginia Coupon Cases*, 114 U. S. 270; *Keith v. Clark*, 97 U. S. 454; *Furman v. Nichol*, 8 Wall. (U. S.) 44; *English v. Oliver*, 28 Ark. 317; *Askew v. Columbia County*, 32 Ark. 270; *Dan-ley v. Pike*, 15 Ark. 141; *Loftin v. Watson*, 32 Ark. 415; *Fuller v. State*, 73 Ga. 408; *Clark v. Keith*, 8 Lea (Tenn.) 703; *Williamson v. Massey*, 32 Gratt. (Va.) 239; *Antoni v. Wright*, 22 Gratt. (Va.) 833.

In *Daniel v. Askew*, 36 Ark. 487, it was held that a collector who is required to take county scrip in payment of taxes, cannot refuse it because it is barred by the Statute of Limitations.

But the privilege of paying in something other than a legal-tender medium is strictly limited to the terms of the statute granting it, *Wallis v. Smith*, 29 Ark. 354; and has been held to extend only to payments made within the time prescribed by law, and not to payments made after default. *Bummel v. Houston*, 68 Tex. 10.

3. See *Adams v. Beale*, 19 Iowa 61; *Harrison v. Sauerwein*, 70 Iowa 291; *Dennett v. Crocker*, 8 Me. 239.

The letters "pd." on the county treasurer's book opposite the amount for which the land was sold, without any evidence that the taxes were paid before the sale, are not of themselves evidence of payment previous thereto. *Ankeny v. Albright*, 20 Pa. St. 157. And see *Ambler v. Clayton*, 23 Iowa 173.

4. *Johnstone v. Scott*, 11 Mich. 232;

any other competent evidence.<sup>1</sup> Like receipts from any other public officers, tax receipts prove themselves.<sup>2</sup>

*g. EFFECT.*—Upon payment of a tax, the lien is discharged,<sup>3</sup>

*Hammond v. Hannin*, 21 Mich. 374; 21 Am. Rep. 490; *Hall v. Hall*, 1 Mass. 101; *Seigneuret v. Fahey*, 27 Minn. 60; *Huber v. Pickler*, 94 Mo. 382; *Deen v. Wills*, 21 Tex. 642.

A collector's receipt for taxes is an official paper which the law requires him to give, and is evidence of the payment of the tax in suits between third persons. *Johnstone v. Scott*, 11 Mich. 232. And see *Weimer v. Porter*, 42 Mich. 569; *Miller v. Hurford*, 13 Neb. 13. But it will not sustain a claim of ownership where it is shown that the taxes were paid under a contract with the real owner. *Ellen v. Ellen*, 16 S. Car. 132.

The receipt of a deputy collector is held to have the same force and effect as that of the treasurer. *Jones v. Welsing*, 52 Iowa 220; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Hammond v. Hannin*, 21 Mich. 374; 4 Am. Rep. 490. But though original evidence, they are not conclusive, and may be rebutted or explained by parol. *Elston v. Kennicott*, 46 Ill. 188; *Rand v. Scofield*, 43 Ill. 167; *Hammond v. Hannin*, 21 Mich. 374; 4 Am. Rep. 490; *Wolf v. Philadelphia*, 105 Pa. St. 25. And until invalidated by proof, are sufficient. *Johnstone v. Scott*, 11 Mich. 232.

Where tax receipts inaccurately describing the property are offered in evidence as proof of payment, it is a question for the jury, whether they were intended to cover the property in dispute. *Orton v. Noonan*, 25 Wis. 672.

1. *Adams v. Beale*, 19 Iowa 61; *Dennett v. Crocker*, 8 Me. 239; *Hammond v. Hannin*, 21 Mich. 374; 4 Am. Rep. 490; *McReynolds v. Longenberger*, 57 Pa. St. 13.

The payment of a tax is matter *in pais*, and may be proven by oral evidence. *Davis v. Hare*, 32 Ark. 386; *Adams v. Beale*, 19 Iowa 61; *McDonough v. Jefferson County*, 79 Tex. 535.

The action of the collecting officer in reference to the payment, receipt, and return for taxes, is a part of the *res gestæ* upon which the validity of a tax deed depends. *Johnstone v. Scott*, 11 Mich. 232. And where land is erroneously assessed twice in different names, the collector who returns it as delinquent is a competent witness to prove

the payment of the taxes by the owner of the land. *Davis v. Hare*, 32 Ark. 386.

Under a *Mississippi* statute providing that none but a certain form of receipt shall be valid as evidence, payment of taxes before a sale cannot be shown to invalidate a tax title, unless the prescribed receipt was given; but it does not prevent proof of the loss of a valid receipt. *Edmondson v. Ingram*, 68 Miss. 32.

As between the parties, payment cannot be shown in opposition to a judicial determination that the taxes are delinquent. *Gaylord v. Scarff*, 6 Iowa 179; *Wallace v. Brown*, 22 Ark. 118; 76 Am. Dec. 421; *Cadmus v. Jackson*, 52 Pa. St. 295.

**Certificate of Payment.**—A certificate by a tax collector of a county where the land is situate, that no taxes are charged against such land on his books, is not sufficient evidence of payment of taxes. *Acklin v. Paschal*, 48 Tex. 147.

**Previous Payment of Taxes.**—Evidence of the payment of taxes for previous years is not admissible to establish payment for a subsequent year. *Ankeny v. Albright*, 20 Pa. St. 157. Nor is the fact that the tax had been marked reduced on the tax books. *State v. School Com'rs*, etc., 13 Wis. 409.

**Presumption of Payment.**—In *Smith v. Tharp*, 17 W. Va. 221, it is held that the mere lapse of time will not raise a legal presumption of the payment of taxes on lands returned delinquent, though taken in connection with other circumstances it might justify a jury in finding as a matter of fact that taxes have been paid. But see *Woodburn v. Farmers*, etc., Bank, 5 W. & S. (Pa.) 447; *McLaughlin v. Kain*, 45 Pa. St. 113. And *Brown v. Day*, 78 Pa. St. 129, where payment was presumed from the lapse of time.

No presumption of payment arises from the duty of the taxpayer to make it. Any such presumption would be overthrown by the counter presumption that the tax officers have not violated their duty by proceeding to enforce the collection of taxes after they have been paid. *Ankeny v. Albright*, 20 Pa. St. 157.

2. See RECEIPTS, vol. 19, p. 1111.

3. *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Huber v. Pickler*, 94 Mo. 382;

and the right to sell the property for non-payment defeated.<sup>1</sup>  
A sale after payment or tender conveys no title to the purchaser.<sup>2</sup>

*Alexander v. Hunter*, 29 Neb. 259; *Wallace's Estate*, 59 Pa. St. 401; *Montgomery v. Meredith*, 17 Pa. St. 42; *Reading v. Finney*, 73 Pa. St. 467; *Hunter v. Cochran*, 3 Pa. St. 105; *Johnson v. Christie*, 64 Ga. 117. Payment extinguishes the tax. *Morrison v. Kelly*, 22 Ill. 610.

**Land Twice Assessed.**—The fact that the land has been twice assessed to different persons and the payment has been made by only one of them, does not alter the rule. *Alexander v. Hunter*, 29 Neb. 259; *Bradley v. Ewart*, 18 W. Va. 598; *Montgomery v. Meredith*, 17 Pa. St. 42.

1. *Morris v. Sioux County*, 42 Iowa 416; *Iowa R. Land Co. v. Guthrie*, 53 Iowa 383; *Gaylord v. Scarff*, 6 Iowa 179; *Wallace v. Brown*, 22 Ark. 118; 76 Am. Dec. 421; *Davis v. Hare*, 32 Ark. 386; *Conant v. Buesing*, 23 Fla. 559; *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192; 17 Am. Dec. 136; *Morrison v. Kelly*, 22 Ill. 610; *Mason v. Chicago*, 48 Ill. 420; *Curry v. Hinman*, 11 Ill. 420; *Wall v. District of Columbia*, 6 Mackey (D.C.) 194; *Griffing v. Pintard*, 25 Miss. 173; *Montgomery v. Meredith*, 17 Pa. St. 42; *Ankeny v. Albright*, 20 Pa. St. 157; *Hunter v. Cochran*, 3 Pa. St. 105; *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Wilbert v. Michel*, 42 La. Ann. 853. And see *Doty v. Bassitt*, 44 Kan. 454; *Jackson v. Morse*, 18 Johns. (N. Y.) 441; 9 Am. Dec. 225; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 328; 49 Am. Dec. 189; *Joslyn v. Rockwell*, 128 N. Y. 334; *Den v. Terrell*, 3 Hawks (N. Car.) 283; *Hilliard v. Griffin*, 72 Iowa 331; *Lefebvre v. Negrotto*, 44 La. Ann. 792; *Patton v. Long*, 68 Pa. St. 260.

To authorize a tax collector to sell land by reason of the non-payment of taxes in any case, the taxpayer must be in default. *Doe v. Burford*, 26 Miss. 194; *Green v. Craft*, 28 Miss. 70; *Williams v. Camnack*, 27 Miss. 209; 61 Am. Dec. 508.

Even though a payment is the result of a mistake, a collector has no power to cancel it and revive the assessment. *Mason v. Chicago*, 48 Ill. 420; *Richmond v. Brown*, 66 Me. 373. Though where money received in payment of a tax is applied to the payment of another tax through the mistake of

a collector, the error may be corrected. *Mason v. Chicago*, 48 Ill. 420.

A tax paid on unseated land is applied to the tract for which it is paid, without reference to any mistake of the owner, though the land on which the payment was intended is afterwards sold for taxes. *Stephens v. Wells*, 6 Watts (Pa.) 325. And see *Maxwell v. Hunter*, 65 Iowa 121. But the payment of taxes assessed upon parts of lots described as the whole should have been described, must be treated as a payment of the whole tax where the owner in good faith so intended it. *Merton v. Dolphin*, 28 Wis. 456.

2. *Walton v. Gray*, 29 Iowa 440; *Rowland v. Doty*, Harr. (Mich.) 3; *Rayner v. Lee*, 20 Mich. 384; *Sigman v. Lundy*, 66 Miss. 522; *Huber v. Pickler*, 94 Mo. 382; *Kinsworthy v. Austin*, 23 Ark. 375; *Laird v. Hiester*, 24 Pa. St. 452; *Dougherty v. Dickey*, 4 W. & S. (Pa.) 146; *Breisch v. Coxe*, 81 Pa. St. 336; *Brown v. Day*, 78 Pa. St. 129; *Reading v. Finney*, 73 Pa. St. 467; *Cadmus v. Jackson*, 52 Pa. St. 295; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Tracey v. Irwin*, 18 Wall. (U. S.) 549; *Atwood v. Weems*, 99 U. S. 183; *Matthews v. Buckingham*, 22 Kan. 166; *Martin v. Snowden*, 18 Gratt. (Va.) 100; *Jones v. Dils*, 18 W. Va. 759; *Randall v. Dailey*, 66 Wis. 285; *Sprague v. Coenen*, 30 Wis. 209. The rule applies to wild lands. *Rish v. Ivey*, 76 Ga. 738.

A tax sale of land as unseated will transfer no title to the vendee, when the land sold constitutes a part of a seated tract upon which the taxes have been paid. *Kramer v. Goodlander*, 98 Pa. St. 366.

In *Sprague v. Coenen*, 30 Wis. 209, it was held that where lands were sold for taxes which had previously been paid, the Statute of Limitations as to tax deeds did not run in favor of the grantee.

When a taxpayer has paid before sale, he is not required to make a tender to the purchaser before bringing suit to set aside the sale. *Lefebvre v. Negrotto*, 44 La. Ann. 792.

But if the owner voluntarily redeems lands sold for taxes after they have been paid, he cannot recover from the county the amount paid for such redemption. *Morris v. Sioux County*, 42 Iowa 416.

Nor will the misapplication of a payment by the tax officer destroy its effect as a payment.<sup>1</sup>

**2. Involuntary Payment.**—(See *infra*, this title, *Remedies for Erroneous and Illegal Taxation*; DURESS, vol. 6, p. 57; PAYMENT, vol. 18, p. 148.)

**XIV. COLLECTION**—1. **How Provided For.**—The power to levy taxes necessarily carries with it the power to enforce their collection,<sup>2</sup> and to provide the means necessary to accomplish this object.<sup>3</sup> Subject to constitutional restrictions,<sup>4</sup> the choice of

The rule is the same whether the sale is made through the inadvertence or mistake of the parties concerned, or in positive disregard of the fact of payment. *Myrick v. Montgomery County*, 33 Ind. 333; *Hickman v. Kempner*, 35 Ark. 505; *Stephens v. Wells*, 6 Watts (Pa.) 325.

**Tender of Taxes.**—A sale of lands for taxes after tender of payment by the owner, though it is assessed in the name of another person, does not divest him of his title. *Kinsworthy v. Austin*, 23 Ark. 375.

Where a taxpayer tenders the amount of taxes due from him to the collector, which he refuses because the collection of the taxes for that year has been enjoined in a suit to which the taxpayer is not a party, and the injunction is dissolved, it is necessary, before the taxpayer can be placed in default for non-payment, that a demand be again made. *Doe v. Burford*, 26 Miss. 194.

**Tender Suspends Interest.**—The tender of the tax suspends the running of interest. *Iowa R. Land Co. v. Carroll County*, 39 Iowa 151.

1. *Dougherty v. Dickey*, 4 W. & S. (Pa.) 146; *Montgomery v. Meredith*, 17 Pa. St. 47; *Henderson v. Robinson*, 76 Iowa 603; *Huber v. Pickler*, 94 Mo. 382; *Jones v. Dils*, 18 W. Va. 759.

Thus, a payment is not defeated by its application to the taxes of other persons. *Henderson v. Robinson*, 76 Iowa 603; *Maxwell v. Hunter*, 65 Iowa 121; *Lefebvre v. Negrotto*, 44 La. Ann. 792. Or to the payment of taxes on other property than that designated by the taxpayer. *Dougherty v. Dickey*, 4 W. & S. (Pa.) 146; *Hickman v. Kempner*, 35 Ark. 505.

Where a tax payment is expressly made to satisfy a particular assessment, the collector, if he receives it, must apply the money to the purpose specified, and no other. *Fuller v. Grand Rapids*, 40 Mich. 395.

Taxpayers are authorized to rely upon the officer to whom payment is made for the proper application of the money given them, and justice will not permit them to lose their lands through the mistake of officers in whom they are authorized to confide. *Henderson v. Robinson*, 76 Iowa 603. And see *Corning Town Co. v. Davis*, 44 Iowa 622; *Corbin v. Stewart*, 44 Iowa 543; *Fenton v. Way*, 40 Iowa 196.

Where the owner of unseated land pays the amount demanded of him by the treasurer, but the payment is credited to another tract and his land is sold for non-payment, the sale is void. *Laird v. Hiestler*, 24 Pa. St. 452.

2. *Morrison v. Larkin*, 26 La. Ann. 701; *Slack v. Ray*, 26 La. Ann. 675; *Gibson v. Mason*, 5 Nev. 283; *State v. Consolidated Va. Min. Co.*, 16 Nev. 432; *Languille v. State*, 4 Tex. App. 312; *Clegg v. State*, 42 Tex. 605. And see *Vandine, Petitioner*, 6 Pick. (Mass.) 187; *Nightingale, Petitioner*, 11 Pick. (Mass.) 168; *Biscoe v. Couller*, 18 Ark. 423; *Brooklyn v. Cleaves*, 1 Hill & D. Supp. (N. Y.) 231; *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Bervear v. Com.*, 5 Wall. (U. S.) 475.

3. *Green v. Gruber*, 26 La. Ann. 694; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Litchfield v. Vernon*, 41 N. Y. 130. And see *Chalker v. Ives*, 55 Pa. St. 81.

Constitutional provisions, providing a method for the collection of municipal taxes, are not self-operative, and laws on the subject previously in force, continue in operation, until they are otherwise abrogated. *New Orleans v. Wood*, 34 La. Ann. 732.

4. See *Mason v. Rollins*, 2 Biss. (U. S.) 99; *Edwards v. Williamson*, 70 Ala. 145; *Litchfield v. Vernon*, 41 N. Y. 130; *Appeal Tax Ct. v. Union R. Co.*, 50 Md. 275; *Languille v. State*, 4 Tex. App. 312. And see *supra*, this title, *The Power to Tax*.



methods for the collection of taxes is within the discretion of the legislature.<sup>1</sup>

**2. The Collector**—*a.* **SELECTION, REMOVAL, RESIGNATION, ETC.**—Sometimes statutes provide that the tax collector shall be elected by popular vote;<sup>2</sup> other statutes provide that he be appointed.<sup>3</sup> And treasurers, sheriffs, constables, and other officers, are, in some instances, authorized to act as collectors.<sup>4</sup> But whether elected or appointed, or designated in any other manner, the collector must be chosen in the manner provided by law, and must possess the necessary qualifications.<sup>5</sup>

The duties which the law imposes upon the collector can be performed only by the person designated by the statute,<sup>6</sup>

1. *In re Elizabeth*, 49 N. J. L. 488; *State v. State Board of Assessors*, 54 N. J. L. 90; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *State v. Central Pac. R. Co.*, 21 Nev. 260; *State v. Mayhew*, 2 Gill (Md.) 487; *Mason v. Rollins*, 2 Biss. (U. S.) 99. And see *Falconer v. Shores*, 37 Ark. 386; *People v. Seymour*, 16 Cal. 334; 76 Am. Dec. 521; *Reg. v. Burnskill*, 8 U. C. Q. B. 546.

A constitutional provision for the method of taxation is not self-operative, and previous collection statutes continue in force until abrogated. *New Orleans v. Wood*, 34 La. Ann. 732.

2. See *Appeal of Town Council* (Pa. 1888), 15 Atl. Rep. 730; *Castle v. Lawlor*, 47 Conn. 340.

3. *Taft v. Barrett*, 58 N. H. 447; *Com. v. Perkins*, 7 Pa. St. 42.

In *Falconer v. Shores*, 37 Ark. 387, it was said that the legislature might provide for the selection of collector, in any manner it chose.

In *New Hampshire*, it has been held that the appointment of a tax collector, by the selectmen of a town, must be made in writing and recorded. *Ainsworth v. Dean*, 21 N. H. 400.

4. See *Wilson v. Seavey*, 38 Vt. 221; *Chandler v. Spear*, 22 Vt. 388; *Falconer v. Shores*, 37 Ark. 386; *Scarry v. Lewis*, 133 Ind. 96; *Hays v. Drake*, 6 Gray (Mass.) 387; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Homer v. Cilley*, 14 N. H. 84; *Bailey v. Lockhart*, 4 Yerg. (Tenn.) 567.

Where the sheriff is required to act as collector, he is usually given the same authority as though he were elected or appointed collector. *Homer v. Cilley*, 14 N. H. 85.

As to the collection of taxes by a coroner, see *State v. Irby*, 1 McMull. (S. Car.) 485.

**Collectors not Constables.**—In *Gage v. Dudley*, 64 N. H. 437, it was held that a constable's power vested in a collector to serve process for the purpose of collection of taxes, did not make him constable for any other purpose.

5. See *Com. v. Browne*, 1 S. & R. (Pa.) 382; *Lincoln v. Chapin*, 132 Mass. 470.

In *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309, it was held that where a collector is appointed, pursuant to a statute, the warrant issued to him is sufficient evidence of his appointment, to justify his acting as such.

In *Taft v. Barrett*, 58 N. H. 447, it was held that an appointment of L. D. F. "collector of a town," is a sufficient appointment of L. D. F. as "collector of taxes."

**Who May Question Authority.**—Every person who pays taxes in a ward or township, has such an interest as authorizes the filing of an information, at his instance, to inquire by what authority the collector exercises his office. *Com. v. Browne*, 1 S. & R. (Pa.) 382.

**Not Subject to Collateral Attack.**—In *Law v. People*, 87 Ill. 385, it was held that the right to an office held by a tax officer, cannot be attacked in a collateral proceeding brought to test the validity of a tax sought to be collected. See also *Odiorne v. Rand*, 59 N. H. 504.

6. *Hadley v. Chamberlin*, 11 Vt. 618; *Fremont v. Boling*, 11 Cal. 380; *Butler v. Nevin*, 88 Ill. 575; *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *Odiorne v. Rand*, 59 N. H. 504; *Com. v. Browne*, 1 S. & R. (Pa.) 382; *Waite v. Hyde Park Lumber Co.*, 65 Vt. 103; *Thompson v. Allen County*, 13 Fed. Rep. 97; *Bryan v. Harvey*, 11 Tex. 311.

Neither the whole, nor any part, of

or by his deputy.<sup>1</sup> Upon the refusal of a collector to act or qualify, or upon a vacancy, a new collector may be chosen.<sup>2</sup>

**b. QUALIFICATION.**—The collector must give the bond or security, and take the oaths required by law.<sup>3</sup> The bond and oath must conform to the statute.<sup>4</sup> But, while this is so, it is

the duties of a collector in collecting taxes, can be assigned to another. *Hadley v. Chamberlin*, 11 Vt. 618.

A collector *pro tem* cannot be appointed for the purpose of collecting arrearages. *Hadley v. Chamberlin*, 11 Vt. 618.

In *Crowell v. Barham*, 57 Ark. 195, it was held that a deputy sheriff cannot discharge the duties of tax collector, even though his principal is both tax collector and sheriff.

1. The collector is a ministerial officer, and may act by deputy. See *Aldrich v. Aldrich*, 8 Met. (Mass.) 102; *Williamstown v. Willis*, 15 Gray (Mass.) 427; *Holden v. Eaton*, 8 Pick. (Mass.) 436; *Walters v. Duke*, 31 La. Ann. 668. In *Aldrich v. Aldrich*, 8 Met. (Mass.) 102, it was held under the *Massachusetts* statute, that a deputy collector who is also a town treasurer, may execute a warrant for the collection of taxes, though he was appointed deputy before the warrant was issued and the warrant is directed to the collector only.

In *Wilhelm v. Cedar County*, 50 Iowa 254, it was held that a board of supervisors may employ a special agent or attorney, to assist in the collection of taxes not collectible by the county treasurer in the ordinary discharge of his duty.

2. See *Carville v. Additon*, 62 Me. 459; *People v. Callaghan*, 83 Ill. 128; *Ridgway Tp. v. Wheeler*, 90 Pa. St. 450.

**Failure to Qualify.**—In *Falconer v. Shores*, 37 Ark. 386, it was held that upon a failure of the sheriff to qualify as collector, by giving bonds, the office becomes vacant without a judicial ascertainment of the vacancy, and a new collector may be appointed. See also *Bailey v. Lockhart*, 4 Yerg. (Tenn.) 567; *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

The collector's removal from his district, has been held to vacate the office. *Gage v. Dudley*, 64 N. H. 437.

The resignation of a collector will not be inferred, as a matter of law, from his default and the delivery of his tax warrants to the selectmen, and his refusal to proceed with the collection.

*Spaulding v. Northumberland*, 64 N. H. 153.

**Expiration of Term.**—In *Haley v. Petty*, 42 Ark. 392, it was held that a collector's term continues until his successor is elected and qualified. See also *PUBLIC OFFICERS*, vol. 19, p. 378.

3. See *PUBLIC OFFICERS*, vol. 19, pp. 378, 440; *OATH*, vol. 16, p. 1017.

**Acceptance of Bond.**—When a bond is produced in a trial by the state, it is *prima facie* evidence of acceptance. *McLean v. State*, 8 Heisk. (Tenn.) 22.

**Approval.**—It has been held that the approval of a collector's bond is a ministerial act, and that *mandamus* lies in a proper case, to compel it. *Bosely v. Woodruff County Ct.*, 28 Ark. 226.

**New Bond.**—In *Texas*, it has been held that a tax collector may be required to furnish a new bond, at the pleasure of the court, without first having been cited to appear and show cause. *Poe v. State*, 72 Tex. 625.

**Amount of Bond.**—It is usual to require from the tax collector, a bond for double the aggregate amount of taxes. *Kane v. Garfield*, 60 Vt. 79.

**Illinois.**—As to the oaths and the commencement of the term of office of a town collector, under the *Illinois* statute, see *People v. Callaghan*, 83 Ill. 128. As to notice of the amount of taxes to be collected, see *Ross v. People*, 78 Ill. 375.

4. *Bradley v. Rapp*, 10 La. Ann. 589; *Farnsworth County v. Rand*, 65 Me. 21.

A bond for a less amount than that required by statute, is void. *Oatman v. Barney*, 46 Vt. 594.

In *Alabama*, a bond was held void where it was made payable to the county court, when the statute required that it should be made payable to the governor. *Calhoun v. Lunsford*, 4 Port. (Ala.) 345. But in *Texas*, where the bond was required to run to the county judge, it was held that the county was protected by a bond running to the governor. *King v. Ireland*, 68 Tex. 682.

**Cure of Omission to Give Bond.**—The failure to give a bond required by statute, and not by constitution, may be

usually held that mere formal irregularities and mistakes may be disregarded.<sup>1</sup>

As a bond, whether required by statute or not, may be good at common law, if entered into voluntarily and for a valuable consideration, it follows that a collector's bond, though not in the statutory form, may yet be binding as a common-law bond.<sup>2</sup>

The execution of the bond is not always a condition precedent to the collector's assuming his official duties.<sup>3</sup>

The lawful acts of a *de facto* collector, as such, are valid; thus, payment to him will discharge a tax.<sup>4</sup> The presumption that

remedied by a curative act. *Powers v. Penny*, 59 Miss. 5.

1. See *DeSoto County v. Dickson*, 34 Miss. 150; *Wilder v. Butterfield*, 50 How. Pr. (N. Y.) 385.

A collector's bond will hold the sureties to a liability for all moneys actually collected, even though the condition for accounting and paying over is left out. *State v. Hill*, 17 W. Va. 452.

A bond in which the sureties bind themselves in several amounts, the aggregate of which is equal to the statutory sum required, is valid against both principal and sureties, though there is no specification as to the amount to which the principal is bound. *People v. Love*, 25 Cal. 521.

2. *Sooy v. State*, 38 N. J. L. 324; *Horn v. Whittier*, 6 N. H. 88; *Walker v. Chapman*, 22 Ala. 116; *Dudley v. Chilton County*, 66 Ala. 593; *Sweetser v. Hay*, 2 Gray (Mass.) 49; *Wilder v. Butterfield*, 50 How. Pr. (N. Y.) 385; *Claasen v. Shaw*, 5 Watts (Pa.) 468; 30 Am. Dec. 338; *Dixon v. U. S.*, 1 Brock. (U. S.) 177; *U. S. v. Howell*, 4 Wash. (U. S.) 620; *U. S. v. Fingey*, 5 Pet. (U. S.) 115; *Trescott v. Moan*, 50 Me. 347; *Scarborough v. Parker*, 53 Me. 252; *Boothbay v. Giles*, 68 Me. 160; *Gorham v. Hall*, 57 Me. 58; *Stevens v. Almen*, 19 Ohio St. 485; *People v. Collins*, 7 Johns. (N. Y.) 554; *State v. Matthews*, 57 Miss. 1; *State v. Harney*, 57 Miss. 863. And see *DeSoto County v. Dickson*, 34 Miss. 150; *Harris v. State*, 55 Miss. 50; *French v. State*, 52 Miss. 759; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79; *Lewenthal v. State*, 51 Miss. 645; *James v. State*, 55 Miss. 57; 30 Am. Rep. 496; *St. Joseph County v. Coffenbury*, 1 Mich. 355; *Post Master Gen'l v. Rice*, Gilp. (U. S.) 554.

**Seal.**—A tax collector's bond which lacks a seal, may be binding upon him as a simple contract. *Wilder v. But-*

*terfield*, 50 How. Pr. (N. Y.) 385; *Richardson v. Rogers*, 50 How. Pr. (N. Y.) 403; *Boothbay v. Giles*, 68 Me. 160.

**Collector Appointed by Military Authority.**—The bond of a collector appointed by the military government, is valid security for those interested, though the collector is not governed by the state tax laws. *State v. Cooper*, 53 Miss. 615.

3. *Scarborough v. Parker*, 53 Me. 252; *Morrill v. Sylvester*, 1 Me. 248; *Boothbay v. Giles*, 68 Me. 160. And see *Bosley v. Woodruff County Ct.*, 28 Ark. 306; *People v. Callaghan*, 83 Ill. 128; *Drew v. Morrill*, 62 N. H. 23. But the acts of a collector have been held invalid where a bond was not given. *Oatman v. Barney*, 46 Vt. 594; *Courser v. Powers*, 34 Vt. 517.

4. *Oldtown v. Blake*, 74 Me. 280; *Orono v. Wedgewood*, 44 Me. 49; *State v. Woodside*, 8 Ired. (N. Car.) 104. And see *Waters v. State*, 1 Gill (Md.) 302; *Com. v. Philadelphia*, 27 Pa. St. 497; *Stockle v. Silsbee*, 41 Mich. 615; *Facey v. Fuller*, 13 Mich. 527; *Douglass v. Wickwire*, 19 Conn. 489; *Sullivan v. State*, 66 Ill. 75; *Williams v. School District*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *Tucker v. Aiken*, 7 N. H. 113; *Wilcox v. Smith*, 5 Wend. (N. Y.) 234; 21 Am. Dec. 213; *Burke v. Elliott*, 4 Ired. (N. Car.) 355; 42 Am. Dec. 142; *Kingsbury v. Ledyard*, 2 W. & S. (Pa.) 37; *Farmers', etc., Bank v. Chester*, 6 Humph. (Tenn.) 458. But see *Houston v. Russell*, 52 Vt. 110.

A collector of taxes who has not been sworn, is an officer *de facto*. *Oldtown v. Blake*, 74 Me. 280; *Johnson v. Goodridge*, 15 Me. 29; *Trescott v. Moan*, 50 Me. 347; *Williams v. School Dist.*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *State v. Woodside*, 8 Ired. (N. Car.) 104.

In *Greene v. Walker*, 63 Me. 311, it was held that the fact that a town treasurer had neither been sworn nor

all public officers, who have acted as such, have been duly appointed, unless the contrary is shown, applies to tax collectors.<sup>1</sup> Where one is collector by virtue of the occupancy of some other office, as that of sheriff or constable, he holds two distinct offices, and must qualify for each.<sup>2</sup>

c. AUTHORITY—(1) *Nature and Extent*.—A tax collector's authority rests upon his warrant to make collections.<sup>3</sup> In the absence of a warrant, he cannot proceed to enforce the payment of taxes.<sup>4</sup> The tax roll, when completed, partakes of the nature of a judgment, and the warrant delivered with it to the collector is in the nature of an execution.<sup>5</sup>

given bond, was no defense against the enforcement of a tax, as he was still a *de facto* officer. But see *Payson v. Hall*, 30 Me. 319, as to the validity of a tax title, where the collector had not qualified. See generally, *DE FACTO OFFICERS*, vol. 5, p. 93.

1. *Capwell v. Hopkins*, 10 R. I. 378; *Kent v. Atlantic De Laine Co.*, 8 R. I. 305; *Tucker v. Aiken*, 7 N. H. 113; *Eldred v. Sexton*, 5 Ohio 215. And see *Downer v. Woodbury*, 19 Vt. 329. See generally, *PUBLIC OFFICERS*, vol. 19, p. 436.

2. *In re McCabe*, 33 Ark. 396; *Falconer v. Shores*, 37 Ark. 386; *People v. Ross*, 38 Cal. 76; *Lathrop v. Brittain*, 30 Cal. 680; *People v. Love*, 25 Cal. 521. But see *Broadwell v. People*, 76 Ill. 554; *Hughes v. People*, 82 Ill. 78; *Kilgore v. People*, 76 Ill. 548; *Wood v. Cook*, 31 Ill. 271.

It is within the power of the legislature, however, to provide that there may be but one bond for both officers. *People v. Ross*, 38 Cal. 76.

In *Mabry v. Tarver*, 1 Humph. (Tenn.) 94, the court held that, under a statute requiring from the sheriff, an officer elected for two years, a bond, as collector of taxes, conditioned for the payment of the taxes in each and every year, a bond, given at the beginning of his first year of office, conditioned for the payment of the taxes of each of the two years, is a good statutory bond. See also *Nevill v. Day*, 3 Humph. (Tenn.) 38; *Governor v. Porter*, 5 Humph. (Tenn.) 166; *McLean v. State*, 8 Heisk. (Tenn.) 271.

3. *Hilbish v. Hower*, 58 Pa. St. 93; *Pearce v. Torrence*, 2 Grant's Cas. (Pa.) 82; *Stephens v. Wilkins*, 6 Pa. St. 260; *Ream v. Stone*, 102 Ill. 359; *Pearson v. Canney*, 64 Me. 188; *Slade v. Governor*, 3 Dev. (N. Car.) 365; *Den v. Craig*, 5 Ired. (N. Car.) 129; *First Nat. Bank v. Waters*, 19 Blatchf. (U. S.)

242; *Erskine v. Holmbach*, 14 Wall. (U. S.) 613.

The collector can exercise no authority not authorized by the warrant. *State v. Hawkins*, 50 N. J. L. 122.

4. *Donald v. McKinnon*, 17 Fla. 746; *Young v. Thomas*, 17 Fla. 169; 39 Am. Rep. 93; *Ream v. Stone*, 102 Ill. 359; *Binkert v. Wabash R. Co.*, 98 Ill. 218; *Hill v. Figley*, 23 Ill. 418; *Corbin v. Hill*, 21 Iowa 70; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Homer v. Cilley*, 14 N. H. 85; *Den v. Craig*, 5 Ired. (N. Car.) 129.

In *Donald v. McKinnon*, 17 Fla. 746, it was held that a sale made by a collector without a warrant, passes no title.

An objection that the collector acted without a rate-bill, must be taken at trial, and cannot be raised, for the first time, upon appeal. *Pickett v. Allen*, 10 Conn. 146.

5. *Moss v. Cummings*, 44 Mich. 359; *Bird v. Perkins*, 33 Mich. 28; *Thibodaux v. Keller*, 29 La. Ann. 508; *Holden v. Eaton*, 8 Pick. (Mass.) 436; *Hubbard v. Garfield*, 102 Mass. 72; *Cunningham v. Mitchell*, 67 Pa. St. 78; *Savacool v. Boughton*, 5 Wend. (N. Y.) 171; 21 Am. Dec. 181. And see *Cheever v. Merritt*, 5 Allen (Mass.) 563; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Greene v. Mumford*, 4 R. I. 318; *Gossett v. Kent*, 19 Ark. 602; *Nowell v. Tripp*, 61 Me. 426; 14 Am. Dec. 572; *Clifton v. Wynne*, 80 N. Car. 145; *Mulford v. Sutton*, 79 N. Car. 276; *Gore v. Mastive*, 66 N. Car. 371; *Virdenn v. Bowers*, 55 Miss. 1; *Edes v. Boardman*, 58 N. H. 584; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 597; *First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242; *Erskine v. Holmbach*, 14 Wall. (U. S.) 613. And see *Yuba County v. Adams*, 7 Cal. 35; *Preston v. Boston*, 12 Pick. (Mass.) 14; *Byars v. Curry*, 75

The collector is bound to obey a warrant in due form, issuing from the proper authorities, when it is not illegal on its face.<sup>1</sup>

Where a tax is partly legal and partly illegal, and the illegal portion is clearly severable from the rest, it is the duty of the collector to proceed with the collection of so much as is lawful.<sup>2</sup>

In some states the collector is not required to have any formal writ or warrant; his authority rests upon his compliance with the statutory requirements, and upon the tax book or roll, no preliminary process being necessary.<sup>3</sup>

The collector cannot, ordinarily, collect taxes for years anterior to his election and qualification; his power extends only to taxes accruing during the period for which he was elected.<sup>4</sup> The general authority of the collector is confined to the limits of his own collection district, and if he undertakes to execute his warrant beyond these limits, he must bring himself within the provisions of a statute permitting it.<sup>5</sup>

Ga. 515; *Harris v. Wood*, 6 T. B. Mon. (Ky.) 641; *State v. Lutz*, 65 N. Car. 503; *Den v. Craig*, 5 Ired. (N. Car.) 129.

The duplicate is but a memorandum of the amount which the collector is to collect from the parties therein named respectively. *Hilbish v. Hower*, 58 Pa. St. 93.

A warrant fills the place and performs the functions of a summons, and is the writ to the officer, by which he is authorized to collect the tax, or, in the event of its non-payment, to subject the property of the taxpayer to sale therefor. *Donald v. McKinnon*, 17 Fla. 746.

The collector's warrant and the tax roll together constitute the execution, and they must be construed together. *Van Rensselaer v. Witbeck*, 7 N. Y. 517.

1. *First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242; *Kellar v. Savage*, 20 Me. 199; *Smyth v. Titcomb*, 31 Me. 282. And see *Gove v. Newton*, 58 N. H. 359; *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y. 339.

2. *Clifton v. Wynne*, 80 N. Car. 145; *Mendocino v. Chalfant*, 51 Cal. 369. And see *Trull v. Madison County*, 72 N. Car. 388.

In *Vassalboro v. Nowell*, 75 Me. 245, it was held that a collector who accepts a warrant and collects a portion of a tax, part of which is illegal, is obliged to collect so much of the remainder as is legally assessed.

3. *Jackson County v. Gullatt*, 84 Ala. 243; *Parker v. Sexton*, 29 Iowa 421; *Tallman v. Cooke*, 43 Iowa 330; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153; *Litchfield v. Hamilton County*, 40 Iowa 66; *Rhodes v. Sexton*, 33 Iowa 540; *Timberlake v. Brewer*, 59

Ala. 108; *Johnson v. Chase*, 30 Iowa 308; *Hurley v. Powell*, 31 Iowa 64; *Pentland v. Stewart*, 4 Dev. & B. (N. Car.) 386.

4. *Otis v. Boyd*, 8 Lea (Tenn.) 679; *Fremont v. Boling*, 11 Cal. 380. And see *Skinner v. Roberts* (Ga. 1893), 17 S. E. Rep. 353; *Peck v. Holcombe*, 3 Port. (Ala.) 329; *Fitts v. Hawkins*, 2 Hawks. (N. Car.) 394.

In some of the states, collectors are empowered to complete their collections, notwithstanding new collectors may have been chosen and sworn. See *Scarborough v. Parker*, 53 Me. 252; *Picket v. Allen*, 10 Conn. 146. But this has been changed by statute in *Connecticut*. See *Castle v. Lawlor*, 47 Conn. 340.

In *Smith v. Riding* (Del. 1891), 22 Atl. Rep. 97, it was held that a statute terminating the powers of collectors and abolishing the office, did not take from ex-collectors their power to collect all uncollected taxes included in their warrants for two years after the date thereof.

If the officer is delayed by the taxpayer, he may proceed after the expiration of the time within which he is required to act, *Jones v. Arrington*, 94 N. Car. 541; or after the expiration of his term of office. *Kellar v. Savage*, 20 Me. 199. See also *Slade v. Governor*, 3 Dev. (N. Car.) 365; *Gordon v. Lafayette County*, 74 Mo. 426.

In *Louisiana*, the authority of the collector terminates when the delinquent list is returned. *Hall v. Hall*, 23 La. Ann. 135.

5. *State v. Scammon*, 22 N. H. 44; *Gage v. Dudley*, 64 N. H. 437; *Mason*

(2) *The Warrant*—(a) **Issuance.**—The warrant must be issued by authority of law, and in the manner designated by statute. It must be issued by and to the proper person or body.<sup>1</sup> It has been held that two or more warrants may be issued for the same tax.<sup>2</sup> The officer issuing the warrant is presumed to have performed his duty, and to have complied with all the requirements of law, until the contrary appears.<sup>3</sup>

*v. Johnson*, 51 Cal. 612; *McKay v. Batchellor*, 2 Colo. 591.

**Removal of Taxpayer.**—In *Cheever v. Merritt*, 5 Allen (Mass.) 563, it was held that where a taxpayer removes from a collector's district without paying his tax after its assessment, the collector's warrant for distress to the sheriff or constable of the town to which he has removed, need not recite the facts, *i. e.*, the fact of removal, etc., which authorize the collector to issue it. This decision is apparently in conflict with that in *Williamstown v. Willis*, 15 Gray (Mass.) 427; but in *Sherman v. Torrey*, 99 Mass. 474, *Chapman, C. J.*, attempts to reconcile them.

Provisions for the collection of personal taxes, from persons removing from one county to another, by sending a tax bill to the sheriff of the county to which they remove, cannot be attacked upon the ground of want of due process of law. *De Arman v. Williams*, 93 Mo. 158. And the remedy is not impaired by the fact that the removal was made with intent to return. *Houghton v. Davenport*, 23 Pick. (Mass.) 235.

**Unorganized Counties.**—An unorganized county is, in effect, a part of the county to which it is attached for the purpose of taxation, and the collection of taxes upon personal property situated in such county, may be enforced by the tax collector of the county to which it is attached. *Llano Cattle Co. v. Fought*, 69 Tex. 402.

1. *Hilbish v. Hower*, 58 Pa. St. 93; *Chalker v. Ives*, 55 Pa. St. 81; *Butler v. Nevin*, 88 Ill. 575; *Van Wagenen v. Brown*, 26 N. J. L. 196; *Talmadge v. Rensselaer County*, 21 Barb. (N. Y.) 611; *Waite v. Hyde Park Lumber Co.*, 65 Vt. 103; *Weimer v. Bunbury*, 30 Mich. 201; *Pearson v. Canney*, 64 Me. 188; *Nashville v. Pearl*, 11 Humph. (Tenn.) 249.

In *Butler v. Nevin*, 88 Ill. 575, it was held that where an ordinance does not designate the officer from whom the warrant must issue, as required by

statute, the warrant cannot be issued at all, and if issued, will be void.

In *State v. Runyon*, 42 N. J. L. 568, it was held that until a delinquent list has been duly returned by the proper officers, the warrant cannot issue.

Where several persons collectively are authorized to issue the warrant, it is void unless issued by all. *Townsend v. Gray*, 1 D. Chip. (Vt.) 127.

The warrant must be properly issued, although there is a statute providing that mere irregularities and omissions shall not invalidate the tax. *Muskegon v. Martin Lumber Co.*, 86 Mich. 625.

In *Pearce v. Torrence*, 2 Grant's Cas. (Pa.) 81, it was held that it must appear to the justice of the peace that the individual has refused to pay his taxes, before he can issue the warrant.

**Duty to Issue Mandatory—Mandamus to Compel.**—The duty to issue the warrant is ministerial, and *mandamus* will lie, in a proper case, to compel the performance of this duty. *People v. Halsey*, 53 Barb. (N. Y.) 547; *aff'd* 37 N. Y. 344. See *People v. Ashbury*, 44 Cal. 617.

That the issuing of a warrant is a ministerial act, see *Henry v. Sargeant*, 13 N. H. 321; 40 Am. Dec. 146.

**Upon Whom the Duty of Issuance Is Imposed.**—It is usually imposed upon assessors, treasurers, or other officers connected with the administration of the tax laws. See *People v. Halsey*, 53 Barb. (N. Y.) 547; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Butler v. Nevin*, 88 Ill. 575.

In *Iowa*, the county judge signs the tax warrant. *Corbin v. Hill*, 21 Iowa 70.

2. *Eddy v. Wilson*, 43 Vt. 362. *Compare*, however, *Inglee v. Bosworth*, 5 Pick. (Mass.) 500; 41 Am. Dec. 419; *Pond v. Negus*, 3 Mass. 230; 3 Am. Dec. 131.

3. *Chandler v. Spear*, 22 Vt. 388; *Bank of U. S. v. Tucker*, 7 Vt. 134; *Doolittle v. Doolittle*, 31 Barb. (N. Y.) 312; *Clifton v. Wynne*, 80 N. Car. 145; *State v. McIntosh*, 7 Ired. (N. Car.) 68; *Clemons v. Lewis*, 36 Vt. 673.

(b) *Contents*.—The warrant must comply as to form and contents with the law authorizing its issue, any substantial non-compliance with the statutory requisites invalidating the warrant and all proceedings under it.<sup>1</sup> But irregularities which do not affect the rights of the taxpayer, and accidental informalities, defects, and omissions do not necessarily render the warrant invalid.<sup>2</sup>

The warrant is usually annexed to the assessment roll or a duplicate thereof,<sup>3</sup> and must show distinctly what taxes are to be collected and against whom they are assessed.<sup>4</sup> The warrant to collect taxes is not a process, and need not run in the name of

1. *Hilbish v. Hower*, 58 Pa. St. 93; *Pearce v. Torrence*, 2 Grant's Cas. (Pa.) 82; *Bradford v. Randall*, 5 Pick. (Mass.) 495; *Nashville v. Pearl*, 11 Humph. (Tenn.) 249. And see *Wing v. Hall*, 47 Vt. 182; *Cheshire v. Howland*, 13 Gray (Mass.) 321. See *Pearson v. Canney*, 64 Me. 188; *Orneville v. Pearson*, 61 Me. 552; *Machiasport v. Small*, 77 Me. 109; *Den v. Craig*, 5 Ired. (N. Car.) 29; *Stephens v. Wilkins*, 6 Pa. St. 260; *May v. Wright*, 17 Vt. 97; *Van Wagenen v. Brown*, 26 N. J. L. 196.

In *Picket v. Allen*, 10 Conn. 146, it was held that where the tax warrant was unaccompanied by a rate bill, the collector had no authority to take the property of any individual.

The system of valuation of property, by which a tax is extended, in the collector's return, and the oath or affidavit of the collector required to accompany it, are substantial requirements. *People v. Otis*, 74 Ill. 384.

An execution issued for taxes, should specify for what taxes; otherwise it may be restrained by prohibition. *State v. Graham*, 2 Hill (S. Car.) 457.

2. *Walker v. Miner*, 32 Vt. 769; *Wells v. Austin*, 59 Vt. 157; *Bath v. Whitmore*, 79 Me. 182; *Barnard v. Graves*, 13 Met. (Mass.) 85; *King v. Whitcomb*, 1 Met. (Mass.) 328; *Bailey v. Ackerman*, 54 N. H. 527; *State v. Charleston*, 4 Rich. (S. Car.) 286; *Union Trust Co. v. Weber*, 96 Ill. 346; *Chandler v. Spear*, 22 Vt. 388; *Spear v. Braintree*, 24 Vt. 414; *Goodwin v. Perkins*, 39 Vt. 598; *Wing v. Hall*, 47 Vt. 182; *Picket v. Allen*, 10 Conn. 146; *Gove v. Newton*, 58 N. H. 359; *First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242; *Bird v. Perkins*, 33 Mich. 28; *Tweed v. Metcalf*, 4 Mich. 579; *Mussey v. White*, 3 Me. 290; *Corbin v. Hill*, 21 Iowa 70; *American Tool Co. v. Smith*, 32 Hun (N. Y.) 121.

In *Bellows v. Weeks*, 41 Vt. 590, it

was held that an error in the date of the warrant, apparent upon its face, does not invalidate it.

A collector has been held to be protected, where the assessment roll was not accompanied by the required affidavit of the assessors. *Bradley v. Ward*, 58 N. Y. 401; *Boyd v. Gray*, 34 How. Pr. (N. Y.) 322. And see *Hart v. Smith*, 44 Wis. 213.

In *Wilcox v. Gladwin*, 50 Conn. 77, it was held that the form for a warrant, given in the statute, is not imperative.

In *Barnard v. Graves*, 13 Met. (Mass.) 85, it was held, where the warrant directed the collector to make the distress twelve days after demanding payment, instead of fourteen days as required by statute, that the warrant was not invalidated, if, in making the distress, the warrant was executed according to law. See also *King v. Whitcomb*, 1 Met. (Mass.) 328.

3. *Black on Tax Titles*, § 201. And see *Donald v. McKinnon*, 17 Fla. 746; *Pearson v. Canney*, 64 Me. 188; *Bailey v. Ackerman*, 54 N. H. 527; *Bradley v. Ward*, 58 N. Y. 401.

In *Barnard v. Graves*, 13 Met. (Mass.) 85, it was held that a warrant to collect taxes, issued to a collector, does not authorize him to collect a tax by distress, unless it is accompanied with a tax list; but it is not necessary that the tax list should be annexed to the warrant. But see *Picket v. Allen*, 10 Conn. 145.

Under the *Vermont* statutes, the warrant for the collection of a state tax need not be attached to the rate bill. *Bellows v. Weeks*, 41 Vt. 590. But if it is annexed to the rate bill of one year, it will not justify taking property to satisfy the tax of another year. *Rowell v. Horton*, 57 Vt. 31.

4. *Clark v. Bragdon*, 37 N. H. 562; *State v. Perkins*, 24 N. J. L. 409. And see *Machiasport v. Small*, 77 Me. 109. Where a warrant directs land to be

the people.<sup>1</sup> Where a warrant is directed to the officer who is to execute it, as such officer, the omission of his name will not invalidate it.<sup>2</sup>

A warrant directed to the wrong officer is void,<sup>3</sup> and neither he, nor the officer to whom it should have been directed, can execute it.<sup>4</sup> Where lists are required to be kept separately for different classes of taxes, or for different political subdivisions, the requirement must be obeyed;<sup>5</sup> but one warrant may direct the collection of all the lists.<sup>6</sup>

The warrant must, either in terms or by implication, authorize the collector to take all the steps necessary to collection, or it is invalid and requires no action on his part.<sup>7</sup>

(c) **Execution and Delivery.**—The warrant must be signed by the person, or by a majority of the body issuing it,<sup>8</sup> in such a manner

sold for a larger amount than the amount of taxes due thereon, the warrant is null and void as to the land in question. *Hopper v. Malleson*, 16 N. J. Eq. 382.

**Description.**—Particularity of description, sufficient to identify lands and ascertain their locations, is required in the duplicate, warrant, and notices of sale, only when the lien upon land for taxes given by statutes is intended to be enforced. *State v. Hawken*, 50 N. J. L. 122; *Pfeiffer v. Miles*, 48 N. J. L. 450. And see *Dickson v. Rouse*, 80 Mo. 224.

1. *Scarritt v. Chapman*, 11 Ill. 443; *Curry v. Hinman*, 11 Ill. 420; *Haley v. Elliott*, 16 Colo. 159; *Mussey v. White*, 3 Me. 290; *Tweed v. Metcalf*, 4 Mich. 579; *Wisner v. Davenport*, 5 Mich. 501; *Sprague v. Birchard*, 1 Wis. 457. Compare *Nashville v. Pearl*, 11 Humph. (Tenn.) 249.

2. *Wilson v. Seavey*, 38 Vt. 221; *Chandler v. Spear*, 22 Vt. 388; *Byars v. Curry*, 75 Ga. 515. And see *Pickett v. Allen*, 10 Conn. 146; *First Nat. Bank v. St. Joseph Tp.*, 46 Mich. 526; *Bedgood v. McLain*, 89 Ga. 793; *Hays v. Drake*, 6 Gray (Mass.) 387. But see *Butler v. Nevin*, 88 Ill. 575.

In *Keith v. Freeman*, 43 Ark. 296, it was held that a tax warrant addressed to the sheriff is not invalid, where the sheriff and collector are the same person.

3. *Stephens v. Wilkins*, 6 Pa. St. 260; *Dinsmore v. Westcott*, 25 N. J. Eq. 470. And see *Butler v. Nevin*, 88 Ill. 575. Compare *Chandler v. Spear*, 22 Vt. 388; *Wilson v. Seavey*, 38 Vt. 221.

4. *Cannell v. Crawford County*, 59 Pa. St. 106. Compare *Scarry v. Lewis*, 133 Ind. 96, as to the validity of the

tax, when the tax duplicate was not delivered to the county auditor.

5. *Thayer v. Stearns*, 1 Pick. (Mass.) 482; *People v. Moore*, 1 Idaho 662; *Case v. Dean*, 16 Mich. 12. And see *Brown v. Powell*, 85 Ga. 603. But see *Thatcher v. People*, 79 Ill. 597.

In *Wall v. Trumbull*, 16 Mich. 228, it was held that where a tax is placed in a separate column on the tax roll, when it is not required by law to be so placed, the rights of no one can be prejudiced thereby, and no one is entitled to complain. See also *Bristol v. Chicago*, 22 Ill. 587.

6. *Thayer v. Stearns*, 1 Pick. (Mass.) 482.

A warrant authorizing a collector to collect several taxes, separately assessed, may be regarded as several warrants to collect the several taxes. *Brackett v. Whidden*, 3 N. H. 19.

7. *Bachelder v. Thompson*, 41 Me. 539; *State v. Atkinson*, 107 N. Car. 317; *Frankfort v. White*, 41 Me. 537; *Pearson v. Canney*, 64 Me. 188; *Boothbay v. Giles*, 68 Me. 161; *Boothbay v. Giles*, 64 Me. 403; *Orneville v. Pearson*, 61 Me. 552; *Tremont School Dist. v. Clark*, 33 Me. 482; *Waldron v. Lee*, 5 Pick. (Mass.) 328.

In *Orneville v. Pearson*, 61 Me. 552, it was held that a collector of taxes, acting under a warrant, is exonerated from completing the service, if the warrant direct and exempt from distress of property not exempted by statute.

It is not necessary that a tax warrant should specifically direct the sales of real estate, in terms. *Westhampton v. Searle*, 127 Mass. 502; *King v. Whitcomb*, 1 Met. (Mass.) 328.

8. *Belfast Sav. Bank v. Kennebec*



as to show the intention to give it official sanction;<sup>1</sup> but it is immaterial whether the signatures appear at the beginning or the end.<sup>2</sup>

Provisions in relation to the signature, as for instance, that both list and warrant shall be signed, are mandatory;<sup>3</sup> but provisions as to the time of delivery are directory. The delivery of the warrant, however, must be made in time to allow the collector time for compulsory enforcement of the tax by action.<sup>4</sup>

**3. Method of Collection—***a. GENERALLY.*—The government is entitled to all the remedies for the collection of taxes, to which

Land, etc., Co., 73 Me. 404; Pearson v. Canney, 64 Me. 188; Goddard v. Seymour, 30 Conn. 394; Sprague v. Bailey, 19 Pick. (Mass.) 436. And see Smith v. Messer, 17 N. H. 420.

In *Belhows v. Weeks*, 41 Vt. 590, it was held that, in the absence of statutory provision, one selectman may properly perform the mechanical act of writing the names of the other members of the board, to a certificate of assessment, he being authorized by them so to do.

1. *Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404.

In *Sheldon v. Van Buskirk*, 2 N. Y. 473, it was held that a warrant issued by supervisors of a county for the collection of taxes, is valid, even though the persons describing it are not described therein as supervisors, or by any other official designation.

**Presumption of Due Signature.**—It will be presumed that the tax list and warrant were duly signed by the assessors, in absence of proof to the contrary. *Kellar v. Savage*, 20 Me. 199.

2. *Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404; *Hogelskamp v. Weeks*, 37 Mich. 422.

A warrant does not, like a deed, import a sealed instrument. *Bradford v. Randall*, 5 Pick. (Mass.) 495.

Where the law requires the controller's signature to be "affixed" to a collector's warrant, the word "counter-signed" at the left of his name, does not vitiate his signature. *Scammon v. Chicago*, 42 Ill. 192.

In *Hogelskamp v. Weeks*, 37 Mich. 422, it was held that a highway tax is not void simply because the commissioner of highways did not sign the highway list, when he did sign the warrant for collection which was attached to the list. And in *Kane v. Brooklyn*, 114 N. Y. 586, the same rule was applied to the signature of the board of supervi-

ors upon the city tax rolls of Brooklyn. See also *Doolittle v. Doolittle*, 31 Barb. (N. Y.) 313.

Under the *New Hampshire* statute, the list of taxes committed to the collector, must be signed by the collector. *Gordon v. Rundlett*, 28 N. H. 435.

3. *Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404; *Colby v. Russell*, 3 Me. 227; *Foxcroft v. Nevens*, 4 Me. 72; *Johnson v. Goodridge*, 15 Me. 29; *Bangor v. Lancey*, 21 Me. 472; *Pearson v. Canney*, 64 Me. 188; *Chase v. Sparhawk*, 22 N. H. 134; *Copp v. Whipple*, 41 N. H. 273. And see *Den v. Craig*, 5 Ired. (N. Car.) 129.

It is not sufficient that the list is specially referred to in the warrant to the collector, accompanying it. *Copp v. Whipple*, 41 N. H. 273.

In *Chase v. Sparhawk*, 22 N. H. 134, it was held that selectmen issuing a warrant without authenticating the accompanying list of taxes, are answerable, in an action of trespass, for the act of the collector in the seizure of property for the enforcement of the collection of taxes, in pursuance of the direction contained in the warrant.

4. *Bradley v. Ward*, 58 N. Y. 401; *People v. Allen*, 6 Wend. (N. Y.) 486; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Oswego County v. Betts*, 6 N. Y. Supp. 934; 53 Hun (N. Y.) 638; *Alvord v. Collin*, 20 Pick. (Mass.) 418; *Hubbard v. Winsor*, 15 Mich. 146; *Smith v. Crittenden*, 16 Mich. 152; *Weeks v. Batchelder*, 41 Vt. 317; *Cardigan v. Page*, 6 N. H. 182; *Cooley on Taxation* (2d ed.), p. 428.

A tax sale is not invalid because the tax collector's certificate was not dated, or because the auditor's certificate did not show when it was received in his office. *Corburn v. Crittenden*, 62 Miss. 125. See also *Mills v. Scott*, 62 Miss. 525; *Wheeler, etc., Mfg. Co. v. Ligon*, 62 Miss. 560.

it may choose to resort.<sup>1</sup> The state may provide that taxes shall be enforced, to the exclusion of other claims against the person or property.<sup>2</sup> The method employed to enforce the collection may be changed at any time before the taxes are discharged or paid,<sup>3</sup> for example, the state may adopt more stringent measures;<sup>4</sup> but the law as it was before the change will govern pending proceedings, unless it is otherwise provided.<sup>5</sup> The statutory remedy is exclusive, unless other remedies are expressly authorized.<sup>6</sup>

1. See *Litchfield v. Vernon*, 41 N. Y. 30; *York v. Goodwin*, 67 Me. 260; *Packard v. Tisdale*, 50 Me. 376; *State v. Duncan*, 3 Lea (Tenn.) 679; *Jonesboro v. McKee*, 2 Yerg. (Tenn.) 167; *Rutledge v. Fogg*, 3 Coldw. (Tenn.) 568; 91 Am. Dec. 299; *Marr v. Bank of Tennessee*, 4 Coldw. (Tenn.) 471.

2. A state is not bound to wait until the estate of a deceased person or insolvent has been distributed, but may enforce the payment of taxes, to the exclusion of other creditors. *Dunlap v. Gallatin County*, 15 Ill. 7. And see *Bulfinch v. Benner*, 64 Me. 404; *Huis-camp v. Albert*, 60 Iowa 421; *In re Columbian Ins. Co.*, 3 Abb. App. Dec. (N. Y.) 239; *Harvey v. South Chester*, 99 Pa. St. 565.

3. *Aplin v. Reynolds*, 83 Mich. 471; *In re Elizabeth*, 49 N. J. L. 488; *Hosmer v. People*, 96 Ill. 58; *Edwards v. Williamson*, 70 Ala. 145.

The legislature has power to pass an act to remedy defects in a law authorizing a tax, while the tax remains uncollected. *Cowgill v. Long*, 15 Ill. 203.

4. *In re Elizabeth*, 49 N. J. L. 488. And see *State v. Heman*, 70 Mo. 441.

**Knowledge of Taxpayer.**—Every taxpayer is assumed to know the usual course taken to enforce payment of delinquent taxes. *Louden v. East Saginaw*, 41 Mich. 18.

5. *Karnes v. People*, 73 Ill. 274; *State v. Waterville Sav. Bank*, 68 Me. 519; *Oakland v. Whipple*, 44 Cal. 303; *State v. Tufts*, 108 Mo. 418; *Fitch v. Elko County*, 8 Nev. 271. And see *Bellows v. Parsons*, 13 N. H. 256; *State v. Sloss*, 83 Ala. 93; *People v. Moore*, 1 Idaho 662; *State v. Shepherd*, 74 Mo. 310; *Smith v. Kelly* (Oregon, 1893), 33 Pac. Rep. 642; *Pacific, etc., Tel. Co. v. Com.*, 66 Pa. St. 70; *People v. Latham*, 53 Cal. 386; *New Orleans v. Day*, 29 La. Ann. 416; *New Orleans v. Rheinisch Westphalian Lloyds*, 31 La. Ann. 784. But see *Spokane County v. Northern Pac. R. Co.*, 5 Wash. 89; *Briggs v.*

*Chandler*, 60 Miss. 862; *Bryan v. Harvey*, 11 Tex. 311.

The repeal of a statute under which taxes are levied, however, puts an end to the right to collect them, unless the intent to preserve the right to collect appears. *Gorley v. Sewell*, 77 Ind. 317; *Mount v. State*, 6 Blackf. (Ind.) 25; *Bleidorn v. Abel*, 6 Iowa 5; *State v. Hill*, 70 Miss. 106.

**Additional Taxes.**—When the duty to collect taxes, in addition to the ordinary ones, is imposed upon a collector, he should proceed in the same manner as for the collection of other taxes. *Cunningham v. Mitchell*, 67 Pa. St. 78.

**New Remedies.**—In *Briggins v. People*, 106 Ill. 270, it was held that a new remedy given to enforce a tax lien by foreclosure in equity, applies to pre-existing rights, as well as to those subsequently accruing.

**Not Applicable to Municipal Assessments.**—In *Harvey v. South Chester*, 99 Pa. St. 565, it was held that an act applying a new method for the collection of taxes in a certain county, has special reference to taxes, properly speaking, and does not apply to municipal claims or assessments which are made liens entitled to priority of payment by statute.

**Constitutional Charges.**—In *New Orleans v. Wood*, 34 La. Ann. 732, it was held that a constitutional provision with reference to the method of collecting taxes, is not self-operative, and the former mode of collecting remains in force until otherwise abrogated. *Saloy v. Woods*, 40 La. Ann. 585.

6. See *Raynsford v. Phelps*, 43 Mich. 342; *Johnston v. Louisville*, 11 Bush (Ky.) 527; *People v. Lee*, 112 Ill. 113; *Biggins v. People*, 96 Ill. 381; *Hibbard v. Clark*, 56 N. H. 158; 22 Am. Rep. 442; *Pole v. Muscatine*, 17 Iowa 298; *Packard v. Tisdale*, 50 Me. 376; *Macy v. Nantucket*, 121 Mass. 351; *Andover, etc., Turnpike Co. v. Gould*, 6 Mass. 43; 4 Am. Dec. 80; *Crapo v. Stetson*, 8 Met. (Mass.) 393; *Alexander v. Helber*,

b. SUMMARY PROCESSES—(1) *Nature and Constitutionality*.—The term "summary processes" is applied to those informal proceedings for the collection of taxes which are of a speedy and peremptory nature, differing from the ordinary and regular proceedings of courts of justice.<sup>1</sup> Such proceedings are not necessarily unconstitutional.<sup>2</sup>

(2) *Construction*.—Statutes authorizing summary processes for the collection of taxes, are to be strictly construed, as they are in derogation of the common law. They cannot be extended

35 Mo. 334; *Caronchlet v. Picot*, 38 Mo. 125; *Faribault v. Misener*, 20 Minn. 396; *Montour v. Purdy*, 11 Minn. 384; *American Glucose Co. v. State*, 43 N. J. Eq. 280; *Camden v. Allen*, 26 N. J. L. 399; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441. But see *infra*, this title, *Collection by Action*.

This rule does not apply where the remedy given is inadequate. *Johnston v. Louisville*, 11 Bush (Ky.) 527; *McLean v. Myers*, 134 N. Y. 480. And see *Ryan v. Gallatin County*, 14 Ill. 78; *Central Trust Co. v. New York, etc., R. Co.*, 109 N. Y. 250.

The rule has been laid down, however, that when the statutory remedy is defective, the courts cannot provide one. See *Biggins v. People*, 96 Ill. 381; *Thompson v. Allen County*, 13 Fed. Rep. 97.

In *Byrne v. La Salle*, 123 Ill. 581, it was held that where forfeited lands are sold for delinquent taxes, an action afterwards brought to recover a personal judgment against the owner may be barred; but such a proceeding will not in any way impair the validity of a personal judgment already rendered.

In *State v. Georgia Co.*, 112 N. Car. 34, it was held that the existence of a special remedy for the collection of state and county taxes, restricts the revenue officers only, and not the state itself, which may pursue other methods than those provided for by statute.

In *State v. Georgia Co.*, 112 N. Car. 34, it was held that the right of a state to forfeit the charter of a domestic corporation, for failure to pay taxes, does not bar its right to bring a creditor's suit for such taxes.

1. See *Taylor v. Secor* (State Railroad Tax Cases), 92 U. S. 575; *McMillen v. Anderson*, 95 U. S. 41; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Dows v. Chicago*, 11 Wall. (U. S.) 108; *New Orleans v. Cannon*, 10 La. Ann. 764.

2. *State v. Central Pac. R. Co.*, 21 Nev. 260; *State v. Sargeant*, 76 Mo. 557; *Hayden v. Foster*, 13 Pick. (Mass.) 494; *Gibson v. Mason*, 5 Nev. 283; *Dingey v. Paxton*, 60 Miss. 1038; *McCarroll v. Weeks*, 5 Hayw. (Tenn.) 246; *McMillen v. Anderson*, 95 U. S. 37; *Kelly v. Pittsburgh*, 104 U. S. 78; *Railroad Tax Cases*, 13 Fed. Rep. 722; *Springer v. U. S.*, 102 U. S. 586.

It is competent for the legislature to authorize the use of different summary processes for the collection of the sum taxed, see *Bristol v. Chicago*, 22 Ill. 587; or it may provide for its enforcement, either by action or by summary process, at the option of the officers whose duty it is to effect its collection. *York v. Goodwin*, 67 Me. 260.

**Due Process of Law**.—They do not infringe the provision that property shall not be taken without due process of law. *Martin v. Mott*, 12 Wheat. (U. S.) 19; *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *U. S. v. Ferreira*, 13 How. (U. S.) 40; *McMillen v. Anderson*, 95 U. S. 37; *Springer v. U. S.*, 102 U. S. 586; *Pearson v. Yewdall*, 95 U. S. 294; *Greene v. Briggs*, 1 Curt. (U. S.) 311; *Pritchard v. Marden*, 24 Kan. 486; *Weimer v. Bunbury*, 30 Mich. 201; *Neenan v. Smith*, 50 Mo. 525; *Taylor v. Porter*, 4 Hill (N. Y.) 146; 40 Am. Dec. 274; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430; *Vanzant v. Waddell*, 2 Yerg. (Tenn.) 260; *State v. Central Pac. R. Co.*, 21 Nev. 260.

The constitutional provision that no person shall be deprived of property without due process of law, does not require that taxes shall be collected by an action in court, or under the forms of legal procedure. *State v. Central Pac. R. Co.*, 21 Nev. 260.

But the taxpayer must have an opportunity to comply with the requirements of the law, and the state, not he, must be the actor. *Dingey v. Paxton*, 60 Miss. 1038.

beyond their legitimate scope, and none of the safeguards which they have provided can be omitted.<sup>1</sup> And it must appear from the face of the proceedings that the requirements of law have been strictly complied with.<sup>2</sup> In determining what is required, however, the statute must receive a reasonable construction,<sup>3</sup> and

Where a tax may be enjoined, and its validity tested, before a court of justice, due process of law is given, even though the party applying for relief is required to give security in advance, as in other injunction cases. *McMillen v. Anderson*, 95 U. S. 37. And see *supra*, this title, *Due Process of Law*.

**Appeal.**—The taxpayer, however, cannot be deprived of his property by summary process, unless the right of appeal is given to the courts to protect his substantial rights. *State v. Central Pac. R. Co.*, 21 Nev. 260; *Calhoun v. Fletcher*, 63 Ala. 574; *Mobile v. Baldwin*, 57 Ala. 61; *Aplin v. Reynolds*, 83 Mich. 471; *Railroad Tax Cases*, 13 Fed. Rep. 722.

1. *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269; *Parker v. Burgen*, 20 Ala. 251; *Elliot v. Eddins*, 24 Ala. 508; *Gachet v. McCall*, 50 Ala. 307; *Milner v. Clarke*, 61 Ala. 260; *Pack v. Crawford*, 29 Ark. 489; *Graham v. Parham*, 32 Ark. 676; *Wilcox v. Gladwin*, 50 Conn. 77; *Redwine v. Hancock*, 45 Ga. 364; *Barlow v. Sumter County*, 47 Ga. 642; *Allen v. Scott*, 13 Ill. 80; *Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Chicago v. Wright*, 32 Ill. 192; *Charles v. Waugh*, 35 Ill. 315; *Scammon v. Chicago*, 40 Ill. 146; *People v. Otis*, 74 Ill. 384; *Butler v. Nevin*, 88 Ill. 577; *People v. Peacock*, 98 Ill. 172; *People v. Lee*, 112 Ill. 113; *Veit v. Graff*, 37 Ind. 253; *Gregory v. Wilson*, 52 Ind. 233; *Stevens v. Williams*, 70 Ind. 536; *McGahan v. Carr*, 6 Iowa 331; 71 Am. Dec. 421; *Ankeny v. Henningsen*, 54 Iowa 29; *Bishop v. Looan*, 4 B. Mon. (Ky.) 116; *McCall v. Clark County Ct.*, 1 Bibb (Ky.) 516; *Chiles v. Com.*, 4 J. J. Marsh. (Ky.) 577; *Williamsburg v. Lord*, 51 Me. 599; *Forster v. Forster*, 129 Mass. 561; *Newsom v. Hart*, 14 Mich. 233; *King v. Harrington*, 18 Mich. 213; *Weimer v. Bunbury*, 30 Mich. 201; *Blair v. Compton*, 33 Mich. 414; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Cambridge v. Chandler*, 6 N. H. 271; *Homer v. Cibley*, 14 N. H. 85; *Dawson v. Croisan*, 18 Oregon 431; *Drexel v. Com.*, 46 Pa. St. 37; *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *Michie v. Mullin*, 5

Hayw. (Tenn.) 90; *Glass v. White*, 5 Sneed (Tenn.) 475; *Spear v. Ditty*, 8 Vt. 421; *Bellows v. Elliot*, 12 Vt. 574; *Sumner v. Sherman*, 13 Vt. 612; *Carpenter v. Sawyer*, 17 Vt. 124; *Judevine v. Jackson*, 18 Vt. 470; *Henry v. Tilson*, 19 Vt. 447; *Chandler v. Spear*, 22 Vt. 388; *Boardman v. Goldsmith*, 48 Vt. 403; *Emerson v. Thompson*, 59 Wis. 619; *Knox v. Paterson*, 21 Wis. 247; *Potts v. Cooley*, 51 Wis. 355; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Early v. Doe*, 16 How. (U. S.) 610.

The state and its officers are as much bound to observe the law, and proceed in the mode pointed out by statute in the collection of a tax, as are individuals in the enforcement of any statutory right. *People v. Biggins*, 96 Ill. 481.

In *Walker v. People*, 75 Ill. 614, it was held that an act to provide for the collection of revenue, and for the sale of real estate for non-payment of taxes for state, county, and municipal purposes, does not apply to a city, when it has no legislative authority to direct the time and manner of return of the collector's warrants therein provided for.

The rule of strict conformity to statutory provisions in the collection of taxes, applies also to ordinances adopted by a municipality under statutory authority. *Glass v. White*, 5 Sneed (Tenn.) 475.

When the statutes direct a thing to be done, or prescribe the form, time, and manner of doing it, it must be done in the form, time, and manner prescribed, or the act is invalid. *Chandler v. Spear*, 22 Vt. 388.

2. *Francis v. Washburn*, 5 Hayw. (Tenn.) 294; *Hamilton v. Burum*, 3 Yerg. (Tenn.) 359; *Chicago v. Wright*, 32 Ill. 192; *Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Allen v. Scott*, 13 Ill. 80; *Richards v. Stogsdel*, 21 Ind. 74; *Weimer v. Bunbury*, 30 Mich. 201; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

3. *Chandler v. Spear*, 22 Vt. 388; *Michie v. Mullin*, 5 Hayw. (Tenn.) 90. And see *Wilson v. Herrington*, 86

when no particular form or manner of doing a thing is pointed out, any mode which effects the object may be sufficient.<sup>1</sup>

(3) *Different Kinds of Summary Methods*—(a) *Detention of Property*.—Where the sheriff or other officer has in his hand a fund liable for taxes, the taxes may be deducted by him, or a direct claim for the amount due may be made against the fund by the collector, without instituting any other proceedings.<sup>2</sup>

So taxes may be collected indirectly, by directing that a debtor shall pay the tax upon the debt due and deduct it from moneys due his creditor, or that a corporation shall pay the tax upon its stockholders' shares, and deduct the sum paid for the dividends due the shareholders.<sup>3</sup>

Ga. 777; *Harriman v. School Dist.*, 35 Vt. 311; *Clemons v. Lewis*, 36 Vt. 673.

A collector is not bound to keep or sell distrained property within the limits of the town in which it is first seized by him. *Carville v. Additon*, 62 Me. 459.

In *King v. Whitcomb*, 1 Met. (Mass.) 328, it was held that a demand by the collector, of payment of a tax assessed on a non-resident who has no agent or attorney in the city, is sufficient to justify a subsequent seizure and sale of his goods, if it be made at his last usual place of abode, in the town where he is taxed.

1. *Chandler v. Spear*, 22 Vt. 388; *Spear v. Ditty*, 8 Vt. 421; *Bellows v. Elliot*, 12 Vt. 574; *Isaacs v. Shattuck*, 12 Vt. 668; *Michie v. Mullin*, 5 Hayw. (Tenn.) 90.

It is no objection to the legality of the collector's proceedings, that one of the days during which he kept the distress according to law, was Sunday. *Carville v. Additon*, 62 Me. 469.

In *Bird v. Perkins*, 33 Mich. 28, it was held that a tax collector does not become a trespasser *ab initio* by keeping a horse, which is levied upon, a little longer than is absolutely necessary to giving notice and making sale, and that if the keeping is lawful, the expense of the keeping is a lawful charge, but where the keeping is unlawful, the owner may recover the excess.

2. *In re Dupuy*, 33 La. Ann. 258; *Scholefield v. West*, 44 La. Ann. 277; *Central Trust Co. v. New York, etc., R. Co.*, 109 N. Y. 250; *In re Columbian Ins. Co.*, 3 Abb. App. Dec. (N. Y.) 239; *Hoglen v. Cohan*, 30 Ohio St. 436. See REVENUE LAWS, vol. 21, p. 301.

Where a city taxes its own stock, payment may be enforced by deducting the amount of the tax from interest due on

the stock. *Jenkins v. Charleston*, 5 S. Car. 393; 23 Am. Rep. 14.

Where real estate on which taxes are due has been sold under a decree of a court of equity, the duty of a tax collector is to apply to the court to have the taxes paid out of the proceeds of sale. *Prince George County v. Clarke*, 36 Md. 206.

*Decedent's Estate—Assignee*.—In *Millett v. Early*, 16 Neb. 266, it was held that, upon the death of a taxpayer, a claim for taxes may be properly filed against his estate.

Under the *Missouri* statutes, taxes on the personal estate of a decedent, whether accruing before or after his death, are demands which may be established by proceedings either in the probate or circuit court. *State v. Tittman*, 103 Mo. 553. And see *Richardson v. Palmer*, 24 Mo. App. 480.

A petition by a collector of taxes, for an order to compel an assignee of a tax debtor to pay taxes due from the assignor, out of funds in his hands, which fails to show that any property went into the assignee's hands to which a lien could attach, and simply charges that he has funds in his hands sufficient to pay the taxes, is wholly insufficient. *In re Johnson*, 104 Ill. 50.

In *Wolf v. Geffroy*, 16 Ohio St. 219, it was held that provisions of the *Ohio* statute for the summary collection of taxes against executors and administrators, does not apply to taxes assessed upon the intestate before his death, but only to taxes assessed upon executors and administrators as such.

In *Smith v. Gatewood*, 3 S. Car. 333, it was held that where the lien of a municipal corporation for taxes is not displaced by a degree of foreclosure and sale thereunder, the remedy is not against the proceeds of the sale.

3. See *Maltby v. Reading*, etc., R.

In a proper case, the taxable property may be placed in the hands of a receiver, to collect the profits and apply them to unpaid taxes.<sup>1</sup>

(b) **Imposition of Penalties.**—Penalties are frequently imposed for non-payment of taxes or as a punishment for fraud or evasion,<sup>2</sup> and where due notice and opportunity to be heard or to pay have been given the taxpayer, the imposition of the penalty is not unconstitutional.<sup>3</sup> Though it may be otherwise where such notice

Co., 52 Pa. St. 140; Com. v. Lehigh Valley R. Co., 129 Pa. St. 429; Com. v. North Pennsylvania R. Co., 129 Pa. St. 460; Ewing v. Robeson, 15 Ind. 26; Ottawa, etc., Glass Co. v. McCaleb, 81 Ill. 556; McVeagh v. Chicago, 49 Ill. 318; Louisville, etc., R. Co. v. Com., 85 Ky. 198; New Orleans v. Louisiana Sav. Bank, 31 La. Ann. 826; State v. Mayhew, 2 Gill. (Md.) 487; Barney v. State, 42 Md. 480; Haight v. Railroad Co., 6 Wall. (U. S.) 15; Minot v. Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206; First Nat. Bank v. Kentucky, 9 Wall. (U. S.) 353; U. S. v. Baltimore, etc., R. Co., 17 Wall. (U. S.) 322. And see also *TAXATION (CORPORATE)*, vol. 25.

**Mandamus.**—In *McVeagh v. Chicago*, 49 Ill. 318, it was held that *mandamus* would lie to compel the officers of the bank to appropriate such dividends as might be necessary to pay the taxes. And to the same effect see *Barney v. State*, 42 Md. 480. See also *State v. Mayhew*, 2 Gill. (Md.) 487. But in *Eyke v. Lange*, 90 Mich. 592, it was held that *mandamus* would not lie.

1. In *Covington Gas Light Co. v. Covington*, 84 Ky. 95, it was held that, as no portion of the property of a gas company can be seized and sold for taxes, where the effect would be to destroy the public use, the chancellor, in proper proceedings, may require the company through its chief officers to pay the tax into court or place the property in the hands of a receiver for that purpose. See also *Louisville Water Co. v. Hamilton*, 81 Ky. 521; *Brinkman v. Ritzinger*, 82 Ind. 358; *Darusmonth v. Patton*, 4 Lea (Tenn.) 597.

2. See *State v. Consolidated Va. Min. Co.*, 16 Nev. 432; *Worthen v. Badgett*, 32 Ark. 496; *Burlington v. Burlington*, etc., R. Co., 41 Iowa 134; *High v. Shoemaker*, 22 Cal. 363; *Slack v. Ray*, 26 La. Ann. 675; *State v. Jersey City*, 37 N. J. L. 39; *Durant v. Jersey City*, 37 N. J. L. 291; *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Silsbee v. Stockle*, 44 Mich. 561; *People v. Saginaw*, 32

Mich. 260; *People v. Horn Silver Min. Co.*, 105 N. Y. 76; *Myers v. Park*, 8 Heisk. (Tenn.) 550; *Bristol v. Chicago*, 22 Ill. 587; *Wauwatosa v. Gunyon*, 25 Wis. 271; *Com. v. Wyoming Valley Canal Co.*, 50 Pa. St. 410; *State v. Huffaker*, 11 Nev. 300; *Willard v. Wetherbee*, 4 N. H. 118; *Ex p. Lynch*, 16 S. Car. 32; *State v. Manz*, 6 Coldw. (Tenn.) 557; *U. S. v. Brooklyn City*, etc., R. Co., 14 Fed. Rep. 284.

Where the tax itself has been paid, the penalty cannot be enforced. *Shaw v. Peckett*, 26 Vt. 482.

A discount for payment within a prescribed time is provided for in some jurisdictions; for a similar purpose, see *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Ridgway v. O'Neill*, 49 Pa. St. 174.

3. *Slack v. Ray*, 26 La. Ann. 674; *Morrison v. Larkin*, 26 La. Ann. 701; *Dougherty v. Henarie*, 47 Cal. 9; *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *Bristol v. Chicago*, 22 Ill. 587; *McChesney v. People*, 99 Ill. 219; *People v. Smith*, 94 Ill. 226; *Scammon v. Chicago*, 44 Ill. 278; *Weaver v. State*, 89 Ga. 639; *Burlington v. Burlington*, etc., R. Co., 41 Iowa 134; *Ankeney v. Henningsen*, 54 Iowa 31; *DeTreville v. Smalls*, 98 U. S. 517; *Sharpleigh v. Surdam*, 1 Flip. (U. S.) 472; *In re Nichols*, 54 N. Y. 62; *St. Louis v. Sternberg*, 69 Mo. 303; *State v. Moss*, 69 Mo. 495; *State v. Cohen*, 84 N. Car. 771; *State v. Consolidated Va. Min. Co.*, 16 Nev. 432; *State v. Hayne*, 4 S. Car. 403; *Ex p. Lynch*, 16 S. Car. 32; *Nance v. Hopkins*, 10 Lea (Tenn.) 508; *Myers v. Park*, 8 Heisk. (Tenn.) 550; *Worthen v. Badgett*, 32 Ark. 496.

A statute providing for the collection of a penalty upon taxes due from a defaulting non-resident landowner, is not in violation of a compact between the state and the *United States*, which declares that in no case shall non-resident proprietors be taxed higher than residents. *Scott v. Watkins*, 22 Ark. 556.

and opportunity to be heard or to pay have not been provided for by the statute, nor their necessity recognized.<sup>1</sup>

If the collection of the penalty is not otherwise provided for, it is collected in the same manner as the tax.<sup>2</sup> It has been said that the penalty should be reasonable in amount,<sup>3</sup> but very heavy penalties have been upheld.<sup>4</sup>

To avoid conflict with the constitutional provision requiring equality and uniformity, the penalties must be equally and uni-

In *People v. Peacock*, 98 Ill. 172, it was held that a percentage added to a tax because of its non-payment, is not interest, but a penalty, within a constitutional provision forbidding the passage of local or special laws regulating the rate of interest.

**When Interest and Penalties Begin to Run.**—Where interest on taxes is provided for, but no time is fixed for its commencement, it runs from the expiration of the time allowed the taxpayer to make payment. *Harrison v. U. S.*, 20 Ct. of Cl. 175. See also *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *Delaware Div. Canal Co. v. Com.*, 50 Pa. St. 399.

In *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153, it was held that where lands are omitted by the assessor, and are afterwards placed upon the tax list by the county treasurer, as provided by law, the penalties for non-payment begin to run from the time of such entry by the county treasurer.

In *Com. v. Standard Oil Co.*, 101 Pa. St. 119, it was held that the state could only claim interest from the time of notice and demand, under a statute imposing interest upon overdue taxes.

1. See *Clayton v. Chicago*, 44 Ill. 280; *Lake Shore, etc., R. Co. v. People*, 46 Mich. 193; *Redwood County v. Winona, etc., Land Co.*, 40 Minn. 512; *State v. Certain Lands (Minn. 1889)*, 42 N. W. Rep. 473; *Burger v. Carter*, 1 McMull. (S. Car.) 409; *Wauwatosa v. Gunyon*, 25 Wis. 271.

The courts may be authorized to render judgment for a penalty, but power to impose it cannot be conferred upon a mere ministerial officer without any opportunity to be heard by the taxpayer. *Scammon v. Chicago*, 44 Ill. 269.

2. *State v. Huffaker*, 11 Nev. 300; *Baker v. Kelley*, 11 Minn. 480; *Nance v. Hopkins*, 10 Lea (Tenn.) 508. And see *In re Nichols*, 54 N. Y. 62; *High v. Shoemaker*, 22 Cal. 363; *People v. Todd*, 23 Cal. 181; *Kansas, etc., R. Co.*

*v. Amrine*, 10 Kan. 318; *Burlington v. Burlington, etc., R. Co.*, 41 Iowa 134. Costs may be collected in the same manner. *People v. Todd*, 23 Cal. 181.

In *State v. Huffaker*, 11 Nev. 300, in which the penalty was imposed for the non-payment of both state and county taxes, five-thirteenths of it was held to go to the state and eight-thirteenths, to the county, that being the proportion of the division of the whole tax.

Where, in an action for taxes, the plaintiff is not entitled to judgment for the taxes themselves, he cannot recover judgment for penalties, interest, or attorney's fees. *San Bernardino County v. Southern Pac. R. Co.*, 118 U. S. 417.

It is not error to include the penalty given for non-payment of taxes, in a judgment for such taxes. *Bristol v. Chicago*, 22 Ill. 587.

When penalties are withdrawn from consideration, although a part of the cause of action in that suit, a separate action may be afterwards maintained for their recovery. *State v. California Min. Co.*, 13 Nev. 289.

The penalty is not a part of the tax. *Ryan v. State*, 5 Neb. 276.

3. See *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Litchfield v. Webster County*, 101 U. S. 773.

In *Com. v. Standard Oil Co.*, 101 Pa. St. 119, it was held that a state can claim interest only from the time of notice and demand, under a statute imposing interest upon overdue taxes.

In *Silsbee v. Stockle*, 44 Mich. 561, it was held that penalties for the non-payment of taxes within a fixed time, cannot lawfully exceed legal interest. And in *Swinney v. Beard*, 71 Ill. 27, it was held that when the statute is silent as to the rate, it should be computed at the legal rate of interest.

4. See *Ex p. Lynch*, 16 S. Car. 35; *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644; *Scott v. Watkins*, 22 Ark. 556; *Mulligan v. Huntrager*, 18 Iowa 171; *Nance v. Hopkins*, 10 Lea

formly imposed upon all persons similarly situated and belonging to the same class.<sup>1</sup> The penalty, to be valid, must be founded upon the evasion or non-payment of a legal tax.<sup>2</sup>

A statute imposing a penalty cannot be given a retroactive effect,<sup>3</sup> and penalties for non-payment or interest on taxes, the payment of which has been deferred, cannot be recovered, unless clearly authorized by statute.<sup>4</sup> After the repeal of an act by which a penalty is imposed, the right to the penalty is gone; and

(Tenn.) 508; *Potts v. Cooley*, 56 Wis. 45.

If a tax itself does not exceed the limit as to amount, it is no objection that, with the penalty for its non-payment added, the limit is exceeded. *Tobin v. Hartshorn*, 69 Iowa 648; *Chicago, etc., R. Co. v. Hartshorn*, 30 Fed. Rep. 541.

Some of the cases have upheld penalties of an amount equal to the amount of the tax. See *Butler v. Bailey*, 2 Bay (S. Car.) 244; *State v. Manz*, 6 Coldw. (Tenn.) 557.

**Interest Besides Penalties.**—Where a penalty for each year during which a tax remains unpaid, is fixed, interest in addition thereto is not chargeable. *People v. Gold, etc., Tel. Co.*, 98 N. Y. 67.

In *Com. v. Cooke*, 50 Pa. St. 201, it was held that a penalty settled by the auditor general and state treasurer, bears interest after three months from the date of settlement, under a statute providing that "balances" found to be due to the commonwealth, upon settlement, shall bear interest.

1. *State v. Consolidated Va. Min. Co.*, 16 Nev. 432.

The imposition of a pecuniary penalty for non-payment upon one class of taxpayers, leaving other classes exempt from any penalty whatever, conflicts with constitutional provisions requiring taxes to be levied and collected under general laws. *Atlanta, etc., R. Co. v. Wright*, 87 Ga. 487.

In *Beecher v. Webster County*, 50 Iowa 538, a statute conferring power upon supervisors to remit penalties upon unpaid taxes, when not collected within a certain time, has been held not to be in conflict with the constitution, either as impairing the obligation of a contract between the treasurer and the county, or as being a special law for the assessment and collection of taxes, or as being against public policy as encouraging delinquencies in the payment of taxes.

2. See *Worthen v. Badgett*, 32 Ark. 496; *State v. St. Louis, etc., R. Co.*, 71 Mo. 88; *Michigan Cent. R. Co. v. Slack*, 1 Holmes (U. S.) 231; *Lake Shore, etc., R. Co. v. People*, 46 Mich. 193.

The same rule applies where a part of the sum was not legally taxed, *Michigan Cent. R. Co. v. Slack*, 1 Holmes (U. S.) 231; or where the tax is excessive. *Pike v. Cummings*, 36 Ohio St. 213.

3. See *People v. Thatcher*, 95 Ill. 109; *People v. Peacock*, 98 Ill. 172; *Ryan v. State*, 5 Neb. 276; *State v. Winona, etc., R. Co.* (Minn. 1888), 40 N. W. Rep. 166; *State v. Certain Lands* (Minn. 1889), 42 N. W. Rep. 473; *State v. Jersey City*, 37 N. J. L. 39; *Drexel v. Com.*, 46 Pa. St. 37. And see *Fowler v. Fairchild*, 3 Wash. 747; *People v. Peacock*, 98 Ill. 172. But see *Biggins v. People*, 106 Ill. 270.

A person against whom taxes are levied after the passage of an act authorizing the imposition of a penalty for non-payment, may be subject to the penalty, although the taxes were levied under an act previously passed. *Durant v. Jersey City*, 37 N. J. L. 271. See also *Dougherty v. Henarie*, 47 Cal. 9.

4. *Western Union Tel. Co. v. State*, 55 Tex. 314; *State v. Southwestern R. Co.*, 70 Ga. 11; *Augusta v. Dunbar*, 50 Ga. 387; *Kentucky Cent. R. Co. v. Pendleton County* (Ky. 1886), 2 S. W. Rep. 176; *State v. Duncan*, 3 Lea (Tenn.) 679; *Elliott v. East Pa. R. Co.*, 99 U. S. 573. And see *Bennett v. Peck* (N. Y. 1889), 20 N. E. Rep. 571; *State v. California Min. Co.*, 13 Nev. 203; *Lake County v. Sulphur Bank, etc., Co.*, 68 Cal. 14.

In *Louisville, etc., R. Co. v. Com.*, 85 Ky. 198, it was held that where an action for a penalty is barred after the lapse of a designated number of years, a fine or a triple tax cannot be imposed after the expiration of such period from the year for which the tax is claimed, even though the tax itself is not barred.



this, though the repealing act reserves to the state all taxes accruing or accrued under the statute repealed.<sup>1</sup>

Where a state claimed adversely to the true owner of lands, and the proper authorities gave notice to the parties in interest that no legal steps would be taken in the collection of taxes until the title was adjusted, it was held that the statutory interest, which is in the nature of a penalty, could not be exacted for non-payment of taxes within the time prescribed by law, where the owner, on adjustment of the title, offered to pay so much of the taxes as were actually due.<sup>2</sup> And so, where there is doubt as to the legality of the tax, and payment is deferred until the question of legality can be tested, no penalty can be enforced for the delay.<sup>3</sup>

(c) **Restriction of Rights.**—The payment of taxes and penalties is sometimes made a condition precedent to the exercise of certain civil rights.<sup>4</sup> Thus, by statute or constitution, it is sometimes provided that payment of the taxes for the current year shall be a condition precedent to the right to vote.<sup>5</sup>

And so statutes providing that a suit shall not be maintained upon a chose in action,<sup>6</sup> nor for the property of which a party has

1. *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *Anding v. Levy*, 57 Miss. 51; 34 Am. Rep. 435; *State v. Jersey City*, 37 N. J. L. 39; *Snell v. Campbell*, 24 Fed. Rep. 880. But see *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153; *Tobin v. Hartshorn*, 69 Iowa 648; *Chicago, etc., R. Co. v. Hartshorn*, 30 Fed. Rep. 541.

After a tax and the penalties which have accrued by reason of its non-payment have been swept away by repeal of the law which authorized it, the tax itself may be reimposed by subsequent legislation, but the penalties for the past omission cannot be revived. *State v. Jersey City*, 37 N. J. L. 39.

**Remissions of penalties** have been upheld. See *Wheatly v. Covington*, 11 Bush (Ky.) 18, and *Beecher v. Webster County*, 50 Iowa 538.

2. *Litchfield v. Webster County*, 101 U. S. 773. Compare *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153.

3. *Savannah, etc., R. Co. v. Morton*, 71 Ga. 24; *Challiss v. Baker*, 12 Kan. 253. And see *Biggins v. People*, 106 Ill. 270. But see *Winnipiseogee Lake Cotton, etc., Co. v. Guilford*, 64 N. H. 514, where it was held that the taxpayer was liable to pay the taxes due by him, as finally determined by the court upon appeal, though the delay in payment was caused by the pendency of the appeal. See also *Western Union Tel. Co. v. State*, 64 N. H. 265.

4. See *Lott v. Dysart*, 45 Ga. 355; *Griffin v. Rising*, 11 Met. (Mass.) 339; *Patterson v. Barlow*, 60 Pa. St. 55; *Tharp v. Hart*, 2 Sneed. (Tenn.) 569; *Cambiose v. Maffett*, 2 Wash. (U. S.) 98.

5. See *Griffin v. Rising*, 11 Met. (Mass.) 339; *Patterson v. Barlow*, 60 Pa. St. 54; *In re Duffy*, 4 Brew. (Pa.) 531; *State v. Mayhew*, 2 Gill (Md.) 487.

**Exceptions** contained in such provisions should be liberally construed. *Redwine v. Hancock*, 45 Ga. 364.

**Liability of Assessors.**—An action cannot be maintained against assessors by an individual liable to taxation for their omission to tax him, whereby he loses his right to vote, unless the omission was intentional. *Griffin v. Rising*, 11 Met. (Mass.) 339.

6. See *Lott v. Dysart*, 45 Ga. 355. A subsequent repeal of an act avoiding a contract for non-payment of a tax, does not render the contract valid. *Anding v. Levy*, 57 Miss. 51; 34 Am. Rep. 435.

When proof of payment has been made upon the original contract, it need not be made upon a mere renewal thereof; but if the terms are changed, the proof must be made. *Greene v. Lowry*, 46 Ga. 55.

Where a set-off has been pleaded with a cost of action, it is error to allow the plaintiff to dismiss his action upon his own motion, upon the ground that he has not paid taxes on his own

been deprived, unless he shows that the taxes thereon have been paid, have been upheld.<sup>1</sup> Statutes providing that conveyances shall not be recorded until proof of the payment of taxes, are not unconstitutional.<sup>2</sup> Analogous statutes, however, have been held unconstitutional in some cases.<sup>3</sup>

(d) *Seizure—Levy or Distress of Property*—(See also *infra*, this title, *Tax Sales*).—Statutes frequently provide that the collector may enforce collection by a seizure and sale of the delinquent taxpayer's property, and apply the proceeds to the satisfaction of the taxes. Such summary method of collection is not unconstitutional.<sup>4</sup> Seizure is usually made upon the theory

debt, as required by law. *Scruggs v. Gibson*, 45 Ga. 509.

**Offer to Pay into Court.**—Where, upon the trial of an action, the plaintiff failed to show that the taxes due upon the debt sued for, had been paid, but proposed in open court then and there to pay them into court, for the use of the state, it was held error for the court to deny him the right so to pay them. *Lott v. Dysart*, 45 Ga. 355.

In *Georgia*, when suit is brought by a representative of an estate to which a widow and minor children are entitled, and there are no debts, no proof of payment of taxes need be made. *Redwine v. Hancock*, 45 Ga. 364.

1. See *Taylor v. Burdett*, 11 Leigh (Va.) 334; *Tharp v. Hart*, 2 Sneed (Tenn.) 569; *Burrow v. Smith*, 2 Sneed (Tenn.) 566.

2. *State v. Ramsey County*, 26 Minn. 521.

Neither does such a restriction, in effect, impose a penalty for non-payment of taxes. *State v. Ramsey County*, 26 Minn. 521. Compare *Weller v. St. Paul*, 5 Minn. 95.

3. In *Lassitter v. Lee*, 68 Ala. 287, a section of the revenue law of 1868, which provided that before any person claiming title to real property sold for taxes under the act should be entitled to prosecute or defend any suit against any person claiming such property under any tax sale, he should deposit in court double the amount of the purchase-money, together with all taxes and interest accruing since the sale and the value of improvements made by the purchaser, was held to prescribe a condition precedent so unreasonable as to impair constitutional rights. See also *Whitworth v. Anderson*, 54 Ala. 33; *South, etc., Ala. R. Co. v. Morris*, 65 Ala. 193; *Reed v. Tyler*, 56 Ill. 288; *Wilson v. McKenna*, 52 Ill. 44; *Conway v. Cable*, 37 Ill. 82; 87 Am. Dec. 240;

*Senichka v. Lowe*, 74 Ill. 274; *Curry v. Hinman*, 11 Ill. 420; *Weller v. St. Paul*, 5 Minn. 95.

In *Reece v. Knott*, 3 Utah 451, it was held that a statute prohibiting persons who are not taxpayers, from serving on juries, conflicts with the provision of the federal constitution that the right of trial by jury shall be preserved.

4. See *State v. Allen*, 2 McCord (S. Car.) 55; *Biscoe v. Coulter*, 18 Ark. 423; *Harris v. Wood*, 6 T. B. Mon. (Ky.) 641; *Cone v. Forest*, 126 Mass. 97; *Springer v. U. S.*, 102 U. S. 586.

**Validity, How Tested.**—In *Saunders v. Russell*, 10 Lea (Tenn.) 293, it was held that the action of a tax collector in seizing property by a distress warrant, is both judicial and ministerial, and the writs of *certiorari* and *supersedeas* are the proper means by which to test the validity of a warrant or the right to issue it.

**Execution.**—The tax collector is sometimes authorized to issue executions against persons who shall make default in returning their taxable property or paying their taxes. *State v. Allen*, 2 McCord (S. Car.) 39; *State v. Hodges*, 14 S. Car. 256; *State v. Columbia*, 6 S. Car. 11; *Wilson v. Herrington*, 86 Ga. 777; *Wright v. Central R., etc., Co.*, 85 Ga. 649.

In *Smith v. Goldsmith*, 63 Ga. 736, it was held that upon failure to pay, the officer might issue execution, whether return had been made or not.

In *Gardner v. Donaldson*, 80 Ga. 71, it was held that a misdescription of improved land, as wild, where the officer had authority to issue execution against land whether wild or improved, did not affect the validity of the sale thereof.

In *State v. Charleston*, 4 Rich. (S. Car.) 286, it was held that an execution issued by a municipality was not

that the tax list and warrant are in the nature of an execution.<sup>1</sup>

Property subject to levy and sale for the non-payment of taxes, is not necessarily the same as that subject to execution and attachment.<sup>2</sup> But where the statute authorizes the tax collector, in general terms, to levy on personal property, it is construed to mean such property as is generally subject to levy and sale under execution.<sup>3</sup>

It has been held that, in the absence of statute, the collector is not bound, nor even authorized, to seize personalty in satisfaction of taxes on the realty.<sup>4</sup> And it has been provided by some statutes that each parcel of property shall be liable for its own taxes, and that no parcel shall be liable for the taxes on any other parcel.<sup>5</sup> But the seizure of personalty in satisfaction of taxes upon

defective in not specifying the subject of taxation.

**Must be Uniform.**—A law subjecting one class of taxpayers to execution for taxes due upon a certain date, while other taxpayers are exempt from such execution until a later date, is unconstitutional. *Atlanta, etc., R. Co. v. Wright*, 87 Ga. 487.

**Property Subject to Seizure or Distress.**—The property subject to seizure or distress is usually designated by statute. Thus, in *Blain v. Irby*, 25 Kan. 499, promissory notes were held to be within a law authorizing a levy upon goods and chattels. And in *Maus v. Logansport, etc., R. Co.*, 27 Ill. 77, it was held that the rails of a railroad company might be levied upon for non-payment of taxes, under the *Illinois* statutes.

In *Marshall v. Wadsworth*, 64 N. H. 386, it was held that the term applies and is limited to the seizure of personal chattels only.

**Exemptions.**—In *Alabama*, it is provided that no property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes. Code of *Alabama* 1886, §§ 540, 542. Under this provision, it was held that personal property purchased by the delinquent taxpayer, after the assessment, is subject to levy. *Solomon v. Willis*, 89 Ala. 596.

1. See *supra*, this title, *The Collector—Authority*.

2. *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494. And see *Boyd v. Wilson*, 86 Ga. 379; *Wilson v. Boyd*, 84 Ga. 34. And see also *Strock*, vol. 23, p. 582, and cases cited in note 7, p. 632.

In *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269, it was held that no per-

sonal property was exempt from levy and sale under the *Alabama* statutes, when the object is the collection of delinquent taxes.

3. *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 308. And see *Blain v. Irby*, 25 Kan. 499.

**Vessels**, like any other property, are subject to state taxation, and are liable to seizure for taxes levied and due thereon. *Oteri v. Parker*, 42 La. Ann. 374; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273.

**Shares of stock** are not subject to levy and sale for taxes, unless made so by statute, such property being incapable of actual or constructive possession or control. *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494.

4. *State v. Cain*, 18 Neb. 631; *Littler v. McCord*, 38 Ill. App. 147.

5. See *Merrick v. Hutt*, 15 Ark. 331; *State v. Sargeant*, 76 Mo. 557. See also *Kirkwood v. Magill*, 6 Kan. 540; *Howland v. Augusta*, 74 Me. 79. Where this requirement exists, the collector has no power to apply the proceeds of one lot in payment of the taxes upon another, even though they both belong to the same owner. *State v. Sargeant*, 76 Mo. 557.

Where the tax is a lien upon the property, the collector may seize and sell it without inquiry as to the title of the person to whom it is assessed. *Cooper v. Holmes*, 71 Md. 20.

Under the *Louisiana* statute, it has been held that the collector cannot seize property for the non-payment of taxes upon other property, unless it is shown that he has attempted to reach and seize the property assessed, and has been prevented by the debtor's own act. *Oteri v. Parker*, 42 La.

realty, has been authorized by statutes in many states;<sup>1</sup> and indeed, as a general rule, it is required that personalty shall be first exhausted before resorting to the realty.<sup>2</sup>

Ordinarily, a levy upon the goods of one, to pay the taxes of another, is void;<sup>3</sup> but the law may adopt the presumption of ownership arising from possession, and provide for seizure, upon failure of the taxpayer to pay the tax imposed on him, of any goods and chattels in his possession.<sup>4</sup> So, where taxes may be assessed to the occupant, or where the tax is a burden or charge upon the property, the property of the person in possession may be seized for the taxes.<sup>5</sup>

Property of a delinquent taxpayer cannot be seized in the hands

Ann. 374; *Meyer v. Parker*, 41 La. Ann. 440.

1. See *Schaeffer v. People*, 60 Ill. 179; *Ring v. Ewing*, 47 Ind. 246; *Ewing v. Robeson*, 15 Ind. 26; *Cones v. Wilson*, 14 Ind. 465; *Blain v. Irby*, 25 Kan. 499; *Lynam v. Anderson*, 9 Neb. 367; *Wright v. Wigton*, 84 Pa. St. 183.

2. See *infra*, this title, *Tax Sales*.

**Penalty.**—In *Foresman v. Chase*, 68 Ind. 500, it was held that the fact that a delinquent taxpayer had personal property out of which his taxes might have been made, but which the collector did not take, did not save the delinquent from a penalty, or release him from the tax.

3. *Atlantic, etc., R. Co. v. Cleino*, 2 Dill. (U. S.) 175; *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Hallock v. Rumsey*, 22 Hun (N. Y.) 89; *Daniels v. Nelson*, 41 Vt. 161; 98 Am. Dec. 577; *Sumner v. Pinney*, 31 Vt. 717. And see *Meyer v. Larkin*, 3 Cal. 403.

The doctrine of constructive fraud, applicable to change of title in personal property, without change of possession, does not apply in favor of a state or municipality levying a tax, and therefore, the seizure of a chattel for the taxes of a vendor after its sale, is illegal, even though it still remains in the vendor's possession. *Daniels v. Nelson*, 41 Vt. 151; 98 Am. Dec. 577.

In *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y. 339, it was held that a statute declaring that goods and chattels upon lands shall be deemed to belong to the person to whom the lands are assessed, did not apply to goods transiently upon the lands, belonging to a person in no way liable to pay the tax. See also *Stockwell v. Vietch*, 15 Abb. Pr. (N. Y.) 412.

In *Indiana*, the property of a guardian cannot be seized to pay taxes as-

sessed against him upon the property of his ward. *Tousey v. Bell*, 23 Ind. 423. But in *New York*, the individual property of a personal representative or trustee, may be taken for a tax imposed upon him in his representative character, when no property of the testator or *cestui que trust* can be found. *Williams v. Holden*, 4 Wend. (N. Y.) 224. See also *supra*, this title, *Upon Whom Imposed*.

**Municipality Not Liable.**—In *Wallace v. Menasha*, 48 Wis. 79; 33 Am. Rep. 804, it was held that a city is not liable in tort for the acts of its treasurer, performed in good faith in the execution of his tax warrant, in seizing and selling the property of one person for the delinquent tax of another.

4. *Sears v. Cottrell*, 5 Mich. 251; *Hersee v. Porter*, 100 N. Y. 403; *Sheldon v. Van Buskirk*, 2 N. Y. 473.

Crops grown and matured upon lands are liable to distress and sale for the taxes assessed upon them. *Blodgett v. German Sav. Bank*, 69 Ind. 153. But where the crop was planted and cultivated by the widow and son of the owner, and the lands were sold under a decree of foreclosure, previous to his death, it is not liable for the payment of taxes charged against him. *Gregory v. Wilson*, 52 Ind. 233.

The possession required to justify a seizure of property for taxes, is the actual physical, and not the legal or constructive possession. *Hersee v. Porter*, 100 N. Y. 403. See also *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y. 339.

5. *McGregor v. Montgomery*, 4 Pa. St. 237; *Wright v. Wigton*, 84 Pa. St. 163; *Morrow v. Dows*, 28 N. J. Eq. 459.

The property of the occupant may be seized, even though it is not upon the premises taxed. *McGregor v.*

of a *bona fide* purchaser for value, unless the tax is a lien upon it.<sup>1</sup> Where property is in the hands of the law, it is not liable to seizure and sale without an order of court.<sup>2</sup>

In general, where taxes on real estate are assessed to a non-resident, the collector cannot seize and sell personal property to enforce the payment thereof.<sup>3</sup>

The seizure must be made with the formalities, and in the manner, required by law.<sup>4</sup>

The collector should, if possible, distrain no more of the delinquent property than is sufficient to pay the tax.<sup>5</sup> He should exercise a sound discretion as to the property seized, and should select such articles as will best facilitate the satisfaction of the tax with the least expense and inconvenience to the taxpayer.<sup>6</sup>

Actual custody and control of the property by the collector or his agent is necessary to a valid distraint.<sup>7</sup> The law governing

Montgomery, 4 Pa. St. 237. And see *McLean v. Cook*, 23 Wis. 364.

In *Vermont*, property under lease is not distrainable for the lessor's taxes. *Bartlett v. Wilson*, 60 Vt. 644.

1. See *Moore v. Marsh*, 60 Pa. St. 46; *Atlantic, etc., R. Co. v. Cleino*, 2 Dill. (U. S.) 175. See also *Lyon v. Guthard*, 52 Mich. 271; *Maish v. Bird*, 22 Fed. Rep. 180; *Jacob v. Preston*, 31 La. Ann. 518; *New Orleans, etc., Inst. v. Leslie*, 28 La. Ann. 496.

But it may be seized, if the purchase was conclusively made for the purpose of defeating the collection of the tax. *Gray v. Finn*, 96 Mich. 62.

In *Pennsylvania*, real estate which has passed the assignee under a voluntary assignment for the benefit of creditors, is not exempt from the payment of taxes, whether assessed thereon before or after the assignment is made, and personal property remaining with the land after the assignment, is liable to distress for their non-payment. *Wright v. Wigton*, 84 Pa. St. 163.

2. *Yuba County v. Adams*, 7 Cal. 35; *Prince George's County v. Clarke*, 36 Md. 206.

3. *Lunt v. Wormell*, 19 Me. 100; *New York, etc., R. Co. v. Lyon*, 16 Barb. (N. Y.) 651. And see *Kensworth v. Mitchell*, 21 Ark. 145; *Merrick v. Fenno*, 15 Ark. 331.

In *Dawson v. Croisan*, 18 Oregon 431, it was held that a requirement that the assessor shall demand immediate payment of a tax, and on default thereof, immediately collect the same, when the property is assessed to any person who is not a permanent resident of the county, or who is about to

depart or remove his property therefrom, does not apply to a non-resident to whom a resident has made an assignment for the benefit of creditors.

4. See *Covington Gas Light Co. v. Covington*, 84 Ky. 94; *Veit v. Graff*, 37 Ind. 253; *Lefavour v. Bartlett*, 42 N. H. 555; *Howard v. Augusta*, 74 Me. 79; *Dawson v. Croisan*, 18 Oregon 431.

In *North Carolina*, the officer is not required to exhibit a certified copy of the tax list from the officer required to make it out, before he distrains property to enforce the tax. *State v. Lutz*, 65 N. Car. 503; *Gore v. Mastin*, 66 N. Car. 371. It is sufficient if the list has been delivered to him. *Gore v. Mastin*, 66 N. Car. 371.

5. *Cone v. Forest*, 126 Mass. 97; *Thompson v. Currier*, 24 N. H. 239. And see *Libby v. Burnham*, 15 Mass. 144. The officer is to exercise a sound discretion as to the amount to be seized. *Jewell v. Swain*, 57 N. H. 506; *Com. v. Lightfoot*, 7 B. Mon. (Ky.) 298.

6. *Jewell v. Swain*, 57 N. H. 506. And see *Forster v. Forster*, 129 Mass. 561; *Williams v. Peyton*, 4 Wheat. (U. S.) 77.

The fact that the market and other circumstances were unfavorable at the time the cattle of the delinquent were distrained, was held no ground for an injunction to restrain the sale, where the defendant had induced the delay by his own conduct and request. *Breese v. Haley*, 10 Colo. 5.

7. *Dodge v. Way*, 18 Vt. 457; *Forth v. Pursley*, 82 Ill. 152.

In *Forth v. Pursley*, 82 Ill. 152, it was held that possession in the officer was not essential to a valid sale as

attachments and executions applies to seizures for non-payment of taxes, unless otherwise provided.<sup>1</sup> Thus, a sufficient levy upon personal property for the collection of a tax, is *prima facie* a satisfaction of the tax.<sup>2</sup>

(e) **Arrest and Imprisonment.**—It is sometimes provided that, upon failure to collect the tax out of the property of the taxpayer, the collector may seize the person of the delinquent and commit him to jail upon his warrant; by other provisions, the collector may make application to a court of competent jurisdiction to enforce the tax by attachment or fine.<sup>3</sup> Such statutes are not

against the party against whom the warrant issued, though it was as to third parties.

In *Belloq v. New Orleans*, 31 La. Ann. 471, it was held that where the seizure is regular, the possession of the owner ceases.

In *New Richmond Lumber Co. v. Rogers*, 68 Wis. 608, it was held that where the officer took possession of a portion of a lot of heavy lumber upon which taxes had not been paid, and notified the only person near the premises that he had levied on it, this was a sufficient levy upon the whole.

In *Louisiana*, where the taxpayer refuses to deliver up delinquent property, a judicial proceeding is given to the collector to enforce the delivery, and such proceeding is not unconstitutional. *State v. Meyer*, 41 La. Ann. 436. And see *Parker v. Sun Ins. Co.*, 42 La. Ann. 1172.

In *Alabama*, a proceeding in the nature of a garnishment is allowed against persons having in their possession the property of delinquent taxpayers. *State v. McAllister*, 60 Ala. 105.

1. See *Georgia v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 435; *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494; *Meyer v. Larkin*, 3 Cal. 403.

In *Meyer v. Larkin*, 3 Cal. 403, it was held that where a tax collector levies on the property of a partnership for a tax due from one of the firm, and sells the whole property and disposes of all the partners, he is guilty of a trespass.

A warrant for the collection of a tax issued against an individual doing business under a special name, may be levied upon the money or property used by such person in such business, by that name. *Patchin v. Ritter*, 27 Barb. (N. Y.) 34.

In New Orleans, the registry of taxes due the city is a seizure of the prop-

erty on which the taxes are assessed, and operates as a binding notice to all future purchasers and incumbrancers of the property. *Belloq v. New Orleans*, 31 La. Ann. 471.

2. *Henry v. Gregory*, 29 Mich. 68.

In *Campbell v. Wyant*, 26 W. Va. 702, it was held that where the sheriff levied upon sufficient personal property to pay the taxes on land, for which the levy was made, and the property was lost through his neglect and misconduct, without any fault of the owner, the taxes so levied should be paid. But a levy on and release of the goods of a stranger, under the mistaken supposition that they are the goods of the landlord, is no bar to a distress of the tenant's goods for the same tax. *McGregor v. Montgomery*, 4 Pa. St. 237.

A distress for a tax, where the goods are retaken and held on replevin, will not operate as a payment or discharge of the tax. *Farnsworth County v. Rand*, 65 Me. 19.

**Forthcoming Bond—Action by Collector on Promise of Taxpayer to Pay Taxes in Consideration of Forbearance.**—In *Packard v. Tisdell*, 50 Me. 376, it was held that an action could not be maintained by a town collector, upon a promise to pay him the tax in consideration that he would forbear to collect the same in the manner required by law, although by such neglect he becomes liable to account for the tax, until he actually pays it to the town.

In *Hardesty v. Price*, 3 Colo. 556, it was held that, where the owners of personal property levied upon by a collector for delinquent taxes, resumed possession, giving a bond conditioned to abide the decision of the county commissioners as to the legality of the assessment, the transaction was against public policy and the bond was void.

3. *Wilcox v. Gladwin*, 50 Conn. 77; *Nowell v. Tripp*, 61 Me. 426; 14 Am. Rep. 572; *Liberty v. Hurd*, 74 Me. 101;

unconstitutional, nor are they affected, it seems, by the abolition of imprisonment for debt.<sup>1</sup>

The right to seize the person of the delinquent, must be conferred by statute;<sup>2</sup> and the collector can act only upon a legal warrant.<sup>3</sup> As a general rule, no arrest can be made where

McMahon v. Palmer, 102 N. Y. 176; 55 Am. Rep. 796; McMahon v. Redfield, 12 Daly (N. Y.) 1; *In re* Nichols, 54 N. Y. 66; Appleton v. Hopkins, 5 Gray (Mass.) 530; Daggett v. Everett, 19 Me. 373; Butler v. Washburn, 25 N. H. 251; Kelley v. Noyes, 43 N. H. 209; Flint v. Whitney, 28 Vt. 680; Henry v. Tilson, 19 Vt. 447.

The affidavit, upon application for the examination of a delinquent taxpayer, under the *New York* statute, need not show jurisdiction to impose the tax. *In re* Conklin, 36 Hun (N. Y.) 588.

A taxpayer cannot prove that he had sufficient personal property out of which the collector might have made the tax, in a proceeding in which he has been ordered to appear before a judge to be examined concerning his property, or in a contempt proceeding brought by the receiver of taxes to enforce their payment. *In re* Hartshorn, 63 Hun (N. Y.) 624. And see McLean v. Erlanger, 62 Hun (N. Y.) 1.

In McLean v. Erlanger, 62 Hun (N. Y.) 1, it was held that the costs of a contempt proceeding in an action for the recovery of a tax, should not be awarded against the taxpayer, where it appears that sufficient personal property existed, upon which to levy.

**Arrest, How Made.**—In Gordon v. Clifford, 28 N. H. 402, it was held that a collector may lawfully force open the outer door of a house in which the tax debtor has taken refuge, in order to arrest him.

1. McMahon v. Palmer, 102 N. Y. 176; 55 Am. Rep. 796; Com. v. Byrne, 20 Gratt. (Va.) 165.

In Reg. v. Morris, 21 U. C. Q. B. 392, it was held that a warrant might issue to imprison a person for non-payment of statute labor, without first summoning him to answer, or making a conviction.

**Imprisonment for Debt.**—In Appleton v. Hopkins, 5 Gray (Mass.) 530, it was held that the *Massachusetts* statute abolishing imprisonment for debt, did not apply to a warrant of distress for non-payment of taxes.

**Discharge in Bankruptcy.**—Although

the delinquent taxpayer had received his certificate of discharge under the *United States* Bankrupt Act, it was held that he might be arrested upon the warrant. Aldrich v. Aldrich, 8 Met. (Mass.) 102. See also Wilmarth v. Burt, 7 Met. (Mass.) 257.

**Bond for Release.**—In Skinner v. Lyford, 73 Me. 282, it was held that a poor debtor's bond given to obtain release from an arrest for taxes under a statute authorizing it, should run to the assessors of the town at the time the arrest was made.

2. St. Louis v. Green, 7 Mo. App. 468. And see Marshall v. Wadsworth, 64 N. H. 386; St. Louis v. Sternberg, 4 Mo. App. 453; Shaw v. Peckett, 26 Vt. 482.

Where a penalty of a double tax is proposed for failure to take out a license, the party thus failing is not within the provision of a statute declaring certain acts to be misdemeanors, and providing a penalty therefor, where no other penalty is imposed by statute. State v. Manz, 6 Coldw. (Tenn.) 557.

A statute authorizing the collection of delinquent taxes, by distress or sale, confers no power to arrest the person of the taxpayer. Marshall v. Wadsworth, 64 N. H. 386.

3. See Pearson v. Canney, 64 Me. 188; Tremont School Dist. v. Clark, 33 Me. 482; Orneville v. Pearson, 61 Me. 552; Lowe v. Weld, 52 Me. 588; Foxcroft v. Nevins, 4 Me. 72; Waldron v. Lee, 5 Pick. (Mass.) 328.

But if the warrant is good, the right to arrest is not affected by the fact that the person arrested was not liable to assessment. Kelley v. Noyes, 43 N. H. 209.

In Bassett v. Porter, 4 Cush. (Mass.) 487, it was held that a collector may arrest a person for the non-payment of his tax, after the expiration of the time limited in the warrant.

A warrant of arrest, omitting an alternative direction to levy on real estate, is not thereby invalidated. Wilcox v. Gladwin, 50 Conn. 77. But a tax warrant, commanding the officer, on non-payment, to "proceed as the law

the delinquent has sufficient goods to satisfy the tax, which the collector might have found if he had sought for them.<sup>1</sup>

c. COLLECTION BY ACTION—(1) *The Right to Proceed by Action.*—Taxes are not debts,<sup>2</sup> and therefore, as a general rule, the common-law action of debt does not lie for their collection where another remedy is given.<sup>3</sup> The right to proceed by action is, however, frequently conferred by statute.<sup>4</sup>

directs," is insufficient to authorize an arrest. *Flint v. Whitney*, 28 Vt. 680.

1. *Lothrop v. Ide*, 13 Gray (Mass.) 93; *Wilcox v. Gladwin*, 50 Conn. 77; *McMahon v. Redfield*, 12 Daly (N. Y.) 1; *Henry v. Tilson*, 19 Vt. 447. And see *Com. v. Byrne*, 20 Gratt. (Va.) 165.

A return of "no goods found" is not conclusive. *McMahon v. Redfield*, 12 Daly (N. Y.) 1.

To make the tax collector liable for making an arrest, proof of a general request to take property is not sufficient, although the taxpayer has it; there should be a distinct and immediate offer of specific property; the collector is not obliged to delay. *Flint v. Whitney*, 28 Vt. 680.

In *New Hampshire*, a collector of taxes is not bound to search for property, but may arrest the body of the delinquent, and is not obliged to discharge him upon his afterwards exposing sufficient property. *Osgood v. Welch*, 19 N. H. 105. See also *Kinsley v. Hull*, 9 N. H. 190.

**Remedy Exclusive.**—Though a collector of taxes in *New Hampshire* may distrain property, and, for want thereof, take the body, yet, having taken the body, he cannot thereafter distrain property. *Butler v. Washburn*, 25 N. H. 251.

2. See *supra*, this title, *Nature*.

3. *Nebraska City v. Nebraska City Gas Light Co.*, 9 Neb. 339; *Cooper v. Savannah*, 4 Ga. 68; *Camden v. Allen*, 26 N. J. L. 398; *Detroit v. Jepp*, 52 Mich. 458; *Richards v. Stogsdel*, 21 Ind. 74; *Turnpike Com'rs v. Louisville, etc., R. Co.* (Ky. 1886), 1 S. W. Rep. 671; *Stafford County v. First Nat. Bank*, 48 Kan. 561; *Packard v. Tisdale*, 50 Me. 374; *Pierce v. Boston*, 3 Met. (Mass.) 520; *Crapo v. Stetson*, 8 Met. (Mass.) 394; *Carondelet v. Picot*, 38 Mo. 125; *State v. Heman*, 7 Mo. App. 428; *Alexander v. Helber*, 35 Mo. 334; *Faribault v. Misener*, 20 Minn. 346; *Greene County v. Murphy*, 107 N. Car. 36; *Shaw v. Pickett*, 26 Vt. 486; *Hibbard v. Clark*, 56 N. H. 158; 22 Am. Rep. 442; *Durant v. Al-*

bany County, 26 Wend. (N. Y.) 66; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Meriwether v. Garrett*, 102 U. S. 472. And see *Board of Supervisors v. Johnson* (Miss. 1890), 7 So. Rep. 390; *Baldwin v. Hewett*, 88 Ky. 673.

Where a right of action is conferred in one court, the tax cannot be collected by action in any other court. *Smith v. Clark* (Va. 1889), 10 S. E. Rep. 4. And see *State v. McAllister*, 60 Ala. 105.

In *Andover, etc., Turnpike Co. v. Gould*, 6 Mass. 40; 4 Am. Dec. 80, it was held that where members of a turnpike corporation expressly agree to pay assessments made by it, an action lies for their recovery, but in the absence of such agreement, the sole remedy is a sale of the shares of the delinquent members.

The constitutional provision of *Louisiana* that taxes shall be collected without suit, prohibits a reconventional demand made for taxes, praying for a personal judgment against the taxpayer for the amount of taxes due. *Rivers v. New Orleans*, 42 La. Ann. 1196.

4. See *Mercier v. New Orleans*, 42 La. Ann. 1135; *Littler v. McCord*, 38 Ill. App. 147; *Mix v. People*, 116 Ill. 265; *Byrne v. La Salle*, 123 Ill. 581; *Biggins v. People*, 96 Ill. 381; *Shaum v. Showers*, 49 Ind. 285; *Jefferson v. Whipple*, 71 Mo. 519; *Jefferson v. Curry*, 77 Mo. 230; *Lord v. Parker*, 83 Me. 530; *McLean v. Myers*, 134 N. Y. 480; *Rich v. Tuckerman*, 121 Mass. 222; *Tripp v. Torrey*, 17 R. I. 359; *Wheeler v. Wilson*, 57 Vt. 157; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 237.

Such provisions are constitutional. *Pritchard v. Madren*, 24 Kan. 486.

Where the collector of taxes of a municipality is authorized to collect the tax by a civil suit, he cannot enforce the payment of the tax by a levy upon the property, before he obtains judgment thereon. *Alexander v. Helber*, 35 Mo. 334.

In *Tennessee*, the tax warrant may be



The sale of land for taxes is prohibited by the constitutions of some of the states, unless founded upon the judgment of a duly authorized court of record.<sup>1</sup>

When no remedy is especially provided by statute, a remedy by action may be implied.<sup>2</sup> When a lien is given, the right to enforce it is inherent in chancery.<sup>3</sup> It has been laid down in some of the cases that the collector's implied right to an action to enforce the payment of taxes arises from the obligation to pay,

for state, county, and municipal taxes, jointly or separately, and an action may be brought for their recovery either jointly or separately, justices of the peace having jurisdiction in all such cases, no matter what may be the amount. *Wilson v. Benton*, 11 Lea (Tenn.) 51. And see *State v. Covington*, 4 Lea (Tenn.) 54; *Jonesboro' v. McKee*, 2 Yerg. (Tenn.) 167.

**Jurisdiction** may be conferred upon a justice of the peace or a city recorder, to entertain suits to collect delinquent taxes. *State v. Van Every*, 75 Mo. 530. And they are not deprived of jurisdiction by a provision that justices shall not have jurisdiction of actions for or against the town in which they are elected. *Hancock v. Merriman*, 46 Wis. 159.

**Non-Residents.**—Action will be permitted against non-residents, unless the statute expressly excludes them. *McLean v. Myers*, 134 N. Y. 480.

1. See *Hinman v. Pope*, 6 Ill. 131; *Burns v. Ledbetter*, 54 Tex. 374.

Such a provision deprives a city of a pre-existing authority to seize and sell property. *Lockhart v. Houston*, 45 Tex. 317.

Under a constitutional provision prohibiting the sale of land for taxes, except upon a judgment obtained in a court of record, the legislature may determine the time when application may be made and judgment rendered. And in case of special assessments and local taxes, the power to designate the time may be delegated to local or municipal authorities. *Leindecker v. People*, 98 Ill. 21.

2. *Nebraska City v. Nebraska City Gas Light Co.*, 9 Neb. 339; *State v. Yellow Jacket Silver Min. Co.*, 14 Mo. 260; *State v. New York, etc., R. Co.*, 60 Conn. 326; *Merriam v. Moody*, 25 Iowa 163; *McInerny v. Reed*, 23 Iowa 410; *Jefferson v. Whipple*, 71 Mo. 519; *Jefferson v. McCarthy*, 74 Mo. 55; *Jefferson v. Curry*, 77 Mo. 230; *State v. Severance*, 55 Mo. 379; *State v. Titt-*

*mann*, 103 Mo. 553; *Dugan v. Baltimore*, 1 Gill & J. (Md.) 499; *Clemens v. Baltimore*, 16 Md. 208; *Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Paine v. Spratley*, 5 Kan. 525; *Territory v. Reyburn*, McCahon (Kan.) 134; *Bergen v. Clarkson*, 6 N. J. L. 352; *Boody v. Watson*, 64 N. H. 162; *Hillsborough County v. Londonderry*, 43 N. H. 453; *Amite v. Clements*, 24 La. Ann. 27; *State v. Williams*, 8 Tex. 384; *Houston, etc., R. Co. v. State*, 39 Tex. 149; *Allen v. Galveston*, 51 Tex. 302; *Lockhart v. Houston*, 45 Tex. 317; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441; *Portland, etc., Ins. Co. v. Portland*, 12 B. Mon. (Ky.) 77. See also *Alexander v. Helber*, 35 Mo. 334.

3. See *State v. Duncan*, 3 Lea (Tenn.) 679; *Jonesboro' v. McKee*, 2 Yerg. (Tenn.) 170; *Rutledge v. Fogg*, 3 Coldw. (Tenn.) 568; 91 Am. Dec. 299; *Marr v. Bank of Tennessee*, 4 Coldw. (Tenn.) 471; *St. Louis, etc., R. Co. v. State*, 47 Ark. 323; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Hart v. Tiernan*, 59 Conn. 521; *New York v. Colgate*, 12 N. Y. 140; *McInerny v. Reed*, 23 Iowa 410; *Lancaster County v. Trimble*, 34 Neb. 752; *Lancaster County v. Rush*, 35 Neb. 119; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va. 441; *Garrett v. Memphis*, 5 Fed. Rep. 860.

In *State v. Duncan*, 3 Lea (Tenn.) 679, it was held that to enforce a lien for taxes by action is inherent in chancery courts, and does not depend upon statutory enactment. But in *People v. Biggins*, 96 Ill. 481, it was held that a tax lien is purely legal in its character, and can be enforced in chancery only when so provided by law. *Compare Mix v. People*, 116 Ill. 265.

Where taxes are levied by a county as trustee for various corporations, such as states, cities, villages, school districts, etc., the county need not pay delinquent taxes before proceeding to foreclose the lien therefor and sell the property taxed. *Lancaster County v. Trimble*, 34 Neb. 752.

and is not taken away, unless the statutory remedy is expressly made exclusive.<sup>1</sup>

As the personal liability to pay the tax exists independently of the lien,<sup>2</sup> the right to recover the tax by action is not dependent upon the existence of a lien,<sup>3</sup> nor does the existence of the lien prevent an action.<sup>4</sup>

As a general rule, judicial proceedings are to be resorted to in aid of the collection only when a seizure might prove an inadequate or inefficient mode of realizing the tax,<sup>5</sup> or when ordinary

The right of a collector to recover taxes paid by him to the treasurer, but not paid to him by suit, carries with it the right to sue in equity to enforce the lien for taxes, whether the lien has been assigned to him or not. *Hart v. Tiernan*, 59 Conn. 521.

1. *Baltimore v. Howard*, 6 Har. & J. (Md.) 283; *Eschbach v. Pitts*, 6 Md. 71; *Dugan v. Baltimore*, 1 Gill & J. (Md.) 499; *Appeal Tax Ct. v. Union R. Co.*, 50 Md. 275; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 547; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Putman v. Fife Lake Tp.*, 45 Mich. 125; *Bergen v. Clarkson*, 6 N. J. L. 352; *U. S. v. Washington Mills*, 2 Cliff. (U. S.) 601; *Garrett v. Memphis*, 5 Fed. Rep. 860; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 237; *Metcalf v. Robinson*, 2 McLean (U. S.) 364; *Oakland v. Whipple*, 39 Cal. 112; *State v. Duncan*, 3 Lea (Tenn.) 679; *State v. Memphis, etc., R. Co.*, 14 Lea (Tenn.) 56; 22 Am. & Eng. R. Cas. 201; *Memphis v. Looney*, 9 Baxt. (Tenn.) 130. And see *Burlington v. Burlington, etc., R. Co.*, 41 Iowa 134; *Nashville v. Cowan*, 10 Lea (Tenn.) 209; *Edgfield v. Brien*, 3 Tenn. Ch. 673; *Dunlap v. Gallatin County*, 15 Ill. 7; *Ryan v. Gallatin County*, 14 Ill. 78; *People v. Davis*, 112 Ill. 272; *Meyer v. Burritt*, 60 Conn. 117.

In *Appeal Tax Ct. v. Union R. Co.*, 50 Md. 274, it was held that upon the assessment of a tax, a duty arises upon the owners of the property taxed, to pay the tax thus imposed, which may be enforced by an action at law as upon an implied *assumpsit*, notwithstanding the repeal of the act under which the tax was imposed.

In *State v. Georgia Co.*, 112 N. Car. 34, it was held that a tax is a debt which may be collected after the return of the tax list unsatisfied, by proceedings in the nature of a creditor's bill.

2. *Meredith v. U. S.*, 13 Pet. (U. S.) 486; *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64. And see *Oakland v. Whipple*, 39 Cal. 112; *O'Grady v. Barnhisel*, 23 Cal. 294; *Hart v. Tiernan*, 59 Conn. 521.

The commencement of a personal action for the recovery of a tax, does not divest its lien. *Eschbach v. Pitts*, 6 Md. 71.

Where a lien is given for taxes, and a mere money judgment has been obtained against the person whose duty it is to pay them, the state cannot, in an action against an alienee of such person's property, enforce the judgment as a lien on the property, without alleging and proving the steps necessary to the creation of a valid tax lien. *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64.

3. *Jefferson v. McCarty*, 74 Mo. 55; *Jefferson v. Whipple*, 71 Mo. 519; *Jefferson v. Curry*, 77 Mo. 230; *Meredith v. U. S.*, 13 Pet. (U. S.) 486. And see *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 231.

Rule Applied to Seizures.—In *Leeds v. Hardy*, 43 La. Ann. 810, it was held that the property assessed remains subject to seizure, even though the Statute of Limitations has run against the lien. Compare *Sherwin v. Boston, etc., Sav. Bank*, 137 Mass. 444.

4. *Meredith v. U. S.*, 13 Pet. (U. S.) 486. And see *Rundell v. Lakey*, 40 N. Y. 517; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 231.

5. *Mercier v. New Orleans*, 42 La. Ann. 1135; *Reed v. His Creditors*, 39 La. Ann. 115; *York v. Goodwin*, 67 Me. 260; *State v. Tittmann*, 103 Mo. 553; *Alexander v. Alexandria*, 5 Cranch (U. S.) 1.

Authorizing the collection of taxes by distress, does not preclude their recovery by an action of debt, where a distress would be ineffectual. *Ryan v. Gallatin County*, 14 Ill. 78.

methods have been exhausted and the tax has been returned unpaid.<sup>1</sup>

(2) *Construction of Provisions for Action*.—Where the statute provides for a remedy by action, in particular cases, it is confined exclusively to the cases therein provided for;<sup>2</sup> and the general rule as to the strict construction and observance of the provisions of tax laws, applies to all requirements that are preliminary and jurisdictional in their nature.<sup>3</sup>

But this rule requiring strict compliance with every form of law, is not applicable to actions for delinquent taxes where jurisdiction has been acquired;<sup>4</sup> and mere irregularities will be allowed to effect a recovery, only to the extent that the taxpayer has been injured thereby.<sup>5</sup>

(3) *Different Kinds of Actions*.—(a) *Actions in Personam*.—Where

1. *McCallum v. Bethany Tp.*, 42 Mich. 457; *State v. Adler*, 68 Miss. 487; *McLean v. Myers*, 58 N. Y. Super. Ct. 337; *Greene County v. Murphy*, 107 N. Car. 36.

In *Greer v. Covington*, 83 Ky. 410, it was held that the power given by the *Kentucky* statute to the city of Covington, to sue the taxpayer for unpaid taxes, is concurrent with its power of levy and sale by the tax collector; *overruling* *Covington v. People's Bldg. Assoc.* (Ky. 1882), 2 S. W. Rep. 323, where it was held that the tax collector must have first exhausted his power to levy and sell the estate of the taxpayer before resort could be had to the action.

In *Durham v. People*, 67 Ill. 414, it was held that, in an action for taxes, the taxpayer could not object that the collector had not made the tax by distraining his personal property, where it appeared that the collector did levy on the property, but the objector replevied the same.

In *McLean v. Myers*, 134 N. Y. 480, it was held that in the city and county of New York, the exhaustion of the warrant is not a condition precedent to the action.

2. *Nebraska City v. Nebraska City Gas Light Co.*, 9 Neb. 339; *Baldwin v. Hewett*, 88 Ky. 673; *Louisville Water Co. v. Com.*, 89 Ky. 244; *McLean v. Myers*, 58 N. Y. Super. Ct. 337. And see *Washington County v. German-American Bank*, 28 Minn. 360.

3. See *Territory v. Delinquent Tax List* (Arizona, 1887), 21 Pac. Rep. 888; *Carlisle v. Watts*, 78 Ala. 486; *Driggers v. Cassady*, 71 Ala. 529; *People v. Central Pac. R. Co.*, 83 Cal. 393; *People v. Otis*, 74 Ill. 384; *Chicago v. Wright*, 32 Ill. 192; *Charles v. Waugh*,

35 Ill. 315; *People v. Brislin*, 80 Ill. 424; *Webb v. Bidwell*, 15 Minn. 479; *State v. Robyn*, 93 Mo. 395; *McCallum v. Bethany Tp.*, 42 Mich. 457; *Clegg v. State*, 42 Tex. 605.

A statute authorizing amendments, and obviating the effect of omissions, errors, etc., cannot be held to waive substantial compliance with steps which are essential to give jurisdiction. It aids and obviates defects of form, but not of substance. *People v. Otis*, 74 Ill. 384.

4. *State v. Central Pac. R. Co.*, 10 Nev. 47; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400. And see *Boyd v. Ellis*, 107 Mo. 394; *Law v. People*, 87 Ill. 385; *People v. Davis*, 112 Ill. 272.

The personal liability of a taxpayer may be enforced, even though irregularities have intervened in the proceeding, which would be fatal to an ordinary tax sale. *Greenwood v. LaSalle*, 137 Ill. 225; *Sanderson v. LaSalle*, 117 Ill. 171. See also *Lord v. Parker*, 83 Me. 530.

5. *State v. Northern Belle Mill, etc.*, Co., 15 Nev. 385; *Hart v. Plum*, 14 Cal. 155; *Chiniquy v. People*, 78 Ill. 570; *Purrrington v. People*, 79 Ill. 11; *Law v. People*, 87 Ill. 385; *Spellman v. Curtenius*, 12 Ill. 409; *Houston County v. Jessup*, 22 Minn. 552; *Brown v. Walker*, 85 Mo. 262. And see *Chambers v. People*, 113 Ill. 509; *Edwards v. People*, 88 Ill. 340; *Gager v. Prout*, 48 Ohio St. 89.

Much greater particularity and precision are required when a forfeiture is sought to be enforced, than when a simple recovery of a tax by suit is asked for. *Rockland v. Ulmer*, 84 Me. 503.

In *Nevada*, it has been held that the omissions of officers to perform the duties required of them between the

the statute authorizes the enforcement of the personal obligation imposed upon the taxpayer by action, the action contemplated is the ordinary action of debt or *assumpsit*.<sup>1</sup>

Where a common-law action is permitted, *assumpsit* is the usual form;<sup>2</sup> but either debt or *assumpsit* may be maintained.<sup>3</sup> The action must be brought against the person whose duty it was to pay.<sup>4</sup> If the tax is imposed upon property, the action should be brought against the person who owned the property at the time of the assessment,<sup>5</sup> even though subsequent changes of ownership have taken place.<sup>6</sup> Personal service has been held a necessary basis for a personal judgment.<sup>7</sup> The appearance of the taxpayer on an application for judgment against his land, and his defense on the merits, do not change the proceedings from an action *in rem* to one *in personam*.<sup>8</sup>

(b) *Actions in Rem*.—In some states, an action *in rem* is allowed the collector; that is, an action or an application for judgment against the specific property taxed is authorized.<sup>9</sup> Such an

assessment and commencement of the suit, constitute no defense to a suit for taxes, as such acts are by statute directory only. *State v. Sadler*, 21 Nev. 13.

1. *Byrne v. LaSalle*, 123 Ill. 581. And see *Wheeler v. Wilson*, 57 Vt. 157; *U. S. v. Lyman*, 1 Mason (U. S.) 481; *Meredith v. U. S.*, 13 Pet. (U. S.) 486.

2. See *U. S. v. Washington Mills*, 2 Cliff. (U. S.) 601; *Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Gunther v. Baltimore*, 55 Md. 457; *Appeal Tax Ct. v. Union R. Co.*, 50 Md. 274; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *Putman v. Fife Lake Tp.*, 45 Mich. 125.

3. *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 237; *Ryan v. Gallatin County*, 14 Ill. 78. And see *Meredith v. U. S.*, 13 Pet. (U. S.) 486; *U. S. v. Lyman*, 1 Mason (U. S.) 498; *Portland, etc., Ins. Co. v. Portland*, 12 B. Mon. (Ky.) 77.

In *Vogel v. Vogler*, 78 Ind. 353, it was held that in an action by a county treasurer against a guardian, the wards are not proper parties to the action.

4. *Everson v. Syracuse*, 29 Hun (N. Y.) 485. And see *Freetown v. Fish*, 123 Mass. 355.

In *Topsham v. Blondell*, 82 Me. 152, it was held that a tax assessed against a husband and wife may be recovered in an action against the husband alone, if the non-joinder of the wife is not pleaded in abatement.

The officer authorized to enforce a tax bill, may assume that the person in whom the records show the title to be vested, is the true owner, and sue accordingly. *Vance v. Corrigan*, 78 Mo. 94.

5. *Greenwood v. La Salle*, 137 Ill. 225; *Laketon Tp. v. Akeley*, 74 Mich. 695; *Jefferson v. Curry*, 77 Mo. 230; *Jefferson v. Mock*, 74 Mo. 61.

Where persons who are necessary parties to a proceeding for taxes, refuse to appear, and the court has no power to reach them by its process, the bill must be dismissed. *Virden v. Needles*, 98 Ill. 366.

Where one who has no interest, is made a party defendant, he must disclaim by answer. *Kansas City v. Hannibal, etc.*, R. Co., 77 Mo. 180.

6. *Everson v. Syracuse*, 29 Hun (N. Y.) 485; *Laketon Tp. v. Akeley*, 74 Mich. 695.

Nor does the distinction of the property relieve the owner from liability for the tax. *Farrell v. U. S.*, 99 U. S. 221.

In *State v. Sack*, 79 Mo. 661, it was held that action may be brought against the record owner of the land, though he is not the true owner.

7. *People v. Fox*, 39 Cal. 621.

Provisions authorizing constructive service, or service by publication, are not unconstitutional, even when personal judgment may be rendered. *New Orleans v. Cannon*, 10 La. Ann. 764. And see *In re New Orleans Drainage Co.*, 11 La. Ann. 238; *Eitel v. Foote*, 39 Cal. 439.

8. *People v. Dragstran*, 100 Ill. 286.

9. *People v. Dragstran*, 100 Ill. 286; *Hills v. Chicago*, 60 Ill. 86; *People v. Otis*, 74 Ill. 384; *Pidgeon v. People*, 36 Ill. 249; *Allen v. McCabe*, 93 Mo. 135. And see *Scammon v. Chicago*, 40 Ill.

action is governed by the general rules applicable to actions *in rem*, unless the contrary is provided by statute.<sup>1</sup> No personal judgment can be entered, as a general rule, even though the owner of the property appears and defends.<sup>2</sup>

The proceeding should be brought against the owner and all persons in interest,<sup>3</sup> and, as in other actions *in rem*, a notice by publication may be sufficient, if authorized by law.<sup>4</sup> But the general rule that, in summary proceedings for the collection of taxes, the provisions of the statute are to be strictly followed, applies with special force to notice by publication,<sup>5</sup> and a failure to give

146; *Thompson v. Carroll*, 22 How. (U. S.) 422.

In *Clegg v. State*, 42 Tex. 605, it was said that taxes upon landed property are usually enforced by proceedings providing for their condemnation and sale, and not by a sale under judgment against the owner.

1. See *People v. Central Pac. R. Co.*, 83 Cal. 393; *Walsh v. People*, 79 Ill. 521; *Auditor Gen'l v. Jenkinson*, 90 Mich. 523.

In *Pidgeon v. People*, 36 Ill. 249, it was held that where in *Illinois* a cause is removed to the circuit court upon repeal, the practice and jurisdiction are not changed, and the trial must be had *de novo*.

2. *People v. Dragstran*, 100 Ill. 286; *Pidgeon v. People*, 36 Ill. 249. And see *Clegg v. State*, 42 Tex. 605.

In *California*, suit is authorized against both the owner and the property, and personal judgment may be rendered upon personal service of the summons. *People v. Fox*, 39 Cal. 621.

3. See *Hosmer v. People*, 96 Ill. 58; *People v. Quick*, 87 Ill. 435; *Mix v. People*, 116 Ill. 265; *Carlisle v. Watts*, 78 Ala. 486; *Alexander v. Thacker*, 30 Neb. 614; *Kansas City v. Hannibal*, etc., R. Co., 77 Mo. 180; *Simonson v. Dolan*, 114 Mo. 176.

The owner of record is the person against whom the action should be brought. *Vance v. Corrigan*, 78 Mo. 94.

Though all parties in interest are not made parties, a decree may be made as to one who has been made a party. *Mix v. People*, 116 Ill. 265. And see *Hogan v. Smith*, 11 Mo. App. 314; *Desormeaux v. Moylan*, 26 La. Ann. 730.

A party having no interest in the lands, has no right to make objections to the rendition of judgment, unless he appears as an agent or attorney of the person interested. *Hosmer v. People*, 96 Ill. 58. See also *McClure v. Martland*, 24 W. Va. 561.

The assignee of a note secured by a deed of trust, is a necessary party to a suit to enforce a lien for taxes against the land covered by the trust deed. *Boatman's Sav. Bank v. Greeve*, 84 Mo. 477. And see *Gritchell v. Kreidler*, 12 Mo. App. 497.

4. See *People v. Fox*, 39 Cal. 621; *Eitel v. Foote*, 39 Cal. 439; *Truman v. Robinson*, 44 Cal. 623; *Driggers v. Cassady*, 71 Ala. 529; *Carlisle v. Watts*, 78 Ala. 486; *People v. Dragstran*, 100 Ill. 286; *Buck v. People*, 78 Ill. 560; *New Orleans v. Cannon*, 10 La. Ann. 764; *Wellshear v. Kelley*, 69 Mo. 343; *Williams v. Hudson*, 93 Mo. 524; *State v. Van Every*, 75 Mo. 530; *Pritchard v. Madren*, 24 Kan. 486; *Fudge v. Fudge*, 23 Kan. 416; *Missouri River, etc., R. Co. v. Shepard*, 9 Kan. 647.

In *Goldsworthy v. Johnson*, 87 Mo. 233, it was held that an order of publication in a proceeding to charge lands with taxes, need not describe the lands.

5. *Scammon v. Chicago*, 40 Ill. 146; *People v. Otis*, 74 Ill. 384; *Spellman v. Curtenius*, 12 Ill. 409; *Charles v. Waugh*, 35 Ill. 315; *Nashville v. Weiser*, 54 Ill. 245; *Kipp v. Collins*, 33 Minn. 394; *Stearns County v. Smith*, 25 Minn. 131; *Whelen v. Weaver*, 93 Mo. 430.

General rules with relation to service by publication, apply to the method of obtaining the order of publication in proceedings to enforce taxes. *Martin v. Parsons*, 50 Cal. 499.

In *Charles v. Waugh*, 35 Ill. 315, it was held that a notice which omitted to state that an order of sale would be asked for, was insufficient.

In *Carlisle v. Watts*, 78 Ala. 486, it was held that a notice addressed to the estate of the decedent, and left at his former residence, conferred no jurisdiction.

In *Durham v. People*, 67 Ill. 414, it was held that a description of lands as those upon which taxes remained due and unpaid for the year 1871 and pre-

the notice, or to give it in the manner prescribed by statute, is fatal to the validity of the proceedings.<sup>1</sup>

The owner, by entering an appearance, however, and urging general objections against the rendition of judgment for taxes, waives the right to object to the sufficiency of the notice.<sup>2</sup> The making and filing of a delinquent list, containing a description of the property against which the judgment is sought for taxes, is generally an essential requisite to the jurisdiction.<sup>3</sup>

vious years, was a substantial compliance with the statutory provision requiring such notice to state the years for which the taxes were due.

In *Truman v. Robinson*, 44 Cal. 623, it was held that a provision for service by publication, did not repeal a provision previously existing for service by delivering a copy to the person or persons to be certified.

1. *Fortman v. Ruggles*, 58 Ill. 207; *Charles v. Waugh*, 35 Ill. 315; *McKee v. Champaign County*, 53 Ill. 477; *Dentler v. State*, 4 Blackf. (Ind.) 259. See also *Chiniquy v. People*, 78 Ill. 570.

In *Elting v. Gould*, 96 Mo. 535, it was held sufficient to designate the owner of the land taxed, by the name disclosed by recorded deeds.

In *Scammon v. Chicago*, 40 Ill. 146, it was held, where a newspaper proprietor published a daily newspaper and also a Sunday paper of the same name, which, however, was not delivered to the regular daily subscribers, that the Sunday and daily issues must be regarded as distinct papers, and the publication of the notice in a Sunday paper will be sufficient.

**Necessity of Notice.**—In all cases there must have been notice, either actual or constructive, for appearance, to confer jurisdiction upon the court. *Fortman v. Ruggles*, 58 Ill. 207; *Charles v. Waugh*, 35 Ill. 315; *McKee v. Supervisors*, 53 Ill. 477; *Chicago v. Wright*, 32 Ill. 192; *McKee v. Champaign County*, 53 Ill. 477; *Dentler v. State*, 4 Blackf. (Ind.) 258; *Pritchard v. Madren*, 24 Kan. 486; *Abbott v. Lindenbower*, 42 Mo. 162. And see *infra*, this title, *In Actions in Personam*, and *In Actions in Rem*.

The collector's return of service on the notice of condemnation proceedings, is not conclusive, the notice being jurisdictional. *Riddle v. Messer*, 84 Ala. 236.

**Proof of Publication.**—Newspapers containing notices of application for judgment against delinquent lands,

afford evidence of the publication of the notice, when accompanied by proof that the paper was a newspaper published in the county. *Durham v. People*, 67 Ill. 414.

Where publication of notice is proved, it will be presumed that the newspaper in which it was published was one of general circulation. *Kipp v. Collins*, 33 Minn. 394.

A certificate of publication, stating that the foregoing was duly published in the Peoria "Democratic Press," immediately following a tax list, will be held to refer to such list, and it will be presumed that the Peoria "Democratic Press" was a newspaper. *Jackson v. Cummings*, 15 Ill. 449.

In *Fox v. Turtle*, 55 Ill. 377, it was held that where notice of application for judgment against lands for taxes, is published by a firm or by a corporation, a certificate of one of the partners, or of an officer of the corporation, showing the official connection of the person making it with the newspaper, is sufficient to prove publication.

2. *People v. Dragstran*, 100 Ill. 286; *People v. Sherman*, 83 Ill. 165; *Mix v. People*, 106 Ill. 425; *English v. People*, 96 Ill. 566.

In *Warren v. Cook*, 116 Ill. 199, it was held that the filing of objections, by an attorney having general authority to appear for that purpose, must be regarded as an entry of the owner's appearance.

In *Atlantic, etc., R. Co. v. Yavapai County* (Arizona, 1889), 21 Pac. Rep. 768, it was held that appearance constituted a waiver of all objections for irregularities, and that the person appearing could be heard only as to the legality of the tax.

3. *People v. Dragstran*, 100 Ill. 286; *Spellman v. Curtenius*, 12 Ill. 409; *Pickett v. Hartsock*, 15 Ill. 279; *Morgan v. Camp*, 16 Ill. 175; *Morrill v. Swartz*, 39 Ill. 108; *People v. Otis*, 74 Ill. 384; *Charles v. Waugh*, 35 Ill. 315; *Fox v. Turtle*, 55 Ill. 377; *Marsh v.*

(4) *Procedure*—(a) *Generally*.—In the absence of statutory regulations, the procedure, in actions to enforce the collection of taxes, is governed by the rules applicable to ordinary actions;<sup>1</sup> but, when the procedure is regulated by statute, it must conform thereto.<sup>2</sup> It has been held that no compromise can be made by subordinate officers.<sup>3</sup>

The action is usually brought in the name of the political division by which the tax is imposed,<sup>4</sup> though the officer whose duty it is to prosecute the action, is sometimes permitted to do so in his own name.<sup>5</sup> The duty to prosecute the action, in the absence of a statute to the contrary, rests upon the collector.<sup>6</sup>

Chesnut, 14 Ill. 223; *People v. Brislin*, 80 Ill. 423; *San Diego County v. California*, etc., R. Co., 65 Cal. 282; *Bleidorn v. Abel*, 6 Iowa 5.

The report and notice is the foundation of the whole proceeding. *Spellman v. Curtenius*, 12 Ill. 409; *Pickett v. Hartsock*, 15 Ill. 279.

In *Chouteau v. Hunt*, 44 Minn. 173, it was held that it makes no difference, under a statute requiring the notice to be attached to a list of delinquent taxes, whether the notice precedes or follows the list.

1. *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *People v. Central Pac. R. Co.*, 83 Cal. 398; *State v. Duncan*, 3 Lea (Tenn.) 679. And see *Myers v. McRay*, 114 Mo. 377; *State v. Hannibal*, etc., R. Co., 113 Mo. 297; *Boulware v. Otoe County*, 16 Neb. 26.

Where taxes are required to be collected by action, the procedure is in the discretion of the legislature. *State v. Central Pac. R. Co.*, 21 Nev. 260.

2. *McCallum v. Bethany Tp.*, 42 Mich. 457; *Mix v. People*, 86 Ill. 312. And see *Andrews v. People*, 75 Ill. 605; *Moran v. January*, 47 Mo. 166.

3. In *Nevada*, it has been held that neither the board of county commissioners nor the district attorney has authority to compromise. *State v. Central Pac. R. Co.*, 9 Nev. 79; *State v. Central Pac. R. Co.*, 10 Nev. 47; *State v. California Min. Co.*, 15 Nev. 234. See also *State v. California Min. Co.*, 13 Nev. 289.

In *Missouri*, it has been held that the county court has power to compromise a disputed claim for taxes. *St. Louis*, etc., R. Co. *v. Anthony*, 73 Mo. 431.

In *Mix v. People*, 116 Ill. 265, it was held that where an assessment has been illegally compromised, and the amount agreed upon has been paid, the payment so made should be de-

ducted from the proper tax on a proceeding to foreclose the tax lien.

4. See *Oakland v. Whipple*, 39 Cal. 113; *People v. Central Pac. R. Co.*, 43 Cal. 398; *San Luis Obispo County v. White* (Cal. 1890), 24 Pac. Rep. 864; *San Luis Obispo County v. White* (Cal. 1891), 27 Pac. Rep. 756; *Ward v. Alton*, 23 Ill. App. 475; *York v. Goodwin*, 67 Me. 260; *State v. Tittmann*, 103 Mo. 553; *Lockhart v. Houston*, 45 Tex. 317; *Texas Banking*, etc., Co. *v. State*, 42 Tex. 636.

In *State v. Duncan*, 3 Lea (Tenn.) 679, it was held that a state, county, or city may file a bill, for the enforcement of a lien for taxes due it, in its own name, without the intervention of any commissioner or other officer.

A lien given to a city for unpaid taxes, may be taken from her by statute and vested in the state, and when this is done, it must be enforced by suit in the name of the state. *State v. Van Every*, 75 Mo. 530.

5. *Mortensen v. West Point Mfg. Co.*, 12 Neb. 197; *Lord v. Parker*, 83 Me. 530; *Hart v. Tiernan*, 59 Conn. 521.

A mere clerical mistake, in substituting the name of the defendant for that of the collector, in the petition, will not vitiate it. *Gibbs v. Southern* (Mo. 1893), 22 S. W. Rep. 713.

In *Meyer v. Burrill*, 60 Conn. 117, it was held that where, after suit brought for the collection of a tax, the collector pays to the communities or districts, taxes due from the taxpayer, the court may properly admit such communities or districts as parties plaintiff.

In *Gonzales v. Lindsay*, 30 La. Ann. 1085, it was held that the police jury of a parish is not the necessary party to a suit brought by a state tax collector, for the recovery of parish taxes.

6. *Lockhart v. Houston*, 45 Tex. 317; *Webster v. Chicago*, 62 Ill. 302; *Putman v. Fife Lake Tp.*, 45 Mich. 125.

Other officers, however, are sometimes appointed to conduct actions to enforce the collection.<sup>1</sup>

It has been held that causes of action for non-payment of taxes, imposed by different political bodies, could not be joined in the same action;<sup>2</sup> nor for taxes imposed for different periods.<sup>3</sup> Several causes of action, when properly joined, must be separately stated, and must all belong to one class, and affect all the parties to the action.<sup>4</sup>

(b) **Pleadings and Proof.**—The complaint or declaration should show

And see *People v. Brislin*, 80 Ill. 423; *Ward v. Alton*, 23 Ill. App. 475; *Parks v. Miller*, 48 Ill. 360; *Schaeffer v. People*, 60 Ill. 179; *State v. Hamilton*, 94 Mo. 544; *Thatcher v. Powell*, 6 Wheat. (U. S.) 127. The complaint or petition must show the right to sue. *Bays v. Lapidge*, 52 Cal. 481.

In *Hills v. Chicago*, 60 Ill. 86, it was held that under the constitution of *Illinois*, the court could not render a judgment for the sale of real estate for taxes, upon an application of any other person than the officer whose duty it was to make such application. But in *Mix v. People*, 116 Ill. 265, it was held that where a suit to foreclose a tax lien was brought by an attorney at law occupying no official position, and nearly two years elapsed before the landowner entered a motion to dismiss the suit, for want of authority the motion would be overruled.

In *State v. Hill*, 70 Miss. 106, it was held that an action for taxes could not be maintained, where there was no one authorized to prosecute it.

It has been held in *Maine*, that the right of an officer to sue can be contested only by plea in abatement. *Kellar v. Savage*, 20 Me. 199.

1. See *State v. Hobart*, 12 Nev. 408; *State v. Central Pac. R. Co.*, 10 Nev. 47; *Beers v. People*, 83 Ill. 488; *People v. Central. Pac. R. Co.*, 43 Cal. 398.

It has been held in *Illinois*, that upon a refusal of the proper officer to act, the county board may institute the necessary proceedings. *Ward v. Alton*, 23 Ill. App. 475.

In *Nevada*, the attorney general has entire control of all tax suits on the part of the state. Other attorneys may appear with his consent, but not otherwise; but an attorney thus appearing, will be presumed to have done so with his consent, unless the contrary is shown. *State v. California Min. Co.*, 13 Nev. 203.

2. *People v. Central Pac. R. Co.*, 83

Cal. 393; *People v. California Pac., etc., R. Co.* (Cal. 1890), 23 Pac. Rep. 310. And see *Los Angeles v. Ballerino* (Cal. 1893), 32 Pac. Rep. 581.

Under the *Connecticut* statutes, a collector who has settled for taxes due the state, town, and city respectively, becomes entitled to all their liens, and should bring but one suit to enforce them. *Hart v. Tiernan*, 59 Conn. 521.

In *Wheeler v. Wilson*, 57 Vt. 157, it was held that an action by the collector against a delinquent taxpayer, is an action of *assumpsit*, under the *Vermont* statute, and that a count due the collector as an individual, may be joined with that for the tax in the same action.

3. *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633.

Under the *Nevada* statutes, taxes due the state on the proceeds of mines, for the different quarters of each year, cannot be united in the same cause of action; each separate tax, constitutes a separate and independent liability. *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220. And statutes providing that such taxes may be collected in the same manner as other taxes, do not prevent a quarterly collection, though other taxes are collected yearly. *State v. Eureka, etc., Min. Co.*, 8 Nev. 15; *State v. California Min. Co.*, 13 Nev. 203.

In *Missouri*, all lands owned by the same person may be included in one petition, and in one count thereof, for all taxes of all years remaining due and unpaid. See *State v. Rau*, 93 Mo. 126.

4. *People v. Central Pac. R. Co.*, 83 Cal. 393.

In *Shain v. Markham*, 4 J. J. Marsh. (Ky.) 578; 20 Am. Dec. 232, it was held to be error to issue a joint summons, in an action for taxes, against several delinquents, for failure to furnish the commissioners with a list of their taxable property.



a *prima facie* valid tax,<sup>1</sup> and the property against which,<sup>2</sup> and the person upon whom,<sup>3</sup> it is a charge. It should show the jurisdiction of the court over the subject-matter,<sup>4</sup> and that the

1. *Ottawa Gas Light, etc., Co. v. People*, 138 Ill. 336; *People v. Davis*, 112 Ill. 272. And see *Mix v. People*, 122 Ill. 641. But see *State v. Rau*, 93 Mo. 126.

In *People v. Central Pacific R. Co.*, 83 Cal. 393, it was held that the sufficiency of a complaint in an action to recover delinquent taxes, must be tested by the rules regulating pleadings in civil actions, notwithstanding special provisions therefor. See also *People v. California Pac. R. Co.* (Cal. 1890), 23 Pac. Rep. 310; *Putman v. Fife*, Lake Tp., 45 Mich. 125.

2. *People v. Central Pac. R. Co.*, 83 Cal. 393; *People v. California Pac. R. Co.* (Cal. 1890), 23 Pac. Rep. 310; *Vaughan v. Daniels*, 98 Mo. 230; *Vaughan v. Noyes* (Mo. 1889), 11 S. W. Rep. 574. And see *People v. Cone*, 48 Cal. 427; *Ottawa Gas Light, etc., Co. v. People*, 138 Ill. 336. Vagueness of description of the property taxed, in a tax bill, is fatal. *Jefferson v. Whipple*, 71 Mo. 519.

In *Pritchard v. Madren*, 24 Kan. 486, it was held that the omission of a description of the land and the name of the owner, from the title of a petition, does not render the judgment void, where the land is fully described in the body of the petition.

In *State v. Hannibal, etc., R. Co.*, 101 Mo. 136, it was held that it is sufficient to set out the number of miles owned by a railroad company in a designated county, but that the petition need not state the number of miles, if it gives the amount of the railroad tax levied against the road by the county.

3. *People v. Central Pac. R. Co.*, 83 Cal. 393; *People v. California Pac. R. Co.* (Cal. 1890), 23 Pac. Rep. 310; *Bowman v. People*, 114 Ill. 474. But see *Pritchard v. Madren*, 24 Kan. 486.

In *People v. Winkelman*, 95 Ill. 412, it was held that a declaration in an action for taxes, should allege that the defendant was the owner of the forfeited property at the time the tax was required to be assessed. See also *Biggins v. People*, 96 Ill. 381; *Bowman v. People*, 114 Ill. 474.

In *State v. Sloss*, 87 Ala. 119, it was held that a complaint in an action against an agent, for taxes assessed against his principal, must show that

the recovery is sought under the statute permitting it.

In *Pritchard v. Madren*, 24 Kan. 486, it was held that the failure to state the name of the true owner of the land, in a petition and judgment, does not vitiate the proceedings.

**Unknown Owners.**—In *State v. Staley*, 76 Mo. 158, it was held that where persons unknown are made parties defendant to a suit, for the collection of back taxes, it must be alleged in the petition and recited in an order of publication, that there are persons interested whose names are unknown, and their interests, and the manner in which they were interested, must be described so far as can be ascertained.

4. *People v. Davis*, 112 Ill. 272; *Ottawa Gas Light, etc., Co. v. People*, 138 Ill. 336; *People v. Central Pacific R. Co.*, 83 Cal. 393; *Rockland v. Farnsworth*, 83 Me. 228.

It must be made to appear that all the statutory requirements have been complied with. *North Tonawanda v. Western Trans. Co.*, 1 Sheld. (N. Y.) 371; *Young v. Lorain*, 11 Ill. 637; *Williams v. State*, 6 Blackf. (Ind.) 36. And see *Gregon v. Astor*, 2 How. (U. S.) 319. And the burden of proof rests with the complainant. *Hill v. Crompton*, 119 Mass. 376.

In *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272, it was held that the return of a marshal, that he has levied on lands by virtue of his warrant, is *prima facie* evidence that there were no goods or other chattels to levy on.

**Form of Complaint.**—The legislature has power to prescribe the form of complaint to be used in actions for the recovery of delinquent taxes. *Stockton v. Western Fire, etc., Ins. Co.*, 73 Cal. 621. And where the statute prescribes the necessary requisites of a good declaration, no other need be added. *Wheeler v. Wilson*, 57 Vt. 157.

In *State v. Rau*, 93 Mo. 126, it was held that the cause of action must be set out in the petition, and not in the tax bill. See also *Kentucky Cent. R. Co. v. Pendleton County* (Ky. 1886), 2 S. W. Rep. 176.

In *Ewing v. Robeson*, 15 Ind. 26, it was held that a tax duplicate is not such a written instrument as to make it necessary that a copy thereof should be

property is delinquent.<sup>1</sup> It need not aver how and by whom the levy and assessment were made;<sup>2</sup> nor need it negative defenses arising subsequent to the inception of the tax, as its remission, etc.<sup>3</sup>

Where one desires to object to the rendition of judgment against delinquent lands, he must show his interest in the property,<sup>4</sup> and, where exemption from taxation is relied upon, the facts which render the property exempt must be pleaded.<sup>5</sup> Objections to the form of pleading must be raised by demurrer.<sup>6</sup>

filed with a pleading based upon, or referring to it, under the *Indiana* code.

1. *People v. Central Pac. R. Co.*, 83 Cal. 393; *People v. California Pac. R. Co.* (Cal. 1890), 23 Pac. Rep. 310; *Lockhart v. Houston*, 45 Tex. 317; *Clegg v. State*, 42 Tex. 611.

A petition in a suit for the recovery of back taxes, should expressly allege that the land had been returned delinquent, or had been forfeited to the state; but where such facts may be gathered from its allegations, the petition will be good after verdict. *Wellshear v. Kelley*, 69 Mo. 343; *Ricker v. Brooks*, 155 Mass. 400.

In *Fisher v. People*, 84 Ill. 491, it was held that the notice of application for judgment against delinquent lands, should designate the years for which the taxes are unpaid, with such certainty, that one who reads it may readily determine for what year or years the taxes in any particular tract were delinquent. But in *Williams v. Hudson*, 93 Mo. 524, it was held that the omission to state one of the years for which taxes were due, in a notice of proceedings for the foreclosure of a tax lien for taxes of several years, is not material.

**Penalties.**—A complaint in an action for taxes to which a penalty has been added, must show how and when the defendant became indebted for the taxes, and how and when the penalty was added to the amount. *People v. Central Pac. R. Co.*, 83 Cal. 393.

**Demand and notice** must be shown where required. *Lockhart v. Houston*, 45 Tex. 317. And see *Mayhew v. Davis*, 4 McLean (U. S.) 213.

Under the *Maine* statute, a defendant in a tax suit is not liable for the costs of the action, or any part thereof, unless it appears that payment of the taxes had been duly demanded, prior to the commencement of the action, and refused. *York v. Goodwin*, 67 Me. 260.

2. *Lockhart v. Houston*, 45 Tex. 317; *Ottawa Gas Light, etc., Co. v. People*,

138 Ill. 336; *Kansas v. Johnson*, 78 Mo. 661. And see *People v. Todd*, 23 Cal. 181.

In *Vogel v. Vogler*, 78 Ind. 353, it was held that a complaint in an action for omitted taxes, afterwards placed upon the duplicate list for collection, must specifically aver by what officer and under what circumstances the assessment was made. See also *State v. Howard*, 80 Ind. 466.

3. *People v. Todd*, 23 Cal. 181; *Applin v. Slowman*, 84 Mich. 118.

4. *People v. Quick*, 87 Ill. 435.

In *Hess v. People*, 84 Ill. 247, it was held that the court has power to make a rule limiting the time for filing objections to judgment, against delinquent land, for taxes, and may enforce the same by refusing to entertain them after the expiration of the time fixed.

**Who May Move to Vacate.**—In *Swan v. Knoxville*, 11 Humph. (Tenn.) 130, it was held that one who was the owner of lands at the time the report of delinquency was made, has the right to appear and move the court to vacate a judgment rendered thereon.

5. See *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *Andrews v. People*, 75 Ill. 605; *Olcott v. State*, 10 Ill. 481.

6. *Ottawa Gas Light, etc., Co. v. People*, 138 Ill. 336; *St. Louis, etc., R. Co. v. Anthony*, 73 Mo. 431. And see *Sterling Gas Co. v. Higby*, 134 Ill. 557.

In *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, it was held that a demurrer may be interposed to a complaint in an action for the collection of delinquent taxes, upon any of the grounds of demurrer in ordinary civil actions.

**Amendments.**—In *Greer v. Covington*, 83 Ky. 410, it was held that the only limitations on the discretion of the court to permit the amendment of the pleadings in an action for taxes, is that the amendment must be in furtherance of justice, and must not substantially change the claim or defense.

It rests with the plaintiff to show a lawful levy<sup>1</sup> and assessment.<sup>2</sup> The requisite facts may be shown by the production of the records.<sup>3</sup>

The delinquent list or assessment roll is made by statute, in some states, *prima facie* evidence of the facts necessary to maintain the action.<sup>4</sup> The general presumption that a public officer has performed his duty, applies to the assessor and other revenue officers.<sup>5</sup> The burden of proof is upon the taxpayer, when he desires to dispute the truth of the facts shown by the record.<sup>6</sup>

(c) **Defenses.**—The legislature has power to limit the defenses which may be made to a tax suit,<sup>7</sup> but only so far as the defenses

1. *People v. Central Pac. R. Co.*, 83 Cal. 393; *People v. California Pac. R. Co.* (Cal. 1890), 23 Pac. Rep. 310; *Louisville v. Louisville Gas Co.* (Ky. 1893), 22 S. W. Rep. 550; *North Tonawanda v. Western Trans. Co.*, 1 Sheld. (N. Y.) 371.

2. *State v. Washoe County*, 14 Nev. 142; *People v. Central Pac. R. Co.*, 83 Cal. 393; *People v. California Pac. R. Co.* (Cal. 1890), 23 Pac. Rep. 310; *People v. Reynolds*, 28 Cal. 108; *People v. Cone*, 48 Cal. 427; *Holden v. Eaton*, 7 Pick. (Mass.) 15; *Lockhart v. Houston*, 45 Tex. 317; *Clegg v. State*, 42 Tex. 611. And see *People v. Flint*, 39 Cal. 670; *People v. Goldtree*, 44 Cal. 323.

3. See *Scott v. People* (Ill. 1892), 33 N. E. Rep. 180; *Hosmer v. People*, 96 Ill. 58; *Mix v. People*, 86 Ill. 313; *Bristol v. Chicago*, 22 Ill. 587; *Muskegon v. Martin Lumber Co.*, 86 Mich. 625; *Den v. Helmes*, 3 N. J. L. 600; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *San Gabriel Valley Land, etc., Co. v. Witmer*, 96 Cal. 623; *State v. Eureka, etc.*, Min. Co., 8 Nev. 15.

In *Hopper v. Malleeson*, 16 N. J. Eq. 382, it was held that a recital in a tax warrant of the words, "Whereas it appears to the mayor and aldermen of the city of Paterson that an assessment of four dollars was made against the estate of M.," was not legal evidence of the fact of an assessment and the demand of payment.

In *Mix v. People*, 122 Ill. 641, it was held that a tabulated statement prepared by a county clerk, containing a computation of the taxes due and unpaid as shown by the collector's books of certain towns, is admissible as evidence in a tax suit.

4. *People v. Donnelly*, 58 Cal. 144; *Modoc County v. Churchill*, 75 Cal. 172; *Durham v. People*, 67 Ill. 414; *Bristol v. Chicago*, 22 Ill. 587; *Hosmer v. People*, 96 Ill. 58; *Buck v. Peo-*

*ple*, 78 Ill. 560; *Mix v. People*, 81 Ill. 118; *Chiniquy v. People*, 78 Ill. 570; *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *People v. Givens*, 123 Ill. 352; *Fisher v. People*, 84 Ill. 491; *Putman v. Fife Lake Tp.*, 45 Mich. 125; *State v. Maloney*, 113 Mo. 367; *State v. Rau*, 93 Mo. 126. And see *Powers v. Penny*, 59 Miss. 5.

Such statutes are not unconstitutional. *Andrews v. People*, 75 Ill. 605; *Burbank v. People*, 90 Ill. 554.

In *Los Angeles v. Los Angeles Water Works Co.*, 49 Cal. 638, it was held that a delinquent list is not *prima facie* evidence of the correctness of the prior proceedings by which the tax was levied and assessed.

5. *Durham v. People*, 67 Ill. 414; *Mix v. People*, 86 Ill. 312; *Buck v. People*, 78 Ill. 560; *Scott v. People* (Ill. 1892), 33 N. E. Rep. 180; *Beers v. People*, 83 Ill. 488; *Mix v. People*, 81 Ill. 118; *Shelbyville Water Co. v. People*, 140 Ill. 545. And see *State v. Richardson*, 77 Mo. 589.

6. *Durham v. People*, 67 Ill. 414; *Mix v. People*, 86 Ill. 312; *Buck v. People*, 78 Ill. 560; *Chiniquy v. People*, 78 Ill. 570; *People v. Givens*, 123 Ill. 352; *Andrews v. Rumsey*, 75 Ill. 598; *Mix v. People*, 81 Ill. 118; *Sherrill v. Hewett*, 13 N. Y. Supp. 498; 59 Hun (N. Y.) 619. And see *Miller v. Hurford*, 13 Neb. 13; *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *Wattles v. Lapeer*, 40 Mich. 624.

In *Miller v. Hurford*, 13 Neb. 13, it was held that an answer which admits the assessment, but claims it to be illegal for certain causes therein set forth, shifts the burden of proof as to the assessment upon the party charging the illegality.

7. *People v. Wilkerson*, 1 Idaho 619; *State v. Central Pac. R. Co.*, 21 Nev. 260; *DeTreville v. Smalls*, 98 U. S. 517. And see *Mix v. People*, 116 Ill. 265;

excluded are based upon irregularities or formal defects.<sup>1</sup> In the absence of such legislative restrictions, any defense may be made to an action for taxes that could be made to an ordinary action.<sup>2</sup>

The absence of jurisdiction over the person or property taxed,<sup>3</sup> the fact that the property taxed was of right exempt from taxation,<sup>4</sup> the absence or illegality of an assessment,<sup>5</sup> or any

*Muskegon v. Martin Lumber Co.*, 86 Mich. 625.

But the pendency of an application for a judgment against lands for taxes of a prior year is a good defense against the rendition of judgment for the same taxes on a subsequent application. *Andrews v. People*, 75 Ill. 605.

The burden of proof is upon the taxpayer to show that the informality which prevented the collection of a tax of a previous year still exists, in an action for its collection in a subsequent year. *People v. Chicago, etc., R. Co.*, 140 Ill. 210.

The legislature has the power to provide that a former recovery shall not constitute a defense to an action to recover taxes. *State v. Central Pac. R. Co.*, 21 Nev. 260.

In *Biggins v. People*, 106 Ill. 270, it was held that a judgment in a suit at law, which exonerated the defendant from liability for back taxes, penalties, interest and costs, does not bar a suit in equity to enforce the statutory lien on the land for the same taxes, penalties, costs, etc.

In *People v. Chicago, etc., R. Co.*, 140 Ill. 210, it was held that under a statute providing that where the collection of taxes is prevented by any erroneous proceeding, the amount of such taxes may be added to the taxes on such property for any subsequent year, the judgment rendered in favor of a delinquent taxpayer on account of an informality in the assessment, is no bar to an application for judgment for the same taxes the following year.

1. See *State v. Central Pac. R. Co.*, 21 Nev. 260; *State v. Central Pac. R. Co.*, 21 Nev. 247; *State v. Central Pac. R. Co.*, 21 Nev. 94; *People v. Central Pac. R. Co.*, 83 Cal. 393; *People v. Wilkerson*, 1 Idaho 619; *De Treville v. Smalls*, 98 U. S. 517.

A law authorizing a judicial proceeding, by which rights of property might be divested or affected, without giving the owner the right to contest, every material allegation involved therein, would deprive him of his prop-

erty without due process of law. *Wilburn v. McCalley*, 63 Ala. 436. And see *Calhoun v. Fletcher*, 63 Ala. 574.

2. See *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *State v. Central Pac. R. Co.*, 21 Nev. 260; *Aplin v. Sloman*, 84 Mich. 118; *Redwood County v. Winona, etc., Land Co.*, 40 Minn. 512; *St. Louis County v. Nettleton*, 22 Minn. 356; *Houston County v. Jessup*, 22 Minn. 552; *Olmsted County v. Barber*, 31 Minn. 256; *Chisago County v. St. Paul, etc., R. Co.*, 27 Minn. 109.

3. *McCrillis v. Mansfield*, 64 Me. 198.

Evidence in a tax suit, that the defendant had retired from the firm on which the tax was imposed, before it was assessed, and thereafter retained no interest in the firm or in the property taxed, is admissible, under a general denial. *Washburn v. Walworth*, 133 Mass. 499.

The collector's return of service indorsed on the notice in an action for taxes, is not conclusive on the owner, and he may show that in fact he was not served. *Riddle v. Messer*, 84 Ala. 236.

4. *Burcham v. Terry*, 55 Ark. 398; *State v. Wesleyan Cemetery Assoc.*, 11 Mo. App. 560; *State v. Central Pac. R. Co.*, 21 Nev. 247. And see *Houston County v. Jessup*, 22 Minn. 552.

The fact that lands against which taxes are sought to be enforced, are exempt from taxation, does not affect the jurisdiction of the court in which proceedings are brought to try and determine the legality of the tax, under the *Minnesota* statute, *Chisago County v. St. Paul, etc., R. Co.*, 27 Minn. 109; and the court may refuse to set aside a judgment for taxes on that ground. *Aitkin County v. Morrison*, 25 Minn. 295.

In *Scholefield v. West*, 44 La. Ann. 277, it was held that a taxpayer who pays taxes upon his property assessed in the name of some other person, is estopped from disputing the correctness of the assessment.

5. *People v. Nichols*, 49 Ill. 517; *Oteri v. Parker*, 42 La. Ann. 374; *Davis v. Vanarsdale*, 59 Miss. 367;

other defect rendering the tax wholly invalid,<sup>1</sup> is always a good defense.

Payment of the tax before suit is a bar to a recovery;<sup>2</sup> but payment under an illegal assessment, is no bar to a recovery, founded upon a subsequent valid assessment.<sup>3</sup> Matters which could and should have been set up at an earlier stage of the proceedings and before action brought, are not, as a rule, available by way of defense to the action for the recovery of the tax.<sup>4</sup>

A party resisting judgment against his property for taxes, cannot raise an objection which does not apply to his property, but only to that of others who do not object;<sup>5</sup> nor can he plead a set-off.<sup>6</sup> Upon a suit for the collection of taxes, the validity

*Adams v. Vicksburg Bank* (Miss. 1890), 10 So. Rep. 102; *State v. Central Pac. R. Co.*, 7 Nev. 99; *Western R. Co. v. Nolan*, 48 N. Y. 513.

A defective assessment roll may be introduced on the trial of a tax suit, to show that the taxes were not legally assessed; but it cannot avail in a collateral attack on a judgment. *Eitel v. Foote*, 39 Cal. 439.

1. See *Otter Tail County v. Batchelder*, 47 Minn. 512; *St. Louis County v. Nettleton*, 22 Minn. 356; *St. Louis County v. Smith*, 22 Minn. 356; *Nashville v. Weiser*, 54 Ill. 246; *Blanchard v. Powers*, 42 Mich. 619; *Silsbee v. Stockle*, 44 Mich. 561.

2. *Chauncey v. Wass*, 35 Minn. 1; *McDougall v. Brazil*, 83 Ind. 211; *Driggers v. Cassady*, 71 Ala. 529; *Pope v. Macon*, 23 Ark. 644; *Craig v. Flanagan*, 21 Ark. 319; *Powers v. Penny*, 59 Miss. 5; *Davis v. Vanarsdale*, 59 Miss. 367. And see *supra*, this title, *Payment*.

But the tender must be of the whole amount due. See *Driggers v. Cassady*, 71 Ala. 529. And see *supra*, this title, *Payment*.

3. *North Carolina R. Co. v. Alamanace*, 82 N. Car. 262; *Wilmington R. Co. v. Brunswick County*, 72 N. Car. 10; *Wilmington Bridge Co. v. New Hanover Co.*, 72 N. Car. 15; *Richmond, etc., R. Co. v. Brogden*, 74 N. Car. 707; *Wayne v. Savannah*, 56 Ga. 488.

4. See *Mix v. People*, 116 Ill. 265; *English v. People*, 96 Ill. 566; *Lehman v. Robinson*, 59 Ala. 220; *People v. Whyler*, 41 Cal. 351; *Rockland v. Rockland Water Co.*, 82 Me. 188; *Boothbay v. Race*, 68 Me. 351; *State v. Sadler*, 21 Nev. 13; *Matter of McLean* (Supreme Ct.), 6 N. Y. Supp. 230.

It is no defense to an application for judgment against delinquent lands,

that the taxes are high, where there is no unfairness or injustice in the assessment, and no inequality in the taxes imposed. *Buck v. People*, 78 Ill. 560; *Spencer v. People*, 68 Ill. 510.

In *Houston County v. Jessup*, 22 Minn. 552, it was held that the objection that the county commissioners did not designate the paper in which the list of taxes should be published, was not a proper matter for answer in proceedings to enforce the payment of a tax; but should be made by objection on motion to dismiss the proceedings before answering.

In *Clayton v. Chicago*, 44 Ill. 280, it was held that the question as to whether the collector gave notice that he would levy on personal property in default of the tax, and as to the sufficiency of the notice if given, is wholly immaterial, on an application for judgment against lands for taxes.

In *Lehman v. Robinson*, 59 Ala. 220, it was held that where complaint is made that an assessment is excessive or illegal, it should not be collected by coercive process until the county commissioners have acted in the case, but upon their failure to do so, the courts may be called upon to redress the wrong.

5. *Buck v. People*, 78 Ill. 560; *Chiniquy v. People*, 78 Ill. 570; *Gage v. Busse*, 7 Ill. App. 433.

Thus, a misdescription or defective description of a tract of land by an assessor, will not affect the tax imposed upon other tracts. *Buck v. People*, 78 Ill. 560. Nor will the omission of other property in the same jurisdiction. *Spencer v. People*, 68 Ill. 510.

6. *Morris v. Tainier*, 39 La. Ann. 47; *Wayne v. Savannah*, 56 Ga. 448; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *Apperson v. Memphis*, 2 Flip. (U. S.)

of the organization of the municipality imposing the tax cannot be attacked.<sup>1</sup>

In some cases, statutes of limitation have been held to apply to actions for the recovery of taxes;<sup>2</sup> while in others, it has been held that, though the statute applies to suits by municipalities, it does not apply to an action by the state.<sup>3</sup> On the other hand, it has been held that actions for the recovery of taxes are proceedings for the enforcement of a public right, against which no statute of limitation runs.<sup>4</sup>

(d) *Application for Judgment.*—An application for judgment must be made at the time named in the notice; previous to that time the

364. And see *supra*, this title, *Taxes Distinguished from Debts*.

He cannot plead set-off against the collector personally any more than against the state. *Humphreys v. Patton*, 21 W. Va. 220.

In *Dorsett v. Brown*, 83 Ga. 581, it was held that where tax executions belong to the tax collector after the expiration of his term of office, they are subject to existing equities between him and the taxpayer, and he or his personal representatives may, in a proper case, be perpetually enjoined from enforcing them.

1. See *Wabash, etc., R. Co. v. Drainage Dist.*, 134 Ill. 384; *St. Louis v. Shields*, 62 Mo. 247; *Mendenhall v. Burton*, 42 Kan. 570; *Briggs v. Whipple*, 7 Vt. 15; *Burt v. Winona, etc., R. Co.*, 31 Minn. 472.

Nor can the regularity of the collector's election or appointment be questioned. *Odiorne v. Rand*, 59 N. H. 504; *Law v. People*, 87 Ill. 385; *Sullivan v. State*, 66 Ill. 75.

2. See *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Burlington v. Burlington, etc., R. Co.*, 41 Iowa 134; *Rich v. Tuckerman*, 121 Mass. 222; *Condon v. Maynard*, 71 Md. 601; *Gunther v. Baltimore*, 55 Md. 457; *Redwood County v. Winona, etc., L. Co.*, 40 Minn. 512; *San Francisco v. Luning*, 76 Cal. 610; *Los Angeles County v. Ballerino* (Cal. 1893), 32 Pac. Rep. 581; *Brown v. Porter*, 7 Humph. (Tenn.) 373; *San Francisco v. Jones*, 20 Fed. Rep. 188.

The statute runs from the time the tax becomes due and payable. *Condon v. Maynard*, 71 Md. 601.

A promise of payment takes a tax out of the statute, the same as in the case of an ordinary claim. *Perkins v. Dyer*, 71 Md. 421.

In the absence of a Statute of Limitations, applicable to a claim for taxes due, there is no bar to such claim, short of the presumption of payment after the lapse of twenty years. *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546.

In *Los Angeles County v. Ballerino* (Cal. 1893), 32 Pac. Rep. 581, it was held that a cause of action for delinquent taxes is not within the Statute of Limitations with reference to contract obligations, but must be brought within the time provided for action on a liability created by statute.

Penalties imposed for delay in the payment of taxes, fall within statutes of limitations applicable to the recovery of penalties in ordinary actions. *Louisville, etc., R. Co. v. Com.*, 85 Ky. 198.

Statutory provisions that the administrator shall not be held to answer to the suit of any creditor of the deceased, unless it is commenced within two years from the time of his qualification, are applicable to suits for taxes. *Rich v. Tuckerman*, 121 Mass. 222.

3. See *Brown v. Painter*, 44 Iowa 368; *Des Moines v. Harker*, 34 Iowa 84; *State v. Henderson*, 40 Iowa 242; *Jefferson v. Whipple*, 71 Mo. 519.

4. *Greenwood v. La Salle*, 137 Ill. 225. And see *McKenzie v. Wooley*, 39 La. Ann. 944; *Reed v. His Creditors*, 39 La. Ann. 115.

In *Mercier v. New Orleans*, 42 La. Ann. 1135, it was held that a judgment for city taxes is not a money judgment, does not possess the attributes of an ordinary judgment, and is not covered by the prescription of judgment defined in the civil code.

In *Leeds v. Hardy*, 43 La. Ann. 810, it was held that the securities for the payment of city taxes are prescriptible, though the tax itself is imprescriptible.

court has no jurisdiction.<sup>1</sup> The statute must be complied with in the application for and rendition of judgment.<sup>2</sup>

(5) *The Determination*—(a) *In Actions in Personam*.—An ordinary money judgment terminates a personal action for taxes.<sup>3</sup> This judgment is enforced, like an ordinary judgment, by execution.<sup>4</sup> No additional force attaches to the judgment from its having been rendered for taxes.<sup>5</sup>

(b) *In Actions in Rem*.—In actions *in rem* the judgment<sup>6</sup> and execution<sup>7</sup> are against the property itself. To enable the court to render judgment, the record must affirmatively show facts necessary to the jurisdiction.<sup>8</sup>

The form of the judgment, and its recitals, when prescribed by statute, must be substantially complied with;<sup>9</sup> but the judg-

1. *Pickett v. Hartsock*, 15 Ill. 279; *Brown v. Hogle*, 30 Ill. 119; *Spurlock v. Dougherty*, 81 Mo. 171. And see *People v. Nichols*, 49 Ill. 517; *Kinney v. Forsythe*, 96 Mo. 414.

Up to that time, the owner has a right to, pay the taxes charged upon the property. *Pickett v. Hartsock*, 15 Ill. 279.

In *Chouteau v. Hunt*, 44 Minn. 173, it was held that the service of the notice and delinquent list is complete with the last publication, and that jurisdiction then attaches, and that therefore a judgment entered twenty days after the last publication is not void, though erroneous. See also *Kipp v. Collins*, 33 Minn. 394.

*Application at Subsequent Term*.—In *Beers v. People*, 83 Ill. 488, it was held that under the *Illinois* statute, the collector may apply for judgment against lands for taxes at the May term; and if for any cause it is not made, or judgment is not recovered at that term, he may apply at any subsequent term. See also *People v. Nichols*, 49 Ill. 517.

2. *Brown v. Hogle*, 30 Ill. 119; *Spellman v. Curtenius*, 12 Ill. 409; *Hough v. Hastings*, 18 Ill. 312; *Marsh v. Chesnut*, 14 Ill. 223; *Hope v. Sawyer*, 14 Ill. 254; *Dukes v. Rowley*, 24 Ill. 210; *Essington v. Neill*, 21 Ill. 139; *Morgan v. Camp*, 17 Ill. 175; *Lane v. Bommelmann*, 21 Ill. 143.

Where a decree is entered without authority, it cannot be subsequently validated by entering the affidavit. *Simms v. Greer*, 80 Ala. 263.

3. *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64; *Greenwood v. La Salle*, 137 Ill. 225.

4. *Byrne v. La Salle*, 123 Ill. 581.

The judgment in a personal action for a tax when obtained, is purely

personal, and may be levied on any property of the defendant, liable to execution. *Greenwood v. La Salle*, 137 Ill. 225; *Douthett v. Kettle*, 104 Ill. 356.

5. *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64; *Byrne v. La Salle*, 123 Ill. 581; *Greenwood v. La Salle*, 137 Ill. 225.

Such a judgment cannot be satisfied by a sale as under a judgment in a proceeding *in rem*. *Byrne v. La Salle*, 123 Ill. 581.

6. *Allen v. McCabe*, 93 Mo. 135; *Pidgeon v. People*, 36 Ill. 249. And see *St. John v. East St. Louis*, 50 Ill. 92; *Chesnut v. Marsh*, 12 Ill. 173.

In *Chesnut v. Marsh*, 12 Ill. 173, it was held that a judgment for taxes cannot be impeached because rendered against the owner as well as against the land; that part of it charging the owner will be regarded as surplusage.

7. *Allen v. McCabe*, 93 Mo. 138. And see *Brown v. Joliet*, 22 Ill. 125; *Pidgeon v. People*, 36 Ill. 249.

8. *Carlisle v. Watts*, 78 Ala. 486; *Driggers v. Cassady*, 71 Ala. 529; *Gunn v. Howell*, 27 Ala. 663; 42 Am. Dec. 785; *Territory v. Delinquent Tax List* (Arizona, 1887), 21 Pac. Rep. 888; *Young v. Lorain*, 11 Ill. 637; *Kinney v. Forsythe*, 96 Mo. 414.

Where power to maintain an action for taxes is conferred upon a court of special and limited jurisdiction, the powers conferred are special and limited; and to sustain a decree, the record must affirmatively show jurisdiction both of the subject-matter and of the person. *Carlisle v. Watts*, 78 Ala. 486.

9. *Kipp v. Collins*, 33 Minn. 394; *Gilfillan v. Hobart*, 34 Minn. 67; *Chesnut v. Marsh*, 12 Ill. 173; *Mix v. People*, 81 Ill. 118. And see *Allen v. McCabe*, 93 Mo. 138; *German-American Bank v. White*, 38 Minn. 471.

ment may be amended as to matters of form and immaterial errors.<sup>1</sup>

The judgment must be certain,<sup>2</sup> and must correspond in amount with the delinquent tax specified in the return, notice, or complaint.<sup>3</sup> The amount for which the judgment is rendered must appear from the judgment itself, without reference to other sources.<sup>4</sup>

The judgment must describe the lands against which it is rendered.<sup>5</sup> Usually the description must conform to that of the

A judgment subjecting the lands of non-residents to sale for the payment of delinquent taxes, which follows the form prescribed by statute, and recites that notice has been given as required by law, is sufficient, even though the landowner was entitled to notice by publication in a newspaper published in the county in which the lands lie. *Driggers v. Cassady*, 71 Ala. 529.

**Mere irregularities and formal defects** will not vitiate the judgment, if it is substantially correct. *Chesnut v. Marsh*, 12 Ill. 173.

**Name of Defendant.**—A material mistake in the name of the defendant is fatal to the judgment. *Simonson v. Dolan*, 114 Mo. 176.

**Time of Payment.**—In *Mix v. People*, 116 Ill. 265, it was held that a decree of foreclosure of a tax lien should fix a certain time within which the amount found due may be paid, so that the parties interested may make payment, and thus avoid a sale.

1. *Atkins v. Hinman*, 7 Ill. 437.

In *Walsh v. People*, 79 Ill. 521, it was held that in proceedings for judgment against delinquent lands for taxes, all amendments which could be made by law, in any ordinary action, may be allowed.

2. *Tidd v. Rines*, 26 Minn. 201; *Pittsburgh, etc., R. Co. v. Chicago*, 53 Ill. 80. And see *Brady v. Seaman*, 30 Cal. 610; *People v. San Francisco Sav. Union*, 31 Cal. 132; *Dukes v. Rowley*, 24 Ill. 210; *Cook v. Norton*, 43 Ill. 391; *Lane v. Bommelmenn*, 21 Ill. 143; *Eppinger v. Kirby*, 23 Ill. 521; 76 Am. Dec. 709; *Lawrence v. Fast*, 20 Ill. 338; 71 Am. Dec. 274; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400.

3. *People v. Nichols*, 49 Ill. 517; *Pitkin v. Yaw*, 13 Ill. 251; *Gage v. Williams*, 119 Ill. 563; *McLaughlin v. Thompson*, 55 Ill. 249; *Elsev v. Falconer*, 56 Ark. 419. And see *Alexandria v. Chapman*, 4 Hen. & M. (Va.) 270; *Mann v. People*, 102 Ill. 346.

In *Jackson v. Cummings*, 15 Ill. 449, it was held that a difference of a quarter of a cent between the delinquent list and the judgment, will not vitiate the proceedings, where all the particulars are truly described. And in *Drake v. Ogden*, 128 Ill. 603, it was held that an illegal item in a tax judgment will invalidate a sale thereunder, even though it constitutes a very small portion of the judgment.

**Costs may be Added.**—In *Merritt v. Thompson*, 13 Ill. 716, it was held that it is not improper, in a suit for taxes, to enter a judgment for costs generally, as in ordinary cases; and in case of such entry of judgment, it will be regarded as a judgment for such amount of costs as are legally chargeable against the land.

4. *Eppinger v. Kirby*, 23 Ill. 521; 76 Am. Dec. 709; *Lawrence v. Fast*, 20 Ill. 338; 71 Am. Dec. 274; *Lane v. Bommelmenn*, 21 Ill. 143; *People v. San Francisco Sav. Union*, 31 Cal. 132; *Woods v. Freeman*, 1 Wall. (U. S.) 398. And see *Merritt v. Thompson*, 13 Ill. 716; *Allen v. McCabe*, 93 Mo. 138.

Mere numerals in the judgment, without some mark indicating that they stand for money, are insufficient. *Woods v. Freeman*, 1 Wall. (U. S.) 398; *Lane v. Bommelmenn*, 21 Ill. 143; *Lawrence v. Fast*, 20 Ill. 338; 71 Am. Dec. 274; *Baily v. Doolittle*, 24 Ill. 577; *Dukes v. Rowley*, 24 Ill. 210; *Potwin v. Oades*, 45 Ill. 366; *Eppinger v. Kirby*, 23 Ill. 521; 76 Am. Dec. 709; *Pittsburgh, etc., R. Co. v. Chicago*, 53 Ill. 80; *Elston v. Kennicott*, 46 Ill. 187; *Tidd v. Rines*, 26 Minn. 201. But see *State v. Eureka, etc., Min. Co.*, 8 Nev. 15; *Cahoon v. Coe*, 52 N. H. 518.

5. *Sanford v. People*, 102 Ill. 374; *People v. Chicago, etc., R. Co.*, 96 Ill. 369; *People v. Dragstran*, 100 Ill. 286; *Mix v. People*, 116 Ill. 265; *Driggers v. Cassady*, 71 Ala. 529. And see *Bower v. O'Donnall*, 29 Minn. 135;



assessment and other previous proceedings.<sup>1</sup> Although not technically correct, if the description is that by which the land is commonly known, it may be sufficient.<sup>2</sup> Latent ambiguities may be cured by extrinsic evidence.<sup>3</sup>

Where the interests of different persons have been assessed separately, and some have paid the taxes as assessed, the judgment should designate the different interests.<sup>4</sup> The judgment should be against each lot or parcel of land assessed, and not against several parcels in the aggregate,<sup>5</sup> though it has been held that a defect in this respect does not go to the jurisdiction.<sup>6</sup>

*Kipp v. Fernhold*, 37 Minn. 132; *Keith v. Hayden*, 26 Minn. 212; *State v. Hunter*, 98 Mo. 386.

It is sufficient if the description is such that the land can be located by one acquainted with plats and surveys. *Brown v. Walker*, 85 Mo. 262. And see *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

Figures and abbreviations may be used to designate lands against which judgment for taxes is asked, but they must be so certain that the definite locality can be given them. *Olcott v. State*, 10 Ill. 481.

A bill to correct defective description will not lie. *Mix v. People*, 116 Ill. 265.

1. *Mix v. People*, 116 Ill. 265; *Driggers v. Cassady*, 71 Ala. 529; *Smith v. State*, 5 Blackf. (Ind.) 65; *Feller v. Clark*, 36 Minn. 338. And see *Henderson v. White*, 69 Tex. 103; *McCormick v. Edwards*, 69 Tex. 106; *Chouteau v. Hunt*, 44 Minn. 173.

In *Chiniquy v. People*, 78 Ill. 570, it was held that there is no variance where the judgment describes a third part of a tract and the delinquent list describes the whole tract, the presumption being that the taxes had been paid upon the remaining two-thirds, before judgment.

2. *Gilfillan v. Hobart*, 34 Minn. 67; *St. Peter's Church v. Scott County*, 12 Minn. 280; *Stewart v. Colter*, 31 Minn. 385.

In *Spellman v. Curtenius*, 12 Ill. 409, it was held that if the judgment describing the lands to be sold for taxes, shows the year for which the taxes are due, it is sufficient, and need not show the name of the patentee or owner, nor the valuation, nor the county in which it lies.

3. *Brown v. Walker*, 85 Mo. 262; *Driggers v. Cassady*, 71 Ala. 529.

Parol evidence has been allowed in aid of the identification of the property taxed, thus rendering certain what might otherwise be ambiguous. *Ellis v. Mar-*

*tin*, 60 Ala. 394; *Clements v. Pearce*, 63 Ala. 284; *People v. Leet*, 23 Cal. 162; *People v. Crockett*, 33 Cal. 150.

In *Brown v. Walker*, 85 Mo. 262, it was held that an imperfect description of land contained either in a tax bill, judgment, execution, or sheriff's deed, may be made certain by extrinsic evidence, if the ambiguity is latent and susceptible of explanation.

4. *People v. Shimmins*, 42 Cal. 121.

In *State v. Rand*, 39 Minn. 502, it was held to be error to enter judgment for the whole amount of the tax, upon a credit consisting of a part of the purchase price of land formerly owned in common, against those only who were served and have appeared.

5. *Pitkin v. Yaw*, 13 Ill. 251; *Mix v. People*, 116 Ill. 265; *Olcott v. State*, 10 Ill. 481; *Brown v. Walker*, 85 Mo. 262; 11 Mo. App. 226; *Howard v. Stevenson*, 11 Mo. App. 410; *State v. Kerr*, 8 Mo. App. 125; *State v. Illinois, etc., R. Co.*, 8 Mo. App. 599, note; *Brockschmidt v. Cavender*, 3 Mo. App. 568, note; *Edmonson v. Galveston*, 53 Tex. 157. And see *Kipp v. Fernhold*, 37 Minn. 132; *St. Louis, etc., R. Co. v. State*, 47 Ark. 323.

Where the judgment reserves the findings for the particulars as to the amount charged as a lien on each tract, it is sufficient. *State v. Hunter*, 98 Mo. 386.

A judgment that certain lands be sold for taxes assessed against them, amounts to a finding of the tax due on each tract. *Mix v. People*, 81 Ill. 118.

**Description.**—If the description as to one or more of several tracts is void for uncertainty, a decree will be erroneous, and the uncertainty will vitiate the sale as to the other tracts. *Mix v. People*, 116 Ill. 265.

6. *Brown v. Walker*, 11 Mo. App. 226; 85 Mo. 262; *Jones v. Driskill*, 94 Mo. 190; *State v. Kerr*, 8 Mo. App. 125. And see *Howard v. Stevenson*, 11 Mo. App. 410; *State v. Hunter*, 98 Mo. 386.

(c) **Penalties and Costs.**—Where the recovery of the penalty, as well as the tax, is expressly authorized,<sup>1</sup> it may be included in the judgment as a part of the amount recovered.<sup>2</sup>

It has been held that provisions allowing costs against the taxpayer are not unconstitutional.<sup>3</sup> Only such costs can be allowed as are provided for by statute.<sup>4</sup>

(d) **Validity and Effect.**—The validity of a judgment in a tax suit is determined by the rules which govern a judgment in an ordinary action; the judgment is subject to the same mode of attack,<sup>5</sup> and the same presumptions are indulged in its favor.<sup>6</sup> If the court has jurisdiction, it is as binding upon the parties as any other judgment.<sup>7</sup> It is conclusive, and not subject to collateral

The title of a purchaser under such a judgment, is not affected. *Jones v. Driskill*, 94 Mo. 190.

In *Job v. Tebbetts*, 10 Ill. 376, it was held that a precept issued upon a judgment against lands for taxes, need not contain a list of the lands ordered to be sold. See also *Manly v. Gibson*, 14 Ill. 136.

1. See *People v. Todd*, 23 Cal. 181; *People v. Smith*, 94 Ill. 226.

2. *Bristol v. Chicago*, 22 Ill. 587; *People v. Smith*, 94 Ill. 226; *State v. California Min. Co.*, 15 Nev. 234; *State v. California Min. Co.*, 15 Nev. 259; *Potts v. Cooley*, 56 Wis. 45; *Arnold v. Juneau County*, 43 Wis. 627.

3. *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521. And see *State v. California Min. Co.*, 13 Nev. 289; *Cheever v. Merritt*, 5 Allen (Mass.) 563.

In *State v. Illinois, etc., Bridge Co.*, 8 Mo. App. 599, it was held that collectors' and attorneys' fees are properly charged as costs, in a suit to enforce a lien for taxes, though the taxes, interest, and court costs are paid after the suit and before the sale.

**Costs not Allowed Defendant.**—In *People v. Moore*, 1 Idaho 662, it was held that in a suit for taxes, although the defendant recovers, the judgment should be general, without costs.

4. See *Potts v. Cooley*, 56 Wis. 45; *Kent v. Atlantic DeLaine Co.*, 8 R. I. 305.

Under the *Maine* statutes, the plaintiff cannot recover costs in an action for taxes, in the absence of proof of a demand made upon the defendant before the action was brought. *Topsham v. Blondell*, 82 Me. 152.

In *State v. Duncan*, 6 Lea (Tenn.) 679, it was held that under the *Tennessee* statute, the complainants in an action to foreclose a tax lien are entitled

to costs up to and including the condemnation only.

5. *Eitel v. Foote*, 39 Cal. 439; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *Mayo v. Ah Loy*, 32 Cal. 477; *Brown v. Walker*, 85 Mo. 262; *Hogan v. Smith*, 11 Mo. App. 314.

6. *Allen v. McCabe*, 93 Mo. 138; *Brown v. Walker*, 85 Mo. 262; *Hogan v. Smith*, 11 Mo. App. 314; *Willshear v. Kelley*, 69 Mo. 343; *Wertz v. Wertz*, 11 Mo. App. 26; *McCarter v. Neil*, 50 Ark. 188; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *McGregor v. Morrow*, 40 Kan. 730; *Pritchard v. Madren*, 31 Kan. 52; *Mix v. People*, 81 Ill. 118; *Pulaski v. Stewart*, 28 Gratt. (Va.) 879; *Falkner v. Guild*, 10 Wis. 572; *Harvey v. Tyler*, 2 Wall. (U. S.) 332.

No extraordinary or special power of jurisdiction is conferred upon courts, by giving them jurisdiction in tax cases. It is merely an additional remedy or cause of action, by which they may, on certain conditions, foreclose a tax lien. *English v. Woodman*, 40 Kan. 412; *McGregor v. Morrow*, 40 Kan. 730.

In *English v. Woodman*, 40 Kan. 412, it was held that the jurisdiction of the court to render judgment, is not affected by an omission to file proof of service of notice by publication, and obtain its approval by the court, where such publication was actually made.

7. *Warren v. Cook*, 116 Ill. 199; *Graceland Cemetery Co. v. People*, 92 Ill. 619; *Buckmaster v. Carlin*, 4 Ill. 104; *Swiggart v. Harter*, 5 Ill. 364; *Buckmaster v. Ryder*, 12 Ill. 207; *Wimberly v. Hurst*, 33 Ill. 166; 87 Am. Dec. 295; *Driggers v. Cassady*, 71 Ala. 529; *Mayo v. Ah Loy*, 32 Cal. 477; *English v. Woodman*, 40 Kan. 412. And see *Brown v. Hogle*, 30 Ill. 119; *Gray v. Bowles*, 74 Mo. 419; *State v. Sargent*, 12 Mo. App. 228; *Young v. Lorain*, 11

attack.<sup>1</sup> But want of jurisdiction invalidates it, and may be shown;<sup>2</sup> and if the tax is void, the judgment also may be

Ill. 624; *Wellshear v. Kelley*, 69 Mo. 343; *Swan v. Knoxville*, 11 Humph. (Tenn.) 130.

Former proceedings for taxes for years prior to those involved in a proceeding of the present year, though presenting the same questions, are not to be deemed *res adjudicata* as to the present year. *Lake Shore, etc., R. Co. v. People*, 46 Mich. 193.

**Personal Judgment Precludes Sale.**—

After the personal judgment for taxes has been rendered, the tax debtor cannot inaugurate the proceedings to have his land sold to the highest bidder, and thereby relieve himself from personal liability to pay the taxes. *Byrne v. La Salle*, 123 Ill. 581.

**Change of the Law.**—Where a statute, under which a decree for taxes was rendered, is repealed, and other taxes are levied under subsequent statutes, the decree cannot be admitted as an estoppel in an action for the recovery of subsequent taxes. *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 632. And see *Richman v. Muscatine County*, 77 Iowa 513.

1. *Mix v. People*, 116 Ill. 265; *Grace-land Cemetery Co. v. People*, 92 Ill. 619; *Job v. Tebbetts*, 10 Ill. 376; *Drake v. Ogden*, 128 Ill. 603; *People v. Smith*, 94 Ill. 226; *Rigg v. Cook*, 9 Ill. 336; 46 Am. Dec. 462; *Driggers v. Cassady*, 71 Ala. 529; *Riddle v. Messer*, 84 Ala. 236; *Eitel v. Foote*, 39 Cal. 439; *Mayo v. Ah Loy*, 32 Cal. 477; *Hogan v. Smith*, 11 Mo. App. 314; *Wellshear v. Kelley*, 69 Mo. 343; *Jones v. Driskill*, 94 Mo. 190; *Kent v. Brown*, 38 La. Ann. 802; *Aplin v. Sloman*, 84 Mich. 118. And see *McCarter v. Neil*, 50 Ark. 188; *Chesnut v. Marsh*, 12 Ill. 173; *People v. Smith*, 94 Ill. 226; *Chicago Theological Seminary v. Gage*, 12 Fed. Rep. 398.

The fact that a single judgment was rendered against distinct lands in a back tax suit, cannot be shown by parol evidence in an ejectment suit for the purpose of impeaching the judgment. *Brown v. Walker*, 85 Mo. 262.

The validity of a judgment rendered in a tax suit cannot be attacked in a collateral proceeding, by showing that a portion of the taxes sued for were barred by the Statute of Limitations. *Wellshear v. Kelley*, 69 Mo. 343.

The amount of costs on a tax sale cannot be made a question, when the

judgment comes collaterally in issue. *Spellman v. Curtenius*, 12 Ill. 409. And see *Merritt v. Thompson*, 13 Ill. 716.

In *Glass v. White*, 5 Sneed (Tenn.) 475, it was held that a provision making all the judgments or orders of sale for taxes, conclusive, unless it was shown that the taxes were duly paid before such judgment or order of sale was rendered, embraces public taxes only, and has no application to tax sales by municipal corporations.

2. *Brown v. Hogle*, 30 Ill. 119; *Buckmaster v. Carlin*, 4 Ill. 104; *Spellman v. Curtenius*, 12 Ill. 409; *Fleming v. McGee*, 81 Ala. 409; *Kipp v. Collins*, 33 Minn. 394. And see *Pickett v. Hartsock*, 15 Ill. 282; *Morgan v. Camp*, 16 Ill. 175; *Fortman v. Ruggles*, 58 Ill. 207; *McGregor v. Morrow*, 40 Kan. 730; *English v. Woodman*, 40 Kan. 412; *Vaughan v. Daniels*, 98 Mo. 230; *Vaughan v. Moyer* (Mo. 1889), 11 S. W. Rep. 574; *Voorhees v. Bank of U. S.*, 10 Pet. (U. S.) 468; *Thompson v. Tolmie*, 2 Pet. (U. S.) 162; *Kemp v. Kennedy*, 5 Cranch (U. S.) 173.

Want of jurisdiction of the court, to render a tax judgment, may be shown by evidence *de hors* the record. *Brown v. Corbin*, 40 Minn. 508; *Chauncey v. Wass*, 35 Minn. 1; *Eastman v. Linn*, 26 Minn. 215.

In *Biggins v. People*, 106 Ill. 270, it was held that a decree dismissing a bill to enforce a lien for taxes for want of jurisdiction, does not bar a second bill filed for the same purpose, after the enactment of a law conferring the jurisdiction.

**Presumption of Jurisdiction.**—The judgment raised a presumption of jurisdiction in the court, which can be overcome only by proof that it had no jurisdiction. *Kipp v. Collins*, 33 Minn. 394. And see *Prout v. People*, 83 Ill. 154.

In *Williams v. Hudson*, 93 Mo. 524, it was held that the omission to name one of the years for which the taxes were due and for which suit was brought from the order of publication, will not affect the judgment when attacked in a collateral proceeding.

A recital in a decree under the *California* statute, that all the owners and claimants of the property have been duly summoned and have made default, is conclusive that the court acquired jurisdiction, if nothing contradictory to

void.<sup>1</sup> Those who have not been made parties, or who have no interest in the land, are not affected by the judgment;<sup>2</sup> nor by a decree foreclosing the tax lien.<sup>3</sup>

(6) *Appeal and Review*.—In the absence of statute, no appeal lies from a judgment in a tax suit.<sup>4</sup> Where provided for, the statute must be followed, and the right can be exercised only in the manner prescribed.<sup>5</sup> But it has been held that orders in such

it appears in the record. *Eitel v. Foote*, 39 Cal. 439; *Truman v. Robinson*, 44 Cal. 623. In the latter case it was also held that legislative bodies have power to provide that a recital in a judgment that the summons has been served on all the defendants, and that they have made default, shall be proof of such facts.

1. See *Gage v. Bailey*, 102 Ill. 14; *Belleville Nail Co. v. People*, 98 Ill. 399; *Thatcher v. People*, 93 Ill. 240; *Taylor v. Thompson*, 42 Ill. 9; *Campbell v. State*, 41 Ill. 454; *Drake v. Ogden*, 128 Ill. 603; *Kent v. Brown*, 38 La. Ann. 802; *Gamble v. Witty*, 55 Miss. 26.

2. See *Williams v. Hudson*, 93 Mo. 524; *Hogan v. Smith*, 11 Mo. App. 314; *Allen v. McCabe*, 93 Mo. 138; *Blodgett v. Schaffer*, 94 Mo. 652; *Watt v. Donnell*, 80 Mo. 195; *Boatmen's Sav. Bank v. Grewe*, 13 Mo. App. 335; *Mayo v. Ah Loy*, 32 Cal. 477; *Mix v. People*, 116 Ill. 265; *Virden v. Needles*, 98 Ill. 366; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633; *Pritchard v. Greenwood County*, 26 Kan. 584; *Desormeaux v. Moylan*, 26 La. Ann. 730. *Compare* *Reiley v. Lancaster*, 39 Cal. 354.

Those claiming under persons made parties to the action, are bound by a judgment *in rem*, though not made parties. *State v. Central Pac. R. Co.*, 10 Nev. 47; *Vance v. Corrigan*, 78 Mo. 94.

In *Berlien v. Bieler*, 96 Mo. 491, it was held that a sale of land for taxes in a proceeding against heirs, will not divest the life estate of the widow under a will.

Where a tax debtor is dead, a judgment against him is void as to his heirs. *Crosley v. Hutton*, 98 Mo. 196.

A trustee under a deed of trust is an "owner," and so a necessary party to a suit to enforce a lien for taxes; but the omission to join him as a party does not render the tax sale wholly void. His rights are not foreclosed by the tax sale. *Gitchell v. Kreidler*, 84 Mo. 472. See also *Boyd v. Ellis*, 107 Mo. 394.

A *cestui que trust* has the right to pay the taxes and redeem the land from

the paramount lien of the state, and when he is not made a party to the tax suit, that right remains unimpaired, and not affected by the judgment and sale in the tax proceeding. *Allen v. McCabe*, 93 Mo. 138; *Williams v. Hudson*, 93 Mo. 524.

3. *Williams v. Hudson*, 93 Mo. 524; *Gitchell v. Kreidler*, 84 Mo. 474; *Stafford v. Fizer*, 82 Mo. 393; *Corrigan v. Bell*, 73 Mo. 53; *Mix v. People*, 116 Ill. 265; *Bleidorn v. Abel*, 6 Iowa 6.

In *Hogan v. Smith*, 11 Mo. App. 314, it was held that the fact that the defendant in an action to enforce a lien for taxes is merely the owner of a life estate in the land and that the remainderman is not made a party, does not make the judgment rendered therein void. But the judgment is not binding upon the remainderman. *Allen v. De Groodt*, 98 Mo. 159.

4. *State v. Jones*, 24 Minn. 251; *People v. Smith*, 94 Ill. 226. See *Hess v. People*, 84 Ill. 247; *Atchison, etc., R. Co. v. Brown*, 26 Kan. 443; *State v. Jones*, 24 Minn. 251.

In *Hess v. People*, 84 Ill. 247, it was held that where a statute allowing an appeal from a tax judgment is repealed, no appeal will lie where the final judgment is rendered, after the day the appeal takes effect, although the application is made before that time.

**To What Court.**—Under the *Illinois* statutes, suits for taxes are regarded as suits relating to the public revenue, from the determination of which, appeals must be taken directly to the supreme court. *Johnson v. Eliel*, 9 Ill. App. 520; *Mix v. People*, 7 Ill. App. 224.

5. See *Mix v. People*, 7 Ill. App. 224; *Johnson v. Eliel*, 9 Ill. App. 520; *Andrews v. Rumsey*, 75 Ill. 598; *State v. Jones*, 24 Minn. 251; *Washington County v. German-American Bank*, 28 Minn. 360.

Where the statute requires the transcript of a judgment in a tax suit, to be filed at the next term after the appeal is taken, a delay in doing so amounts to an abandonment of the appeal. *Fortman v. Ruggles*, 58 Ill. 207.

proceedings may be reviewed where similar orders in ordinary actions are made reviewable.<sup>1</sup>

Where the right of appeal is given, and no mode of procedure is prescribed, that obtaining in ordinary actions is adhered to.<sup>2</sup> For example, a question cannot be raised, for the first time, in the appellate court.<sup>3</sup> But this rule does not apply to jurisdictional questions,<sup>4</sup> nor to questions as to the observance of mandatory requirements of law,<sup>5</sup> which may be raised upon appeal, though no exceptions were taken in the court below.

#### 4. The Return—*a.* OF THE WARRANT.—A return of the tax

**Parties.**—A former owner having no interest in the property taxed, cannot appeal. *McClure v. Maitland*, 24 W. Va. 561.

**Security on Appeal.**—In *Nashville v. Weiser*, 54 Ill. 245, it was held that the appeal bond on an appeal from a judgment against real estate for the non-payment of taxes assessed by a city, in which the city alone is interested, need not be made payable to the people of the state; but may be made payable to the city.

The legislature may constitutionally require one who wishes to appeal from a judgment against his land for taxes, to deposit a sum equal to the amount of the judgment and costs. *Andrews v. Rumsey*, 75 Ill. 598.

1. *Chisago County v. St. Paul, etc., R. Co.*, 27 Minn. 109; *Aitkin County v. Morrison*, 25 Minn. 295.

In *Minnesota*, notice to the supreme court of an appeal from an order of the district court, refusing to set aside a tax judgment, must be served upon the county attorney. *Nobles County v. Sutton*, 23 Minn. 299.

2. See *State v. Northern Belle Min. Co.*, 15 Nev. 385; *Hosmer v. People*, 87 Ill. 385; *Hosmer v. People*, 96 Ill. 58; *Nobles County v. Sutton*, 23 Minn. 299.

Where a judgment against land for taxes, is in proper form, and it is affirmed on appeal, a general judgment of affirmance is sufficient, without specifying the taxes due on each tract. *Durham v. People*, 67 Ill. 414.

In *State v. California Min. Co.*, 13 Nev. 203, it was held that an undertaking on appeal in a suit for taxes, which complies with the Civil Practice Act for a stay of execution, is sufficient.

**Jurisdictional Limits.**—In *Rhode Island*, provisions limiting the jurisdiction of the court, on appeal, to a certain amount in ordinary cases, do not

apply to tax suits. *Tripp v. Torrey*, 17 R. I. 359. And see as to *Louisiana*, *State v. Sies*, 30 La. Ann. 918.

3. See *Speight v. People*, 87 Ill. 595; *Law v. People*, 87 Ill. 385; *Karnes v. People*, 73 Ill. 274; *Chiniquy v. People*, 78 Ill. 570; *Melrose v. Bernard*, 126 Ill. 496; *Hosmer v. People*, 96 Ill. 58.

Where a judgment for taxes is partly valid, special objection must be made to the invalid part, in order to save the question on appeal. *Jenkins v. Rice*, 84 Ind. 343. And see *Speight v. People*, 87 Ill. 595.

An objection that a delinquent tax list was not properly certified by the auditor, is not available in the appellate court, where the list itself is not contained in the record, and there is no statement showing that there was a want of a certificate, or that it was defective in any respect. *State v. Manhattan Silver Min. Co.*, 4 Nev. 318.

Where a taxpayer appears before the court and makes specific objections to a judgment for taxes, but does not object on account of the levy being improperly made, he admits the legality of the levy, and cannot afterwards question it on appeal. *Karnes v. People*, 73 Ill. 274.

4. *People v. Dragstran*, 100 Ill. 286; *Law v. People*, 87 Ill. 385.

A judgment for illegal taxes or taxes which are in part illegal, will be reversed. *Taylor v. Thompson*, 42 Ill. 9; *Campbell v. State*, 41 Ill. 454.

The right of a city to maintain an ordinary action at law for the collection of delinquent taxes, is not a jurisdictional question which may be first urged in the appellate court. *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633.

5. *Chicago v. Wright*, 32 Ill. 192; *People v. Dragstran*, 100 Ill. 286.

When the error appears upon the face of the record of the tax, it may be first urged upon appeal. *Wiggins Ferry Co. v. People*, 101 Ill. 446.

warrant, showing the proceedings taken under it, is usually required.<sup>1</sup>

A clause in a tax warrant, directing the tax collector to make his return at a certain time, is held directory only, and does not prevent the collector from making collection after that time.<sup>2</sup> The power to collect remains until the taxes are actually paid,<sup>3</sup> and the warrant may be extended when necessary to effect the collection.<sup>4</sup>

*b. OF DELINQUENCY.*—In general, property cannot be sold to enforce the tax,<sup>5</sup> nor an action brought for its recovery or to charge

1. See *Olean v. King*, 116 N. Y. 355; *Shimmin v. Inman*, 26 Me. 228; *Upton v. Kennedy*, 36 Mich. 215; *Mast v. Nacogdoches County*, 71 Tex. 380; *Judevine v. Jackson*, 18 Vt. 470; *Taylor v. French*, 19 Vt. 49. See also *infra*, this title, *Tax Sales*.

2. *Picket v. Allen*, 10 Conn. 146; *White v. State*, 51 Ga. 252; *Smith v. Messer*, 17 N. H. 420; *Homer v. Cilley*, 14 N. H. 85; *Sheldon v. Van Buskirk*, 2 N. Y. 473. And see *Gove v. Newton*, 58 N. H. 359; *Richards v. Stogsdel*, 21 Ind. 74; *Bassett v. Porter*, 4 Cush. (Mass.) 487.

A tax warrant is not invalidated by the fact that an unreasonably brief time was granted for its payment, provided the notice and proceeding by the collector were legal and regular. *Weeks v. Batchelder*, 41 Vt. 317.

In *Walker v. Miner*, 32 Vt. 769, it was held that a neglect to comply with a statutory provision requiring a warrant for the collection of a school tax to specify a limited time within which the tax is to be collected, is not a defect of which a taxpayer can take advantage, and, though it may render the warrant informal and defective as between the district and collector, it does not invalidate the action taken by the latter to collect the tax.

3. *Homer v. Cilley*, 14 N. H. 85; *Smith v. Messer*, 17 N. H. 420; *Perry County v. Selma*, etc., R. Co., 58 Ala. 546; *Jacks v. Dyer*, 31 Ark. 334; *White v. State*, 51 Ga. 252; *Union Trust Co. v. Weber*, 96 Ill. 346; *McCracken v. Elder*, 34 Pa. St. 239. And see *Brown v. Porter*, 7 Humph. (Tenn.) 373; *Bassett v. Porter*, 4 Cush. (Mass.) 487.

A constitution requiring taxes on movable property to be collected in the year in which the assessment is made, does not prohibit the collection of the tax during a subsequent year; the failure to collect a tax in the year in which

it is assessed, not operating to discharge it. *Oteri v. Parker*, 42 La. Ann. 374.

4. *Griswold v. Union School Dist.*, 24 Mich. 262; *Bird v. Perkins*, 33 Mich. 28; *Fairfield v. People*, 94 Ill. 244; *Bradley v. Ward*, 58 N. Y. 401. And see *First Nat. Bank v. St. Joseph Tp.*, 46 Mich. 526; *Drennan v. Beierlein*, 49 Mich. 272; *Brown v. Hogle*, 30 Ill. 119; *Brown v. Porter*, 7 Humph. (Tenn.) 373; *Chadwell v. State*, 8 Heisk. (Tenn.) 340.

A renewal signed by all the supervisors personally, and attested by the town clerk, is a sufficient renewal by them as a board. *New Richmond Lumber Co. v. Rogers*, 68 Wis. 608.

In *Blain v. Irby*, 25 Kan. 499, it was held that where a levy is made upon the personal property of the person against whom the tax warrant is issued, previous to the return day of the warrant, a sale thereof is not invalid by being made after the return day.

An act extending the time for the collection of taxes does not revive a warrant which has already expired. *Phillips v. New Buffalo Tp.*, 68 Mich. 217.

In *Michigan*, a township treasurer cannot sue for a tax after the expiration of his warrant, and his warrant cannot be extended beyond the next annual session of the board of supervisors. *Putman v. Fife Lake Tp.*, 45 Mich. 125.

In *New Jersey*, an alias can be issued by a justice other than the one who issues the original tax warrant, only when a request is made for the issue of the second writ, by the township committee. *State v. Dobbs*, 42 N. J. L. 136.

5. See *Kelly v. Craig*, 5 Ired. (N. Car.) 129; *Mordecai v. Speight*, 3 Dev. (N. Car.) 428; *Wartensleben v. Haithcock*, 80 Ala. 565; *Fleming v. McGee*, 81 Ala. 409; *Simms v. Greer*, 83 Ala.

the lands,<sup>1</sup> unless there has been a return of the delinquency. A failure to make such return when required,<sup>2</sup> or to make it within the time prescribed by law,<sup>3</sup> invalidates all subsequent proceedings; but the validity of the tax itself, and of the lien therefor, is not affected.<sup>4</sup> The delinquent list is usually required to be a copy

263; *Otis v. Chicago*, 62 Ill. 299; *Muskegon v. Martin Lumber Co.*, 86 Mich. 625; *Newkirk v. Fisher*, 72 Mich. 113; *Burns v. Ledbetter*, 54 Tex. 374; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Martin v. Barbour*, 34 Fed. Rep. 701; *Huntington v. Brantley*, 33 Miss. 451; *Swan v. Knoxville*, 11 Humph. (Tenn.) 130; *Thompson v. Burhaus*, 61 N. Y. 52; *Striker v. Kelly*, 2 Den. (N. Y.) 323; *Johnson v. Elwood*, 53 N. Y. 431; *Tallman v. White*, 2 N. Y. 66.

In *Homer v. Cilley*, 14 N. H. 85, it was held that a sheriff acting as collector, is bound to deliver a copy of his list of taxes to the deputy sheriff, in the same manner as collectors are required to do, and that until such list is so delivered, he cannot lawfully advertise and sell.

**Forfeiture.**—The return is also necessary, to lay the foundation for a forfeiture. *Hill v. Mason*, 38 Me. 461.

1. *Pidgeon v. People*, 36 Ill. 249; *Taylor v. People*, 7 Ill. 349; *Pickett v. Hartsock*, 15 Ill. 279; *Morrill v. Swartz*, 39 Ill. 108. And see *Buck v. People*, 78 Ill. 560; *Ogden v. Chicago*, 22 Ill. 592; *Burns v. Ledbetter*, 54 Tex. 377.

In some of the states, the filing of a delinquent list constitutes the institution of an action against each tract of land described in it, for the recovery of the taxes appearing in the list against such tract. *Redwood County v. Wirona*, etc., *Land Co.*, 40 Minn. 512; *Chauncey v. Wass*, 35 Minn. 1. And it is in the nature of a pleading stating what is the cause of action. *Wiggins Ferry Co. v. People*, 101 Ill. 446.

Under the *Nevada* statutes, the existence of a delinquent list is not essential to a right of action for taxation, and evidence tending to show that the tax sued for had not been entered on the delinquent list, before the action was commenced, is immaterial. *State v. Northern Belle Min. Co.*, 15 Nev. 385; *State v. Central Pac. R. Co.*, 10 Nev. 47.

2. *People v. Otis*, 74 Ill. 384; *Pickett v. Hartsock*, 15 Ill. 279; *Wartensleben v. Haithcock*, 80 Ala. 565; *Fleming v. McGee*, 81 Ala. 409; *Simms v. Greer*, 83 Ala. 263; *Lawrence v. Zimpleman*, 37 Ark. 643; *Newkirk v. Fisher*, 72

Mich. 113; *Huntington v. Brantley*, 33 Miss. 451; *Belden v. State*, 46 Tex. 103; *Pitts v. Booth*, 15 Tex. 453; *State v. Kirby*, 6 N. J. L. 143; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Martin v. Barbour*, 34 Fed. Rep. 701. And see *Thompson v. Rogers*, 4 La. 9.

Parol evidence is inadmissible to supply the omission, when the delinquent list and notice of sale, and proof of their publication, are required by statute to be perpetuated by a record, to be certified to by the court before the sale. It is indispensable that such record be kept. *Martin v. Barbour*, 34 Fed. Rep. 701.

3. *Weir v. Kitchens*, 52 Miss. 74; *Huntington v. Brantley*, 33 Miss. 451; *Hickman v. Kempner*, 35 Ark. 505; *Burns v. Ledbetter*, 54 Tex. 374; *Martin v. Barbour*, 34 Fed. Rep. 701. But see *Chiniquy v. People*, 78 Ill. 570; *Leindecker v. People*, 98 Ill. 21; *Houghton County v. Rees*, 34 Mich. 481; *Gutches v. Todd County*, 44 Minn. 383.

In *State v. Carneall*, 10 Ark. 156, it was held that a sheriff cannot be deprived of his office by failing to return his assessment list within the time prescribed by law, without an official determination of delinquency.

The return in the prescribed time is also necessary to entitle the collector to credit for lands reported for non-payment. *Chadwell v. State*, 8 Heisk. (Tenn.) 340; *State v. Viator*, 37 La. Ann. 734.

**A warrant for the collection of a tax** based on a tax roll, returned before the time prescribed by law, furnishes no protection to the collector, *Westfall v. Preston*, 49 N. Y. 349; and is void. See *Ronkendorf v. Taylor*, 4 Pet. (U. S.) 349; *Flint v. Sawyer*, 30 Me. 226; *Hobbs v. Clements*, 32 Me. 67; *Hickman v. Kempner*, 35 Ark. 505; *Bleidorn v. Abel*, 6 Iowa 6. But see *Jackson v. Cummings*, 15 Ill. 449.

**Three Weeks.**—In *Pennell v. Monroe*, 30 Ark. 661, it was held that a statute requiring a delinquent list to be published at least three weeks, means twenty-one days.

4. *Union Trust Co. v. Weber*, 96 Ill. 346; *Chiniquy v. People*, 78 Ill. 570; *State v. Hurt*, 113 Mo. 90; *State v.*

of the assessment roll <sup>1</sup> showing what taxes remain due and unpaid,<sup>2</sup> upon what property, and upon whom they were imposed,<sup>3</sup> and that all statutory requisites have been complied with.<sup>4</sup> A statutory form for the return of delinquency must be substantially complied with.<sup>5</sup>

Hutchinson, 116 Mo. 399; Glover v. Edgewater, 3 Thomp. & C. (N. Y.) 497. And see Oteri v. Parker, 42 La. Ann. 374; People v. Seymour, 16 Cal. 332; 76 Am. Dec. 521.

1. Hayes v. Viator, 33 La. Ann. 1162.

It should appear, either in the return, or in its annexed verification, that it is a transcript of the assessment, or that it was taken therefrom. Thompson v. Burhaus, 61 N. Y. 52.

2. Bristol v. Chicago, 22 Ill. 587; Beers v. People, 83 Ill. 488; Bleidorn v. Abel, 6 Iowa 6; Chouteau v. Hunt, 44 Minn. 173. And see Burns v. Ledbetter, 54 Tex. 374; Mann v. People, 102 Ill. 346; Whitney v. Wegler (Minn. 1893), 55 N. W. Rep. 927.

In Louisville, etc., R. Co. v. Com., 85 Ky. 198, it was held that in reporting delinquents, the sheriff is not confined to those who become so during his term of office.

A collector's report of delinquent lands, which shows that he was collector of taxes for a certain year, and that he had not been able to collect the taxes due on the lands mentioned in the report, sufficiently shows for what year the taxes were levied. Karnes v. People, 73 Ill. 274.

Where different rates of taxation are imposed upon different property, the return of the collector should specify the several sorts of property, so that each kind may bear its proper rate of taxation. Savannah, etc., R. Co. v. Morton, 71 Ga. 24.

In Morrill v. Swartz, 39 Ill. 108, it was held that a collector's report merely showing the total amount of taxes due, without showing whether they were due to the state or county, is invalid. See also Fox v. Turtle, 55 Ill. 377.

**Abbreviations.**—The use of initials or abbreviations at the head of each column in the collector's report, to indicate the kind or amount of tax, is unobjectionable. Chiniquy v. People, 78 Ill. 570. And see State v. Eureka, etc., Min. Co., 8 Nev. 15.

**Presumption of Payment.**—Taxes which are not mentioned in the delinquent list will be presumed to have been paid, in the absence of proof to the contrary. Prout v. People, 83 Ill. 154.

3. Chiniquy v. People, 78 Ill. 570;

Halsey v. People, 84 Ill. 89; Morgan v. Camp, 16 Ill. 175; Chouteau v. Hunt, 44 Minn. 173; Burns v. Ledbetter, 54 Tex. 374. And see Oliver v. Gurney, 43 Minn. 69; Kane v. Brooklyn, 1 N. Y. Supp. 306; 48 Hun (N. Y.) 618; Kelly v. Craig, 5 Ired. (N. Car.) 120.

The description must be sufficient to identify the land, and the person or persons against whom it was assessed, must be named. Burns v. Ledbetter, 54 Tex. 374. And see Cooper v. Jackson, 71 Ind. 245; Knight v. Alexander, 38 Minn. 384; 8 Am. St. Rep. 675. But slight variations which are not misleading will not vitiate it. Davis v. How, 52 Minn. 157. And see State v. Rau, 93 Mo. 126.

Where a tract of land containing more than one subdivision is assessed to the owner of one parcel thereof, who pays the proportion of taxes chargeable against his land, the residue of the tract should be returned as delinquent. Pennell v. Monroe, 30 Ark. 661.

In Thompson v. Burhaus, 61 N. Y. 52, it was held that where neither the return of the collector nor that of the treasurer shows that the unpaid taxes are imposed upon non-residents of lands, there can be no sale by the comptroller.

**Name of Owner.**—In Halsey v. People, 84 Ill. 89, it was held that where there is a column in a delinquent list, headed "In Whose Name Assessed," and in such column, opposite the several tracts of land, names are given, and the collector states that he gives the owners' names so far as they are known, the names appearing will be taken to be the names of the owners of the land so far as they are known, and the list sufficiently complies with the requirement of the statute in this particular.

4. Cooley on Taxation (2d ed.) p. 455. And see Wartensleben v. Haithcock, 80 Ala. 565; Fleming v. McGee, 81 Ala. 409; Williams v. State, 6 Blackf. (Ind.) 36; Charles v. Waugh, 35 Ill. 315; People v. Land Owners, 82 Ill. 408; Stambaugh v. Carlin, 35 Ohio St. 209; Belden v. State, 46 Tex. 103; Thatcher v. Powell, 6 Wheat. (U. S.) 119.

5. Fox v. Turtle, 55 Ill. 377; Pickett v. Hartsock, 15 Ill. 279; Morgan v.



Provisions as to the verification, authentication,<sup>1</sup> and publication of the delinquent list,<sup>2</sup> together with those having reference to the return and filing,<sup>3</sup> are mandatory, and must be strictly complied with. A return in the statutory form has been held good,

Camp, 16 Ill. 175; *Morrill v. Swartz*, 39 Ill. 108; *Simms v. Greer*, 83 Ala. 263; *Stambaugh v. Carlin*, 35 Ohio St. 209. And see *Weston v. People*, 84 Ill. 284; *Morrill v. Swartz*, 39 Ill. 108; *In re Tranior*, 27 La. Ann. 150; *Cummings v. Easton*, 46 Iowa 183.

A mere omission of a word, where the error is manifest, may be disregarded. *Scherber v. Koehler*, 49 Wis. 291. And see *Spellman v. Curtenius*, 12 Ill. 414.

Where a report contains matters not required by statute, they may be disregarded, if it is otherwise sufficient. *Ogden v. Chicago*, 22 Ill. 592. And see *Bristol v. Chicago*, 22 Ill. 587.

In *St. Anthony Falls Water Power Co. v. Greely*, 11 Minn. 322, it was held that a list returned by the clerk, which purports to be a list of all taxes "delinquent or unpaid," when the statute provides for a list of all taxes "unpaid and delinquent," is insufficient to authorize a sale thereunder.

1. See *Law v. People*, 80 Ill. 268; *Weston v. People*, 84 Ill. 284; *Hough v. Hastings*, 18 Ill. 312; *Hochlander v. Hochlander*, 73 Ill. 618; *Tabor v. People*, 84 Ill. 202; *Chicago, etc., R. Co. v. People*, 83 Ill. 467; *Hogelskamp v. Weeks*, 37 Mich. 422; *Upton v. Kennedy*, 36 Mich. 215; *State v. Viator*, 37 La. Ann. 734; *Thompson v. Burhaus*, 61 N. Y. 52; *Cotzhansen v. Kaehler*, 42 Wis. 332; *Miner v. McLean*, 4 McLean (U. S.) 138; *Hannel v. Smith*, 15 Ohio 134; *Stambaugh v. Carlin*, 35 Ohio St. 209; *Harmon v. Stockwell*, 9 Ohio 94; *Skinner v. Brown*, 17 Ohio St. 33.

It would appear that a verification of a return is unnecessary, unless required by statute. See *Hollister v. Bennett*, 9 Ohio 83; *Ward v. Barrows*, 2 Ohio St. 241; *Kane v. Brooklyn*, 114 N. Y. 586.

In *Bennett v. Blatz*, 44 Minn. 56, it was held that defects in the verification of a delinquent list does not affect the jurisdiction of the court over a proceeding for the recovery of a tax. See also *Mille Lacs County v. Morrison*, 22 Minn. 178.

2. *Iverslie v. Spaulding*, 32 Wis. 394; *Fox v. Turtle*, 55 Ill. 377; *Pennell v. Monroe*, 30 Ark. 661; *Hill v. Mason*, 38 Me. 461; *Merriman v. Knight*, 43 Minn.

493. And see *Banning v. McManus*, 51 Minn. 289; *Pitts v. Booth*, 15 Tex. 453.

In *Chouteau v. Hunt*, 44 Minn. 173, it was held that the affidavit of the auditor is no part of the delinquent list, and need not be published with it.

In *Buck v. People*, 78 Ill. 560, it was held that an affidavit of a printer of a newspaper, of the publication of the delinquent list, and notice of applying for judgment properly sworn to, which states the day on which the publication was made and the paper in which the list and notice were published, is sufficient proof of publication, to confer jurisdiction on the court to render judgment.

The publisher of a delinquent tax list is not entitled to be paid his advertising charge before he delivers to the county treasurer the copies and proof of publication prescribed by law; and if he refuses to make the delivery until he is paid, the refusal is a good defense to his demand. *Brown v. Otoe County*, 6 Neb. 111.

3. See *Hickman v. Kempner*, 35 Ark. 505; *Leindecker v. People*, 98 Ill. 21; *Dukes v. Rowley*, 24 Ill. 210; *Babcock v. Bonebrake*, 77 Iowa 710; *Ring v. Ewing*, 47 Ind. 246; *Merriman v. Knight*, 93 Minn. 493; *Hill v. Mason*, 38 Me. 461; *Martin v. Barbour*, 34 Fed. Rep. 701; *Belden v. State*, 46 Tex. 103; *Simpson v. Edmiston*, 23 W. Va. 675.

The filing must precede the publication of notice. *Ring v. Ewing*, 47 Ind. 246; *Homer v. Cilley*, 14 N. H. 85.

But it must not be filed until the expiration of the time allowed to pay taxes. *Hickman v. Kempner*, 35 Ark. 505; *Flint v. Sawyer*, 30 Me. 226.

In *Adams v. Moulton*, 7 Pick. (Mass.) 286, it was held that a statute requiring a collector to return to the selectmen, within a certain time, a list of persons from whom he has received payment of state or county taxes, requires that the list shall remain with the selectmen for their use, and not be taken away again by the collector.

In *Louisiana*, the failure to annex to a delinquent tax roll the affidavit required by law, does not vitiate the registry resulting from the recording of the roll. *Edwards' Succession*, 32 La. Ann. 457.

notwithstanding the omission of statements which, in the absence of the statute, would be held requisite.<sup>1</sup>

The return should be made and authenticated by the collector, unless some other officer is designated.<sup>2</sup> The authentication consists generally of an affidavit or certificate to the correctness of the list.<sup>3</sup> The return is usually made to the person whose duty it is to enforce the tax.<sup>4</sup> A return may be amended where the rights of third parties have not intervened.<sup>5</sup>

c. THE RETURN AS EVIDENCE.—A proper and complete return affords *prima facie* proof of the validity of the tax,<sup>6</sup> that the preliminary requirements of the law have been complied with,<sup>7</sup>

1. Dickisen v. Reynolds, 48 Mich. 158; Riddle v. Messer, 84 Ala. 236; Kinsworthy v. Mitchell, 21 Ark. 145; Bristol v. Chicago, 22 Ill. 587; Taylor v. People, 7 Ill. 349; Job v. Tebbetts, 10 Ill. 376; Morrill v. Swartz, 39 Ill. 108. And see Ward v. Barrows, 2 Ohio St. 241; Chouteau v. Hunt, 44 Minn. 173; Kane v. Brooklyn, 1 N. Y. Supp. 306; 48 Hun (N. Y.) 618; Alvord v. Collin, 20 Pick. (Mass.) 418. But see Mayhew v. Davis, 4 McLean (U. S.) 213.

In Taylor v. People, 7 Ill. 349, it was held that a collector is not required to state in his return that he is unable to collect taxes by seizure and sale of the personal property of the taxpayer, as this is to be taken for granted from a report in a proper form, the collector being presumed to have done his duty.

Under the Tennessee statutes regulating the sale of land for taxes, the record need not show the preliminary proceeding necessary to a valid tax; as, for example, that all the property in the county was assessed, and that the assessors were duly elected and qualified, etc. Nance v. Hopkins, 10 Lea (Tenn.) 508.

2. Law v. People, 80 Ill. 268. And see Weston v. People, 84 Ill. 284; Hannel v. Smith, 15 Ohio 134.

Under the Texas statutes, the comptroller is required to make out a list and forward it to the sheriffs of the counties. Burns v. Ledbetter, 54 Tex. 374.

In Ohio, the list must be signed by the collector, or by his chief clerk. Hannel v. Smith, 15 Ohio 134.

3. See Stambaugh v. Carlin, 35 Ohio St. 209; Weston v. People, 84 Ill. 284.

4. See Tallman v. White, 2 N. Y. 66; Hills v. Chicago, 60 Ill. 86; Babcock v. Bonebrake, 77 Iowa 710.

A statute imposing a specific tax, and requiring payment to the comptroller

general, in effect designates that officer as the proper one to receive the return as well as the money. Smith v. Goldsmith, 63 Ga. 736.

5. Jaquith v. Putney, 48 N. H. 138; Shelbyville Water Co. v. People, 140 Ill. 545; Carville v. Additon, 62 Me. 459. And see State v. Phillips, 102 Mo. 664. But see Henrico County v. McGruder, 84 Va. 828.

6. Olmstead County v. Barber, 31 Minn. 256; Mahaney v. People, 138 Ill. 311; Pike v. People, 84 Ill. 80; Fisher v. People, 84 Ill. 491; Chiniquy v. People, 78 Ill. 570. And see Muskegon v. Martin Lumber Co., 86 Mich. 625; Mast v. Nacogdoches County, 71 Tex. 380.

If the return is insufficient or improperly made or executed, it is not admissible in evidence. See Putman v. Fife Lake Tp., 45 Mich. 125; Kelly v. Craig, 5 Ired. (N. Car.) 129; Stambaugh v. Carlin, 35 Ohio St. 209.

In State v. Miller, 16 Mo. App. 539, it was held that a tax bill is admissible in evidence, even though signed by the deputy collector.

7. Burbank v. People, 90 Ill. 554; Chiniquy v. People, 78 Ill. 570; Mix v. People, 81 Ill. 118; Pike v. People, 84 Ill. 80; Caldwell v. Hawkins, 40 Me. 527; Barnard v. Graves, 13 Met. (Mass.) 85; State v. Van Every, 75 Mo. 530; Boardman v. Goldsmith, 48 Vt. 403; Smith v. Mosher, 9 N. Y. Supp. 786; 56 Hun (N. Y.) 643.

In Ottawa v. Macy, 20 Ill. 413, it was held that a collector's return stating that taxes are unpaid, and that he can find no chattels whereon to levy, is conclusive of the fact stated. If it is false, he is answerable personally. See also Goodrich v. Minonk, 62 Ill. 121.

A demand for payment by the collector may be shown by his return. Barnard v. Graves, 13 Met. (Mass.) 85;

and that the tax is delinquent.<sup>1</sup> The return is evidence for the taxpayer as well as for the public.<sup>2</sup>

Where a list is required by statute to be kept, parol evidence is inadmissible to supply omissions.<sup>3</sup> The return is not evidence of anything beyond what the law requires to be stated.<sup>4</sup> Parol evidence, however, is admissible in behalf of the taxpayer to controvert the list,<sup>5</sup> and, in such case, it is also admissible on behalf of the collector in rebuttal.<sup>6</sup> And, in an action against the collector, his proceedings may be proved by parol, when necessary to his justification.<sup>7</sup>

**5. Liability of the Collector and Sureties—*a*. FOR OFFICIAL ACTION.**—It may be stated as a general rule that a collector of taxes who is legally qualified, who is acting within the scope of his powers, and who acts under a warrant regularly issued by competent authority, is protected against all irregularities but his own,<sup>8</sup>

*Job v. Tebbetts*, 10 Ill. 382; *Taylor v. People*, 7 Ill. 349.

1. See *Chiniquy v. People*, 78 Ill. 570; *New York v. Goldman*, 125 N. Y. 395.

2. See *Bruce v. Holden*, 21 Pick. (Mass.) 187; *Barnard v. Graves*, 13 Met. (Mass.) 85; *Chiniquy v. People*, 78 Ill. 570; *State v. Van Every*, 75 Mo. 530.

The admissibility of a tax duplicate in evidence, in an action for the recovery of a tax, is not affected by the fact that the taxpayer is a non-resident. *Wade v. Kimberly*, 5 Ohio Cir. Ct. Rep. 33.

3. *Martin v. Barbour*, 34 Fed. Rep. 707; *Hosmer v. People*, 96 Ill. 58; *Boardman v. Goldsmith*, 48 Vt. 403; *Iverslie v. Spaulding*, 32 Wis. 394. And see *State v. Northern Belle Min. Co.*, 15 Nev. 387.

A warrant of arrest against a taxpayer, is not a returnable process, and the proceedings may be shown by other evidence. *Kelley v. Noyes*, 43 N. H. 209.

4. *Bristol v. Chicago*, 22 Ill. 587; *Sullivan v. State*, 66 Ill. 75; *Com. v. Hart*, 1 Ashm. (Pa.) 77. And see *Ogden v. Chicago*, 22 Ill. 592. Nor is it evidence of anything not actually stated. See *State v. Van Every*, 75 Mo. 530.

A return by a collector, of unpaid taxes on lands of non-residents, is not evidence of the contents of the assessment roll. *Wood v. Knapp*, 100 N. Y. 109.

5. *Boardman v. Goldsmith*, 48 Vt. 403. And see *Andrews v. Rumsey*, 75 Ill. 598.

In *Justices v. Fennimore*, 1 N. J. L. 190, it was held that even though the collector is required by statute to enter in a book kept for that purpose, all cer-

tificates received by him, and give receipts for the same, other persons may prove his receipt of such certificate, by parol evidence.

Where the statute requires the collector to make his return from the best information that he can obtain, in case of a loss of the records, he is made the sole judge of the sources and sufficiency of the information, and his report cannot be impeached by showing that he could have obtained better information, or that he did not know it to be true, but proof that it was not true would be proper. *Andrews v. People*, 75 Ill. 605.

6. *Boardman v. Goldsmith*, 48 Vt. 403.

Irregularities in the delinquent tax list may be corrected by the introduction in evidence of the original assessment roll which gives the true assessment of the property. *State v. Sadler*, 21 Nev. 13.

7. *Spear v. Tilson*, 24 Vt. 420; *Hathaway v. Goodrich*, 5 Vt. 65. And see *Muskegon v. Martin Lumber Co.*, 86 Mich. 625.

In *Hathaway v. Goodrich*, 5 Vt. 65, it was held that the collector's certificates showing seizure and sale, are not proper evidence in his favor.

8. *Nowell v. Tripp*, 61 Me. 426; *Carville v. Addison*, 62 Me. 459; *Judkins v. Reed*, 48 Me. 386; *Caldwell v. Hawkins*, 40 Me. 526; *Ford v. Clough*, 8 Me. 342; 23 Am. Dec. 513; *Seekins v. Goodall*, 61 Me. 400; 14 Am. Rep. 568; *Bethel v. Mason*, 55 Me. 501; *Lott v. Hubbard*, 44 Ala. 593; *Sanders v. Simmons*, 30 Ark. 274; *Ewing v. Robeson*, 15 Ind. 26; *Noland v. Busby*, 28 Ind. 154; *Shaw v. Dennis*, 10 Ill. 405; *Chiniquy v. People*, 78 Ill. 571; *Hill v. Fagley*, 25 Ill. 156; *Sils-*

even though the tax is void,<sup>1</sup> or though the property is exempt

bee *v.* Stockle, 44 Mich. 562; Bird *v.* Perkins, 33 Mich. 28; Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233; 100 Am. Dec. 162; Mathews *v.* Densmore, 43 Mich. 461; Moss *v.* Cummings, 44 Mich. 359; Byles *v.* Genung, 52 Mich. 504; Wall *v.* Trumbull, 16 Mich. 228; Neth *v.* Crofut, 30 Conn. 580; Watson *v.* Watson, 9 Conn. 140; 23 Am. Dec. 324; Peckham *v.* Bicknell, 11 R. I. 596; Brainard *v.* Head, 15 La. Ann. 489; Cunningham *v.* Mitchell, 67 Pa. St. 78; Billings *v.* Russell, 23 Pa. St. 189; 62 Am. Dec. 330; Gove *v.* Newton, 58 N. H. 359; Loomis *v.* Spencer, 1 Ohio St. 153; State *v.* Lutz, 65 N. Car. 503; Colman *v.* Anderson, 10 Mass. 105; Underwood *v.* Robinson, 106 Mass. 296; Stetson *v.* Kempton, 13 Mass. 272; 7 Am. Dec. 145; Noyes *v.* Haverhill, 11 Cush. (Mass.) 338; Sprague *v.* Bailey, 19 Pick. (Mass.) 436; Upton *v.* Holden, 5 Met. (Mass.) 360; Aldrich *v.* Aldrich, 8 Met. (Mass.) 102; Holden *v.* Eaton, 8 Pick. (Mass.) 436; Hays *v.* Drake, 6 Gray (Mass.) 389; Rawson *v.* Spencer, 113 Mass. 80; Howard *v.* Proctor, 7 Gray (Mass.) 128; Hubbard *v.* Garfield, 102 Mass. 72; Cone *v.* Forest, 126 Mass. 97; Kinsley *v.* Hall, 9 N. H. 190; Sheldon *v.* Van Buskirk, 2 N. Y. 473; Savacool *v.* Boughton, 5 Wend. (N. Y.) 171; 21 Am. Dec. 181; Lake Shore, etc., R. Co. *v.* Roach, 80 N. Y. 339; Parker *v.* Walrod, 16 Wend. (N. Y.) 514; 30 Am. Dec. 124; Abbott *v.* Yost, 2 Den. (N. Y.) 86; Patchin *v.* Ritter, 27 Barb. (N. Y.) 34; Doolittle *v.* Doolittle, 31 Barb. (N. Y.) 312; Johnson *v.* Lane, 30 Barb. (N. Y.) 616; Alexander *v.* Hoyt, 7 Wend. (N. Y.) 89; Reynolds *v.* Moore, 9 Wend. (N. Y.) 35; 24 Am. Dec. 116; North Missouri R. Co. *v.* Maguire, 49 Mo. 483; Turner *v.* Franklin, 29 Mo. 285; Walden *v.* Dudley, 49 Mo. 419; St. Louis Mut. L. Ins. Co. *v.* Charles, 47 Mo. 462; State *v.* Dulle, 48 Mo. 282; St. Louis Bldg., etc., Assoc. *v.* Lightner, 47 Mo. 393; Glasgow *v.* Rowse, 43 Mo. 480; Brown *v.* Harris, 52 Mo. 306; McLean *v.* Cook, 23 Wis. 364; Sprague *v.* Birchard, 1 Wis. 457; 60 Am. Dec. 393; Erskine *v.* Hohnbach, 14 Wall. (U. S.) 613; First Nat. Bank *v.* Waters, 19 Blatchf. (U. S.) 242; Baley *v.* Wortsman, 2 N. Y. St. Rep. 246; 41 Hun (N. Y.) 637; Bradley *v.* Ward, 58 N. Y. 401; Chegaray *v.* Jenkins, 5 N. Y. 376.

The question whether a tax is laid in the proper town or ward, cannot be raised in an action against the officer executing it, in order to affect the validity of process, regular on its face. Patchin *v.* Ritter, 27 Barb. (N. Y.) 34.

**Collector's Assistants.**—The tax warrant which protects the collector, will likewise protect those who aid him in making the collection. Doolittle *v.* Doolittle, 31 Barb. (N. Y.) 312.

**Vermont.**—But in Vermont, it has been held that in order to rely upon a valid warrant, the collector must show that all previous proceedings were valid. Collamer *v.* Drury, 16 Vt. 574; Shaw *v.* Pickett, 25 Vt. 423; Spear *v.* Tillson, 24 Vt. 420; Downing *v.* Roberts, 21 Vt. 441; Hathaway *v.* Goodrich, 5 Vt. 65; Parkhurst *v.* Sumner, 23 Vt. 538; 56 Am. Dec. 91; Downer *v.* Woodbury, 19 Vt. 329; Wheelock *v.* Archer, 26 Vt. 380.

**A collector, in attempting to collect a tax which exceeds the amount limited by constitutional provision,** has been held a trespasser, and no valid tax sale can be made for such a tax. Graham *v.* Parham, 32 Ark. 676.

1. Lincoln *v.* Worcester, 8 Cush. (Mass.) 55; Sanders *v.* Simmons, 30 Ark. 274; Abbott *v.* Yost, 2 Den. (N. Y.) 86; Chegaray *v.* Jenkins, 5 N. Y. 376; Baley *v.* Wortsman, 2 N. Y. St. Rep. 246; 41 Hun (N. Y.) 637; Prince *v.* Thomas, 11 Conn. 472; Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Rubey *v.* Shain, 54 Mo. 207; Ranney *v.* Bader, 67 Mo. 476; Gove *v.* Mastin, 66 N. Car. 371; State *v.* Lutz, 65 N. Car. 503. But see Huse *v.* Merriam, 2 Me. 376; Baldwin *v.* McClinch, 1 Me. 102; Graham *v.* Parham, 32 Ark. 676; Greenwell *v.* Com., 78 Ky. 320. The remedy of the taxpayer is to proceed to arrest the collection of the tax, Ranney *v.* Bader, 67 Mo. 476; Rubey *v.* Shain, 54 Mo. 207; Beach *v.* Furman, 9 Johns. (N. Y.) 229; or to proceed against the persons who illegally assess the tax or issue the warrant. Loomis *v.* Spencer, 1 Ohio St. 154; Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Moore *v.* Allegheny City, 18 Pa. St. 58; Weimer *v.* Bunbury, 30 Mich. 201; Baley *v.* Wortsman, 2 N. Y. St. Rep. 246; 41 Hun (N. Y.) 637; Alexander *v.* Hoyt, 7 Wend. (N. Y.) 89; Beach *v.* Furman, 9 Johns. (N. Y.) 229; Kelly *v.*

from taxation.<sup>1</sup> But where the collector intermeddles with the taxpayer's property without a warrant, he is liable as a trespasser.<sup>2</sup>

To justify the collector, the warrant must have been issued by the duly authorized officer or body,<sup>3</sup> having jurisdiction of the matter.<sup>4</sup> The warrant must conform to the statute<sup>5</sup> and be regular upon its face.<sup>6</sup>

Noyes, 43 N. H. 209; *Henry v. Sergeant*, 13 N. H. 321; 40 Am. Dec. 146.

In *Bergen v. Clarkson*, 6 N. J. L. 352, it was held that proceedings under the authority of a void by-law imposing a tax, are themselves void, and furnish no justification of the acts of the person who undertook to execute it.

It is not competent to show that the forms prescribed by statute for the organization of a school district, have not been complied with, in an action against a collector for taking property in obedience to the warrant for the collection of a school tax. *Reynolds v. Moore*, 9 Wend. (N. Y.) 35; 24 Am. Dec. 116.

1. *Erschine v. Hohnbach*, 14 Wall. (U. S.) 613; *Kelley v. Noyes*, 43 N. H. 209; *Blanchard v. Goss*, 2 N. H. 491; *Beach v. Furman*, 9 Johns. (N. Y.) 229; *Moore v. Allegheny City*, 18 Pa. St. 55.

2. *Hilbish v. Hower*, 58 Pa. St. 93; *Stephens v. Wilkins*, 6 Pa. St. 260; *Lawrence v. Zimpleman*, 37 Ark. 643; *Gossett v. Kent*, 19 Ark. 602; *Butler v. Nevin*, 88 Ill. 575; *Donald v. McKinnon*, 17 Fla. 746; *Homer v. Cilley*, 14 N. H. 85; *Kelly v. Craig*, 5 Ired. (N. Car.) 129; *Lamb v. Farrell*, 21 Fed. Rep. 5; *Miner v. McLean*, 4 McLean (U. S.) 138. And see *Hannel v. Smith*, 15 Ohio 134.

3. *Hilbish v. Hower*, 58 Pa. St. 93; *Chalker v. Ives*, 55 Pa. St. 81; *Garber v. Conner*, 98 Pa. St. 551; *Prince v. Thomas*, 11 Conn. 472; *Tremont School Dist. v. Clark*, 33 Me. 482; *Bennett v. Burch*, 1 Den. (N. Y.) 141; *Butler v. Nevin*, 88 Ill. 575; *Brown v. Harris*, 52 Mo. 306.

4. See *St. Louis Mut. L. Ins. Co. v. Charles*, 47 Mo. 466; *Ranney v. Bader*, 67 Mo. 476; *State v. Shacklett*, 37 Mo. 280; *Glasgow v. Rowse*, 43 Mo. 489; *State v. Dowling*, 50 Mo. 134; *St. Louis Bldg., etc., Assoc. v. Lightner*, 47 Mo. 393; *Walden v. Dudley*, 49 Mo. 419; *Rubey v. Shain*, 54 Mo. 207; *Jefferson City v. Opel*, 49 Mo. 191; *Rawson v. Spencer*, 113 Mass. 80; *Hubbard v. Garfield*, 102 Mass. 72; *Suydam v. Wyckoff*, 13 Johns. (N. Y.) 444; *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Clifton*

*v. Wynne*, 80 N. Car. 145; *Cunningham v. Mitchell*, 67 Pa. St. 78.

But where the property is taxable in some form, and the assessor has jurisdiction over it, it is sufficient. *North Missouri R. Co. v. Maguire*, 49 Mo. 482; *Ranney v. Bader*, 67 Mo. 497; *Moore v. Allegheny City*, 18 Pa. St. 58.

In *Hallock v. Rumsey*, 22 Hun (N. Y.) 89, it was held that where property is improperly assessed to one not the owner, a warrant issued on such assessment is void, and furnishes no justification to the collector. See also *Billinger v. Gray*, 51 N. Y. 610.

5. *Hilbish v. Hower*, 58 Pa. St. 93; *Warrensburg v. Miller*, 77 Mo. 56; *St. Louis, etc., R. Co. v. Apperson*, 97 Mo. 300; *Bennett v. Burch*, 1 Den. (N. Y.) 141. And see *Dubois v. Webster*, 7 Hun (N. Y.) 371.

Mere formal irregularities not affecting the validity of the warrant, will not affect its power to protect the collector. See *King v. Whitcomb*, 1 Met. (Mass.) 328; *Hubbard v. Garfield*, 102 Mass. 72. And defects in the proceedings are unimportant, when jurisdiction has attached. *Barrett v. Crane*, 16 Vt. 246.

Where an affidavit which is made a part of the assessment roll and delivered to the collector with the warrant, discloses the want of jurisdiction of the board of supervisors to issue the warrant, the latter furnishes no protection to the collector. *Westfall v. Preston*, 49 N. Y. 349; *Van Rensselaer v. Witbeck*, 7 N. Y. 517. And see *Smith v. Mosher*, 9 N. Y. Supp. 786; *56 Hun (N. Y.) 643*; *New York, etc., R. Co. v. Lyon*, 16 Barb. (N. Y.) 651.

But where he has several warrants, he is not a trespasser because part of them are illegal upon their faces. *Woolsey v. Morris*, 96 N. Y. 311; *Hays v. Drake*, 6 Gray (Mass.) 387; *Bird v. Perkins*, 33 Mich. 28.

6. *Underwood v. Robinson*, 106 Mass. 298; *Rawson v. Spencer*, 113 Mass. 40; *Hubbard v. Garfield*, 102 Mass. 72; *Sherman v. Torrey*, 99 Mass. 472; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170; 21 Am. Dec. 181.

In *Hays v. Drake*, 6 Gray (Mass.)

While, as a general rule, a ministerial officer may execute an invalid process which is good on its face, but is not bound to do so,<sup>1</sup> some cases have adopted the rule that in such case it is his duty to collect without regard to his opinion as to the regularity or legality of the assessment or other precedent steps.<sup>2</sup> But it has been held that he is not protected in the execution of a warrant, regular on its face, if he has knowledge of facts which render it void.<sup>3</sup>

The collector is liable in damages for acts not authorized by his warrant,<sup>4</sup> and for unlawful or fraudulent misconduct in the performance of his duties.<sup>5</sup> And it has been held that if he makes

387, it was held that a tax warrant otherwise valid, addressed to one as "collector or constable," who is authorized to act as collector at the time of its delivery to him, though not at the time of its date, will protect the officer acting under it.

1. See *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Connell v. Barnes*, 7 Hill (N. Y.) 35; *Lott v. Hubbard*, 44 Ala. 593; *Davis v. Wilson*, 61 Ill. 527.

2. *Gove v. Newton*, 58 N. H. 359; *Kelley v. Noyes*, 43 N. H. 209; *Clark v. Bragdon*, 37 N. H. 562; *State v. Roberts*, 52 N. H. 492; *Roberts v. Holmes*, 54 N. H. 560; *Walden v. Dudley*, 49 Mo. 419; *Watson v. Watson*, 9 Conn. 140; 23 Am. Dec. 324. And see *Kellar v. Savage*, 20 Me. 199.

A collector who has a warrant from an authority having power to issue it, cannot inquire into the precedent steps. *Cunningham v. Mitchell*, 67 Pa. St. 78. See also *Paul v. Vankirk*, 6 Binn. (Pa.) 124; *Stephens v. Wilkins*, 6 Pa. St. 260; *Hilbish v. Hower*, 58 Pa. St. 93.

3. *Leachman v. Dougherty*, 81 Ill. 324; *Grace v. Mitchell*, 31 Wis. 545; 11 Am. Rep. 613.

A collector cannot be held chargeable with notice of irregularities in a tax levy, by reason of his having been a member of the taxing board when the tax was levied. *Bird v. Perkins*, 33 Mich. 28. But he cannot rely upon statements made by the attorney of the taxpayer, in ignorance of the true facts, when he had been fully informed before making the levy that the tax was void and would not be paid. *St. Louis, etc., R. Co. v. Apperson*, 97 Mo. 300.

4. *Cone v. Forest*, 126 Mass. 97; *Veit v. Graff*, 37 Ind. 253; *Meyer v. Larkin*, 3 Cal. 403; *Henry v. Bell*, 75 Mo. 194.

As where he sells more property than is necessary to satisfy the tax. *Cone v. Forest*, 126 Mass. 97.

A levy, after the tax is satisfied by payment or tender, renders the collector a trespasser. *Willis v. Miller*, 29 Fed. Rep. 238.

One who is unlawfully arrested and committed to prison on a warrant for the collection of a tax, may show the manner in which he lived while detained in prison and the inconvenience which he suffered while detained there, in an action against the collector to recover for illegal arrest on the question of damages. *Hall v. Hall*, 3 Allen (Mass.) 5.

5. See *Mix v. People*, 116 Ill. 265; *Hardesty v. Price*, 3 Colo. 559; *Cone v. Forest*, 126 Mass. 97.

The complaint in a suit against a county treasurer for selling land for taxes, where there was personal property, must allege the character of the personal property, that it was subject to seizure and sale, and was shown to the officer. *Bunnell v. Farris*, 82 Ind. 393.

**Exemplary damages** are not recoverable against a collector for imprisoning the delinquent taxpayer as a matter of right; in awarding them, the jury must be governed by the malice or the wantonness of the collector, as shown by the conduct for which they find him liable. *Boardman v. Goldsmith*, 48 Vt. 403.

**Prosecutions.**—In *State v. Green*, 87 Mo. 583, it was held that prosecutions against collectors, for collecting illegal taxes, must be founded upon the statute making it a misdemeanor, and they cannot be instituted under general provisions for criminal prosecutions for obtaining money under false pretenses.

**The county is not liable**, where a county treasurer fraudulently collected money as taxes, and converted the same to his own use. *Estep v. Keokuk County*, 18 Iowa 199.

a lawful levy for a tax, but afterwards abuses his authority, he becomes a trespasser *ab initio*.<sup>1</sup>

Where the tax is illegal, or the warrant is invalid, though good upon its face, replevin will lie against the collector to recover property seized thereunder.<sup>2</sup>

It has been held that taxes illegally assessed, which have been paid under protest after seizure, may be recovered back from the collector, if the action is promptly brought before he is required to pay them over;<sup>3</sup> but that after the money has been paid into the treasury, no recovery can be had from the collector.<sup>4</sup> Money in the hands of a collector is not subject to execution or attachment.<sup>5</sup>

*b. TO ACCOUNT FOR COLLECTIONS*—(See also PUBLIC OFFICERS, vol. 19, p. 378)—(1) *Extent of the Liability*.—The collector must keep safely all money received for taxes, and pay it over to the proper officer at the time and in the manner prescribed by statute.<sup>6</sup> He is liable to the political division, for and by which

1. Cooley on Taxation (2d ed.), p. 802. And see *Prince v. Thomas*, 11 Conn. 472; *Veit v. Graff*, 37 Ind. 253; *Farnsworth Co. v. Rand*, 65 Me. 19; *Brackett v. Vining*, 49 Me. 356; *Libby v. Burnham*, 15 Mass. 144; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396.

In *Wilson v. Seavey*, 38 Vt. 221, it was held that if an officer acting under two rate-bills, one of which is valid and the other invalid, seizes no more property than he is authorized to by virtue of the valid process, and sells the same for more than enough to satisfy that process, and applies the excess to satisfy the invalid process, such misapplication does not render the officer a trespasser *ab initio*, but he will be liable for the excess so misapplied.

Where a collector refuses to receive payment of a tax in a proper medium, he is liable to action by the party whose chattels have been levied on to enforce its collection, notwithstanding the fact that such receipt is prohibited by an unconstitutional statute. *Poindexter v. Greenhow*, 114 U. S. 270; *White v. Greenhow*, 114 U. S. 307; *Chaffin v. Taylor*, 114 U. S. 309.

2. *McKay v. Batchellor*, 2 Colo. 591; *Morford v. Unger*, 8 Iowa 82; *Le Roy v. East Saginaw City R. Co.*, 18 Mich. 233; 100 Am. Dec. 162; *Wright v. Briggs*, 2 Hill (N. Y.) 77; *Hudler v. Golden*, 36 N. Y. 446; *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Atlantic, etc., R. Co. v. Cleino*, 2 Dill. (U. S.) 175. See also *Sheldon v. Van Buskirk*, 2 N. Y. 473.

Where property transiently upon the lands assessed, belonging to another person not liable for the tax, is assessed, an action to recover possession thereof may be maintained against the collector. *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y. 329.

Statutes providing that property taken by virtue of a tax warrant cannot be replevied, are not applicable where property owned by one person is seized for the taxes of another. *Hallock v. Rumsey*, 22 Hun (N. Y.) 89.

3. *Hardesty v. Fleming*, 57 Tex. 395. See also *Dickins v. Jones*, 6 Yerg. (Tenn.) 483; 27 Am. Dec. 488.

4. *Dickins v. Jones*, 6 Yerg. (Tenn.) 483; 27 Am. Dec. 488; *Enloe v. Hall*, 1 Humph. (Tenn.) 303; *Crutchfield v. Wood*, 16 Ala. 702; *Lewis County v. Tate*, 10 Mo. 650; *Gray v. Otis*, 11 Vt. 629; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Elliot v. Swartout*, 10 Pet. (U. S.) 137.

5. *Moore v. Chattanooga*, 8 Heisk. (Tenn.) 850.

A judgment creditor of a municipality cannot reach funds accrued to it by taxation by process of garnishment, either while in the course of collection, or after they have been paid into the treasury. *Underhill v. Calhoun*, 63 Ala. 216; *Pruitt v. Armstrong*, 56 Ala. 308; *Droz v. East Baton Rouge*, 36 La. Ann. 340; *Moore v. Chattanooga*, 8 Heisk. (Tenn.) 850; *Brown v. Gates*, 15 W. Va. 131. Nor can the taxpayer be garnished. *Brown v. Gates*, 15 W. Va. 131.

6. See *Brunswick v. Snow*, 73 Me. 181; *Boothbay v. Giles*, 68 Me. 162;

the taxes are imposed, for all moneys collected by him and not accounted for, both personally and on his bond.<sup>1</sup>

He cannot escape from this liability by denying the authority under which he acted, as, having asserted the validity of his authority by collecting the tax, he is estopped from denying it, and disputing the right of the state to money thus coming into his hands.<sup>2</sup> The fact that the tax was unconstitutional, illegal, or

*Baird v. People*, 83 Ill. 387; *Mason v. Fractional School Dist.*, 34 Mich. 234; *People v. Brown*, 55 N. Y. 180.

Where a collector of taxes for a town or city has collected, but not paid over, the taxes, the amount constitutes a fiduciary debt within the bankrupt law, and is not barred by such collector's obtaining a discharge in bankruptcy. *Richmond v. Brown*, 66 Me. 373. And see *Morse v. Lowell*, 7 Met. (Mass.) 152. And he may be guilty of larceny by converting them to his own use. *State v. Dale*, 8 Oregon 229.

A tax collector is not personally liable for paying money to a treasurer who is required to increase his bond before receiving the same, when he acted without knowledge that the treasurer had not increased it. *Woodall v. Oden*, 62 Ala. 125; *Morrow v. Wood*, 56 Ala. 1.

**Cannot Pay Judgments.**—A tax collector of a parish has no right to pay out of taxes collected by him, a judgment against the parish. *Vermilion Parish v. Brookshier*, 31 La. Ann. 736.

1. *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Morse v. Lowell*, 7 Met. (Mass.) 152; *Lincoln v. Chapin*, 132 Mass. 470; *Orneville v. Pearson*, 61 Me. 552; *Webb County v. Gonzales*, 69 Tex. 455; *Boggs v. State*, 46 Tex. 10; *McLean v. State*, 8 Heisk. (Tenn.) 22; *State v. Britt*, 8 Heisk. (Tenn.) 208; *Waters v. Edmondson*, 8 Heisk. (Tenn.) 384; *People v. Cooper*, 10 Ill. App. 384; *Copley v. Dinkgrove*, 7 La. Ann. 595; *Duncan v. State*, 7 La. Ann. 377; *Bufington v. Dinkgrove*, 4 La. Ann. 550; *Goldsmith v. Kemp*, 58 Ga. 106; *Feigert v. State*, 31 Ohio St. 432; *Crawford v. Carson*, 35 Ark. 565; *People v. Love*, 25 Cal. 520; *Clifton v. Wynne*, 80 N. Car. 145; *Wake County v. Magnin*, 78 N. Car. 181.

The liability extends to interest and penalties imposed for delay, as well as to the tax itself. *Wheeling v. Black*, 25 W. Va. 266.

In *Hughes v. People*, 82 Ill. 78, it was held that a sheriff who has received money from a bank, as compensation

for deposits of tax moneys made by him, is properly sued upon his bond as sheriff, and not upon the additional bond the sheriff is required to give as collector of taxes.

In *Haley v. Petty*, 42 Ark. 392, it was held that a collector whose bond provides for the payment of moneys collected by him by virtue of his office, is liable thereon for moneys received by him from the collection of a preceding term.

Where a collector has defaulted, and the town has advanced the amount due the state, the collector and his sureties are liable for the amount so advanced. *Richmond v. Toothaker*, 69 Me. 451.

**Moneys Received by Deputy.**—A sheriff is responsible for money actually received by his deputy upon process committed to the deputy for service, although it is void on its face. *Williamstown v. Willis*, 15 Gray (Mass.) 427. See also *New Hampshire Sav. Bank v. Varum*, 1 Met. (Mass.) 34. *Boothbay v. Giles*, 68 Me. 162; *Brunswick v. Snow*, 73 Me. 177; *Gorham v. Hall*, 57 Me. 61; *State v. Shacklett*, 37 Mo. 280; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *State v. Guilbeau*, 37 La. Ann. 718.

2. See *Horn v. Whittier*, 6 N. H. 88; *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *Meredith v. Ladd*, 2 N. H. 517; *Charleton v. Whilcher*, 5 N. H. 196; *Tucker v. Aiken*, 7 N. H. 113; *Vermilion Parish v. Brookshier*, 31 La. Ann. 736; *Scarborough v. Stevens*, 3 Rob. (La.) 147; *McGuire v. Bry*, 3 Rob. (La.) 196; *Clifton v. Wynne*, 80 N. Car. 145; *Prince v. McNeill*, 77 N. Car. 398; *Hewlett v. Nutt*, 79 N. Car. 263; *State v. Woodside*, 8 Ired. (N. Car.) 104; *Wake County v. Magnin*, 78 N. Car. 181; *Billingsley v. State*, 14 Md. 369; *Lincoln v. Chapin*, 132 Mass. 470; *Cheshire v. Howland*, 13 Gray (Mass.) 321; *Williamstown v. Willis*, 15 Gray (Mass.) 427; *Howard v. Proctor*, 7 Gray (Mass.) 128; *Sandwich v. Fish*, 2 Gray (Mass.) 298; *Great Barrington v. Austin*, 8 Gray (Mass.) 444; *Spencer v. Jones*, 6 Gray (Mass.) 502; *Wendell v.*



otherwise defective,<sup>1</sup> or that the taxpayer, though voluntarily paying, might have refused to pay the tax, is no defense.<sup>2</sup> Even

Fleming, 8 Gray (Mass.) 613; Pease v. Smith, 24 Pick. (Mass.) 122; Sprague v. Bailey, 19 Pick. (Mass.) 436; Alvord v. Collin, 20 Pick. (Mass.) 418; Colerain v. Bell, 9 Met. (Mass.) 499; Briggs v. Murdock, 13 Pick. (Mass.) 305; People v. Cooper, 10 Ill. App. 384; State v. Harney, 57 Miss. 863; Taylor v. State, 51 Miss. 79; Webb County v. Gonzales, 69 Tex. 455; Berrien County v. Bunbury, 45 Mich. 79; Gorham v. Hall, 57 Me. 58; Kellar v. Savage, 17 Me. 445; Trescott v. Moan, 50 Me. 347; Brunswick v. Snow, 73 Me. 177; Tremont School Dist. v. Clark, 33 Me. 482; Hale v. Cushing, 2 Me. 218; Ford v. Clough, 8 Me. 334; 23 Am. Dec. 513; Johnson v. Goodridge, 15 Me. 29; Orono v. Wedgewood, 44 Me. 49; 69 Am. Dec. 81; Governor v. Montgomery, 2 Swan (Tenn.) 613; Jones v. Scanlan, 6 Humph. (Tenn.) 195; 44 Am. Dec. 300; Wilson v. State, 1 Lea (Tenn.) 316; Mississippi County v. Jackson, 51 Mo. 23; State v. Rushing, 17 Fla. 226; Frier v. State, 11 Fla. 300; Treasurers v. Hilliard, 8 Rich. (S. Car.) 412; Scott v. Watkins, 22 Ark. 566; Webb County v. Gonzales, 69 Tex. 455; State v. Middleton, 57 Tex. 185; Com. v. Titman, 148 Pa. St. 168; Ridgway Tp. v. Wheeler, 90 Pa. St. 150; King v. U. S., 99 U. S. 229; Swan v. State, 48 Tex. 121; Morris v. State, 47 Tex. 583; People v. Brown, 55 N. Y. 180; Lovington v. Board of Trustees, 99 Ill. 564; Dogan v. Griffin, 51 Miss. 782; Com. v. Philadelphia, 27 Pa. St. 497; Ross v. Curtis, 31 N. Y. 605; Murdock v. Aiken, 29 Barb. (N. Y.) 59; Walden v. Lee County, 60 Ga. 296; Arnett v. Griffin, 60 Ga. 349; Wilkinson v. Bennett, 56 Ga. 290.

After a tax collector has acted under the ordinance of a police jury, and collected taxes laid by it, neither he nor his sureties can contest the legality of the ordinance. Vermilion Parish v. Brookshier, 31 La. Ann. 736.

A tax collector, having acted in that capacity and given a bond, is estopped from contesting the legality of his election. Kellar v. Savage, 20 Me. 199. And he cannot be excused from the performance of his duty in collecting and paying over taxes committed to him, by reason of any illegality in the prior proceedings of the town, or of its officers, unless he was thereby

prevented from performing his own duty safely. Kellar v. Savage, 17 Me. 444; Ford v. Clough, 8 Me. 343; 23 Am. Dec. 513; Smyth v. Titcomb, 31 Me. 272.

In *Pennsylvania*, it has been held that a collector is not criminally liable for a tax collected, where it was afterwards shown that such tax had been improperly assessed by the assessor and county commissioners. Buck v. Com., 90 Pa. St. 110.

1. Clifton v. Wynne, 80 N. Car. 145; Hewlett v. Nutt, 79 N. Car. 263; San Francisco v. Ford, 52 Cal. 198; State v. Cunningham, 8 Blackf. (Ind.) 339; Smyth v. Titcomb, 31 Me. 272; Thompson v. Stickney, 6 Ala. 579; Olean v. King, 116 N. Y. 355; O'Neal v. Washington County, 27 Md. 227; Waters v. State, 1 Gill (Md.) 302; State v. Baltimore, etc., R. Co., 34 Md. 344; Williams v. Holden, 4 Wend. (N. Y.) 223; Stalel v. O'Malley, 39 Wis. 328; Moore v. Allegheny, 18 Pa. St. 55; Com. v. Philadelphia, 27 Pa. St. 497; Mast v. Nacogdoches County, 71 Tex. 380; Chandler v. State, 1 Lea (Tenn.) 296; Wilson v. State, 1 Lea (Tenn.) 316; Feigert v. State, 31 Ohio St. 432; Silsbee v. Stockle, 44 Mich. 562; Dogan v. Griffin, 51 Miss. 782; Webb County v. Gonzales County, 69 Tex. 455; Bell v. Mobile, etc., R. Co., 4 Wall. (U. S.) 598.

Where a collector collected a "dog tax" which was declared unconstitutional, and penalties, though the act imposing the penalties had been repealed, the court held that he and the sureties on his bond were liable for the same. Chandler v. State, 1 Lea (Tenn.) 296; Wilson v. State, 1 Lea (Tenn.) 316; Lovington v. Board of Trustees, 99 Ill. 564.

That the tax was paid under protest, is no defense. San Francisco v. Ford, 52 Cal. 198; People v. Austin, 46 Cal. 520.

The question of constitutional authority to levy a tax, can arise only between the collector and the person taxed before payment, and between the state and the person taxed after payment. Waters v. State, 1 Gill (Md.) 302.

2. People v. Cooper, 10 Ill. App. 384; Clifton v. Wynne, 80 N. Car. 145; Kellar v. Savage, 20 Me. 199; Ford v. Clough, 8 Me. 334; 23 Am. Dec. 513; Trescott v. Moan, 50 Me. 347; Johnson

though the collector might have refused to collect the tax, having collected it under color of authority, he must account for the moneys received.<sup>1</sup> He is responsible for moneys collected by him, even though they are lost or stolen without negligence on his part.<sup>2</sup>

*v. Goodridge*, 15 Me. 29; *Orono v. Wedgewood*, 44 Me. 49; 69 Am. Dec. 81; *Lyndon v. Miller*, 36 Vt. 329. And see *Ham v. Greve*, 34 Ind. 18; *Burks v. Wonerline*, 6 Bush (Ky.) 20; *Mississippi County v. Jackson*, 51 Mo. 23; *Lynn v. Cumberland (Md. 1893)*, 26 Atl. Rep. 1001; *Moss v. Riddle*, 5 Cranch (U. S.) 351.

In *State v. Woodside*, 8 Ired. (N. Car.) 104, the court held that although the county clerk may not deliver to the sheriff an official copy of the list of taxables, yet if he proceeds, without such official list, to collect the taxes, he and his sureties on his bond are bound for the amount he may so collect, notwithstanding he could not have enforced the collection without such certificate from the clerk. See also *Slade v. Governor*, 3 Dev. (N. Car.) 365; *Kelly v. Craig*, 5 Ired. (N. Car.) 131.

1. *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Cheshire v. Howland*, 13 Gray (Mass.) 321; *Lincoln v. Chapin*, 132 Mass. 470; *Sandwich v. Fish*, 2 Gray (Mass.) 298; *Reynolds v. Lofton*, 18 Ga. 47; *Barlow v. Sumter County*, 47 Ga. 639; *Weimer v. Bunbury*, 30 Mich. 201; *Palmer v. Craddock*, *Sneed (Ky.)* 182.

A collector's receipt for tax bills, whereby he agrees "to collect and pay over" the taxes, is not an absolute agreement on his part to collect and pay over, irrespective of the legality of the taxes. There is, in such case, an implied agreement on the part of the town that the taxes are valid and collectible. For the non-collection of taxes illegally assessed, neither the collector nor the sureties on his bond are liable. But for the misapplication or misappropriation of all moneys voluntarily paid to the collector on such taxes, they are liable. *Tunbridge v. Smith*, 48 Vt. 648.

A collector of taxes is excusable for not proceeding under a defective warrant, and he cannot be held liable for non-collection of the taxes when his warrant confers no authority to distrain. *Frankfort v. White*, 41 Me. 537; *Orneville v. Pearson*, 61 Me. 552; *Boothbay v. Giles*, 64 Me. 403.

But while the collector is under no

obligation to execute a warrant irregular on its face, the taxpayers may waive any formal defects and pay their taxes to the collector; and if he receives them, the defective warrant is no defense against the claim of the town for the money thus actually received. *Trescott v. Moan*, 50 Me. 347, and cases cited.

2. *U. S. v. Prescott*, 3 How. (U. S.) 578; *U. S. v. Morgan*, 11 How. (U. S.) 154; *State v. Houston*, 78 Ala. 576; 56 Am. Rep. 59; *Morbeck v. State*, 28 Ind. 86; *Albany County v. Dorr*, 25 Wend. (N. Y.) 440; *Muzzy v. Shattuck*, 1 Den. (N. Y.) 233; *Boggs v. State*, 46 Tex. 10; *Monticello v. Lowell*, 70 Me. 438; *State v. Harper*, 6 Ohio St. 508; 67 Am. Dec. 363; *State v. Lanier*, 31 La. Ann. 423; *New Providence v. McEachron*, 33 N. J. L. 339; *Com. v. Comly*, 3 Pa. St. 372. And see *State v. Lott*, 69 Ala. 147; *U. S. v. Thomas*, 15 Wall. (U. S.) 337; *United States v. Dashiell*, 4 Wall. (U. S.) 182; *U. S. v. Morgan*, 11 How. (U. S.) 154; *U. S. v. Keebler*, 9 Wall. (U. S.) 83; *Boyd v. U. S.*, 13 Wall. (U. S.) 17; *Halbert v. State*, 22 Ind. 125; *State v. Harper*, 6 Ohio St. 609; 67 Am. Dec. 363; *Redwood County v. Tower*, 28 Minn. 45; *State v. Moore*, 74 Mo. 413; 41 Am. Rep. 322; *Cumberland v. Pennell*, 69 Me. 357; 31 Am. Rep. 284; *York County v. Watson*, 15 S. Car. 1; 40 Am. Rep. 675; *Hancock v. Hazzard*, 12 Cush. (Mass.) 112.

His liability depends upon his contract, and not upon the law of bailment. *State v. Harper*, 6 Ohio St. 608; 67 Am. Dec. 363.

The collector can be released from liability only upon the ground that the moneys were taken from him by irresistible force. *State v. Houston*, 78 Ala. 576; 56 Am. Rep. 59.

In *Halbert v. State*, 22 Ind. 125, the court held that a public officer who is required to give bond for the proper payment of money that may come into his hands, as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence; but his liability is fixed by his bond, and the fact that the money is stolen from him without his fault, does not release him from his obligation

The collector is liable for taxes which he might have collected by reasonable diligence, but which, by reason of his negligence, having been left uncollected, have been lost.<sup>1</sup> So he is liable for taxes for which he has receipted without receiving payment.<sup>2</sup> Where, however, he has discharged his duties, and been guilty of no negligence, he is not liable for sums which he has not actually received.<sup>3</sup> He is not liable for taxes which it was

to make such payment. See also *State v. Harper*, 6 Ohio St. 607; 67 Am. Dec. 363.

But it has been held in *Ohio*, that when the legislature passes an act exonerating such officer and his sureties from the payment of such money, and directs that a tax be levied in the territory upon which the loss must fall, to meet the deficit, such act is not forbidden by the constitution, state or federal. *Board of Education v. McLandsborough*, 36 Ohio St. 227; 38 Am. Rep. 582.

The collector cannot be said to be without fault or neglect, if there has been previously an omission, without exonerative cause, to discharge any duty, the performance of which, as and when required, would have prevented the money from being subject to loss by robbery. If there was such a failure of duty, the condition of the bond was then broken, and such default of the collector, co-operating with the robbery, contributed to the loss of the money. *State v. Houston*, 78 Ala. 579; 56 Am. Rep. 59; *Bevans v. U. S.*, 13 Wall. (U. S.) 56; *Halliburton v. U. S.*, 13 Wall. (U. S.) 63.

1. *Pittsburg v. Tabor*, 61 N. H. 100; *Richmond v. Brown*, 66 Me. 373; *Marlar v. State*, 62 Miss. 677; *Governor v. McEwen*, 5 Humph. (Tenn.) 241. And see *State v. Britt*, 8 Heisk. (Tenn.) 298; *Prince v. Britt*, 8 Heisk. (Tenn.) 290.

A township committee has no power to direct the township collector not to collect a tax which, although illegal, has never been set aside. If, therefore, he fails to collect such a tax, the direction of the committee constitutes no defense to the suit of the township on his official bond. *Painter v. Blairstown*, 43 N. J. Eq. 317.

In *Colerain v. Bell*, 9 Met. (Mass.) 499, it was held that in case of the removal of the collector from office, he and his sureties are liable for such part of the taxes committed to him as are lost by reason of his remissness, even though the uncollected portion thereof has been committed to his successor, who has also given bond for the

faithful discharge of the duties of his office.

2. *McLean v. State*, 8 Heisk. (Tenn.) 22; *State v. Britt*, 8 Heisk. (Tenn.) 298. And see *Jackson County v. Gullatt*, 84 Ala. 243; *McWilliams v. Phillips*, 51 Miss. 196; *Olean v. King*, 116 N. Y. 355.

Under the *Vermont* Gen. Sts., ch. 84, § 64, the collector is accountable to the town for all of an abatement not allowed to him by the selectmen, without regard to previous custom. And under section 65 of the same chapter, he is accountable in like manner for the excess of the state tax remaining in his hands after satisfying the warrant of the state treasurer, and the non-payment thereof constitutes a breach of his bond. *Essex v. French*, 50 Vt. 413.

3. See *State v. Daspit*, 30 La. Ann. 1112; *Gutches v. Todd County*, 44 Minn. 383.

In *Com. v. Masonic Temple Co.*, 89 Ky. 658, the court held that under Gen. St. *Kentucky* (ed. 1873), ch. 92, art. 8, §§ 3, 8, which impose a liability on the collector for all taxes collected, and give the commonwealth a lien on his land therefor, which shall not be discharged until he has obtained a quietus, a sheriff was entitled to a quietus for taxes with which he had become chargeable during his term, but which he had been enjoined from collecting by order of court.

In *School Dist. v. Tebbetts*, 67 Me. 239, it was held that, the fact that money, which accrued from the sale of a district schoolhouse, and which was shown to have been finally disposed of in accordance with the vote of the district, although it had gone through the town treasurer's hands contrary to the vote of the district, before reaching its destination, had been duly accounted for, the town treasurer could not be held liable to the district a second time for it. *Treasurers v. Hilliard*, 8 Rich. (S. Car.) 412. But the insolvency or want of ability to pay is no defense to a suit on the collector's bond, when he

not his duty to collect;<sup>1</sup> nor is he liable where the warrant would not have protected him had he proceeded under it.<sup>2</sup>

(2) *The Accounting*.—The collector must make out his accounts and settle with the state at the time<sup>3</sup> and with the formalities prescribed by law.<sup>4</sup> He can receive nothing but money in payment of taxes, unless he is expressly permitted by statute to receive something else, and, in the absence of such a provision, nothing but money will be received from him in settlement of his accounts.<sup>5</sup>

The collector is not authorized to use his office for purposes of speculation, such as buying up demands against the public to

has failed to execute his warrant of distress, or otherwise exhausted his power. *Gorham v. Hall*, 57 Me. 58; *Colerain v. Bell*, 9 Met. (Mass.) 499.

1. See *West Baton Rouge v. Morris*, 27 La. Ann. 459; *Lincoln v. Chapin*, 132 Mass. 470.

A superseded tax collector and his sureties are liable only for the amount collected by him, and not accounted for; and in a suit to recover the same, the amount must be proved by the state. *State v. Daspit*, 30 La. Ann. 1112.

But he is liable even for taxes of a preceding term if he has collected them. *Haley v. Petty*, 42 Ark. 392.

Where the sheriff has failed to file the list of delinquent taxes until after the time prescribed by law, the collector is not liable for uncollected taxes. *Gutches v. Todd County*, 44 Minn. 383.

2. *Reynolds v. Lafton*, 18 Ga. 47; *Boothbay v. Giles*, 68 Me. 161; *Cheshire v. Howland*, 13 Gray (Mass.) 321. And see *Barlow v. Sumter County*, 47 Ga. 639.

It must be established that the collector has been legally authorized to collect the taxes, or that he has collected them. *Machiasport v. Small*, 77 Me. 109.

In *Williamstown v. Willis*, 15 Gray (Mass.) 427, it was held that a denial by the officer that any warrant was committed to him for services, authorizes proof that a warrant so committed was void on its face.

In *State v. Atkinson*, 107 N. Car. 317, it was held that a constable could not escape liability for failure to collect taxes committed to him, upon the ground that the warrant and list contained no direction to collect.

3. *Moeng v. People*, 138 Ill. 513.

**Account for and Pay Over.**—The statute and the condition in a treasurer's bond requiring him to "account for and pay over" moneys, do not create

two distinct grounds of liability; but the accounting is merely preliminary to the payment. *Franklin v. Kirby*, 25 Wis. 498.

4. See *Pettitt v. State*, 8 Heisk. (Tenn.) 320; *Wood v. State*, 8 Heisk. (Tenn.) 329; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Simmons v. Boullt*, 26 La. Ann. 277; *State v. Powell*, 40 La. Ann. 241.

Under the *Nebraska* statutes, it is only where the county commissioners fail to settle with the treasurer, and allow him credit for uncollectible taxes, and for errors in the tax lists, that the county clerk has authority to examine the lists and correct them. *Eatherly v. State*, 14 Neb. 287.

5. *Miltenerberger v. Cooke*, 18 Wall. (U. S.) 421; *U. S. v. Morgan*, 11 How. (U. S.) 154; *Johnson v. U. S.*, 5 Mason (U. S.) 425; *Smith v. Speed*, 50 Ala. 276; *Crutcher v. Sterling*, 1 Idaho 306; *Askew v. Columbia County*, 32 Ark. 270; *Sheridan v. Rahway*, 44 N. J. L. 587; *Frier v. State*, 11 Fla. 300; *Simmons v. Boullt*, 26 La. Ann. 277. And see *Lawson v. Pulaski County*, 3 Ark. 1; *Wellington v. Lawrence*, 73 Me. 125; *Sawyer v. Springfield*, 40 Vt. 305.

In *McLean v. State*, 8 Heisk. (Tenn.) 22, the court held that *Tennessee* bank notes receivable by the state in payment of taxes, if received by the collector and not paid over, must be accounted for as money, at their face value; and so of county warrants.

In *Orneville v. Pearson*, 61 Me. 552, it was held that, if a person who was collector for consecutive years, paid money, without any appropriation on his part, to the treasurer, who applied it to the oldest liability, having no notice that the money came from the assessments of any particular year, it cannot afterwards be applied by the collector to his liabilities for the subsequent year, even though collected from the taxes of that year.

use in his settlement with the state.<sup>1</sup> And even where the statute directs that such demands are receivable for taxes, they cannot be used in accounting, unless they were actually received by the collector in making his collections.<sup>2</sup>

A settlement is not conclusive evidence of a proper accounting, but mistakes in it may be shown.<sup>3</sup>

Settlement, in the absence of statutory provision, must be made within a reasonable time after collection.<sup>4</sup> Where the collector delays payment after the time for settlement, he is chargeable with interest.<sup>5</sup> Penalties may be imposed upon the collector for failure to pay over.<sup>6</sup>

1. *Frier v. State*, 11 Fla. 300. And see *Elliott v. Miller*, 8 Mich. 132; *Smith v. Speed*, 50 Ala. 276.

In *Cheshire v. Howland*, 13 Gray (Mass.) 321, it was held that payments made by a collector of taxes in behalf of the town, and allowed to him by the town in account, cannot be again allowed him in an action by the town on his official bond.

2. *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 319; *Simmons v. Boulitt*, 26 La. Ann. 277; *Vermilion Parish v. Brookshier*, 31 La. Ann. 736. But see *Askew v. Columbia County*, 32 Ark. 270.

The right of debtors to the State of *Virginia*, to discharge their debts in the state's tax-receivable coupons, is not available to a tax collector who has collected taxes which he has not turned over, nor to the surety on his official bond. *Burgess v. Winston*, 28 Fed. Rep. 559.

In *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318, the court held that, notwithstanding the collector's tender at the treasury, and in court of warrants on the treasury, made receivable for taxes, which were refused by the treasurer, the state was entitled to recover the amount of her demand against the collecting officer.

3. *Moore County v. McRae*, 89 N. Car. 95; *State v. Brewer*, 64 Ala. 287; *People v. Cooper*, 10 Ill. App. 384; *Justices v. Fennimore*, 1 N. J. L. 190. And see *Kilpatrick v. Pickens County*, 66 Ala. 422; *Kinney v. State*, 4 Ill. 357; *Washington County v. Parlier*, 10 Ill. 232; *Wellington v. Lawrence*, 73 Me. 125; *O'Neal v. Washington County*, 27 Md. 227.

In *Allbright v. Governor*, 25 Tex. 687, it was held that a comptroller's statement of accounts is not evidence in an action against the collector.

In *Adams v. Farnsworth*, 15 Gray (Mass.) 423, it was held that in an ac-

tion to recover sums of money not included in the treasurer's account, he may show errors in the account tending to balance the omission without pleading them in his answer or in set-off.

4. *Houston v. Russell*, 52 Vt. 110.

Where the statute required the collector to pay when the law should direct, while the bond required him to pay when the county commissioners should by law direct, the court held that there was no material difference, and that payment to the treasurer was in law payment to the county commissioners. *Frownfelter v. State*, 66 Md. 80.

Where a collector has paid money into the treasury, on account of taxes collected, before he is legally required to account, the payment has relation to the time when he is legally required to pay. *Wyman v. Smith*, 45 Me. 522.

5. *Sheridan v. Stevenson*, 44 N. J. L. 371; *Glover v. Wilson*, 6 Pa. St. 290. And see *State v. Van Winkle*, 43 N. J. L. 125; *State v. Lacey Tp.*, 42 N. J. L. 536; *State v. Lott*, 69 Ala. 147; *Brunswick v. Snow*, 73 Me. 177; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Hartford v. Franey*, 47 Conn. 76; *Wheeling v. Black*, 25 W. Va. 266; *Hawkins v. Minor*, 5 Call (Va.) 118.

In the absence of testimony showing when the amount sued for actually came into the hands of the collector, or that he was in default before the end of the fiscal year, that would be the date from which to charge interest against him. *Cordray v. State*, 55 Tex. 140.

In *Gaskins v. Com.*, 1 Call (Va.) 194, it was held that interest will not be computed upon the damages recovered against a public collector, until after judgment.

6. See *Carnall v. Crawford County*, 11 Ark. 604; *Lawson v. Pulaski County*, 3 Ark. 1; *Smith v. Speed*, 50 Ala. 276; *State v. Lewenthall*, 55 Miss. 589.

c. REMEDIES AGAINST DEFAULTING COLLECTOR—(1) *By Action*—(a) *The Right to Maintain*.—A state or municipality may pursue a delinquent collector for moneys collected and not paid over, or for failure to collect, by suit at common law;<sup>1</sup> or suit may be brought upon his official bond.<sup>2</sup>

As there is an adequate remedy at law, a bill in equity will not lie against a collector.<sup>3</sup> Demand or notice to pay is unnecessary as a foundation for an action against him.<sup>4</sup>

A penalty may be imposed without notifying the collector of the adjustment, as it constitutes part of the preliminary proceedings that may be conducted *ex parte*, and any objection for want of such notice should come from him when summoned to show cause; and if want of knowledge is shown by him, as to the penalty, and is disallowed as a defense, he should spread it on the record bill of exceptions. *Carnall v. Crawford County*, 11 Ark. 604. See also *Christian v. Ashley County*, 24 Ark. 142.

Where a penalty is imposed on a tax collector for failure to account, it is a legal incident, and need not be specially claimed in a declaration against him and his sureties. *State v. Lewenthall*, 55 Miss. 589.

1. *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Baird v. People*, 83 Ill. 387; *Helvey v. Huntington County*, 6 Blackf. (Ind.) 317; *Wentworth v. Gove*, 45 N. H. 160; *Spencer v. Perry*, 18 Mich. 394; *Richmond v. Brown*, 66 Me. 373; *Dogan v. Griffin*, 51 Miss. 782.

2. *Boykin v. State*, 50 Miss. 375. And see BONDS, vol. 2, p. 448; PUBLIC OFFICERS, vol. 19, p. 378; SURETYSHIP, vol. 24, p. 714.

3. *Hindman v. Aledo*, 6 Ill. App. 436; *Clinton County v. Schuster*, 82 Ill. 137; *Ramsey v. Clinton County*, 92 Ill. 225; *Baird v. People*, 83 Ill. 387; *Kilgour v. People*, 76 Ill. 548.

In *Livingston v. Anderson*, 80 Ga. 175, it was held that the sureties of a defaulting tax collector's bond are subrogated to the rights of the state for the uncollected tax, upon settling with the state therefor, and may recover such taxes by appeal to equity, where no legal remedy is provided therefor.

In *Turner v. Teague*, 73 Ala. 554, it was held that the statutory lien on the property of a collector for the payment of any judgment which may be rendered against him in his official capacity, is enforceable only in equity.

4. *Wentworth v. Gove*, 45 N. H. 160; *Watson v. Walker*, 23 N. H. 471; *Hicks v. Burns*, 38 N. H. 151; *Brewster v. Van Ness*, 18 Johns. (N. Y.) 133. Compare *Moody v. Mahurin*, 4 N. H. 296; *Weston v. Ames*, 10 Met. (Mass.) 247; *Prairie v. Worth*, 78 N. Car. 169; *Worth v. Cox*, 89 N. Car. 44; *State v. McIntosh*, 9 Ired. (N. Car.) 307; *Prairie v. Jenkins*, 75 N. Car. 545; *State v. Woodside*, 9 Ired. (N. Car.) 496; *Houston v. Russell*, 52 Vt. 110. And see *Tappan v. People*, 67 Ill. 339; *Dodge v. People*, 113 Ill. 491; *Carnall v. Crawford County*, 11 Ark. 604.

In *Sweetser v. Hay*, 2 Gray (Mass.) 49, it was held that if any demand of payment of a sum of money due upon a bond given by the town treasurer and collector of taxes to the selectmen, is necessary, before commencing an action on the bond, the demand upon such treasurer, made by two of the three selectmen and the town treasurer for the time being, after the three selectmen and treasurer have been appointed by the town, a committee to settle with the former treasurer is sufficient. See also *Adams v. Farnsworth*, 15 Gray (Mass.) 423.

Where a collector fails to settle and pay over, at the time prescribed, it is the duty of the county court to adjust his accounts according to the best information that can be obtained; but such adjustment being but a preliminary step, he is not entitled to previous notice. *Carnall v. Crawford County*, 11 Ark. 604. And suit by the commonwealth on a collector's bond, is sufficient notice. *Lehigh Crane Iron Co. v. Com.*, 55 Pa. St. 448.

In *Tappan v. People*, 67 Ill. 339, it was held that while no demand is necessary in order to recover the amount collected by a collector, if it is also sought to recover a penalty for failure to pay over according to law, demand must be made, penal statutes being required to receive a strict construction.

The form of the action may be *assumpsit* for money had and received;<sup>1</sup> though, sometimes, a special action on the case,<sup>2</sup> or, in some cases an action of debt, may be brought.<sup>3</sup>

(b) **How Prosecuted.**—In the absence of statutory provisions, the proceedings are the same in a tax suit as in ordinary actions.<sup>4</sup>

The suit is generally required to be brought in the name of the state or municipality imposing the tax,<sup>5</sup> and should be prosecuted generally by the officer to whom the money should have been paid over.<sup>6</sup>

1. *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Richmond v. Brown*, 66 Me. 373.

In *Hindman v. Aledo*, 6 Ill. App. 436, it was held that where it is merely sought to recover a sum of money which the defendant has in his hands, and which is the property of the state or municipality, *assumpsit* will lie.

In *O'Neal v. Washington County*, 27 Md. 227, it was held that the fact that a collector is responsible upon his official bond for moneys due the state, is no bar to an action of *assumpsit* for their recovery.

In *School Dist. v. Tebbetts*, 67 Me. 239, it was said by Barrows, J.: "That, under any ordinary circumstances, an action of *assumpsit* by a school district against the treasurer of a town is not the proper remedy to recover any balance of their moneys which has been paid into his hands as such treasurer, is sufficiently obvious. The broad remark made by the court in *Bailey v. Butterfield*, 14 Me. 112, and *McMillan v. Eastman*, 4 Mass. 378, that an action of *assumpsit*, as implied by law, is never a proper remedy against a public officer for neglect or misbehavior in his office, might, under some unusual and peculiar condition of things, need qualification. See *Adams v. Farnsworth*, 15 Gray (Mass.) 423. But, ordinarily, a special action on the case, setting forth the particulars which constitute the default or misfeasance, or, in some cases, an action of debt, has been deemed the proper form."

2. *School Dist. v. Tebbetts*, 67 Me. 239; *Bailey v. Butterfield*, 14 Me. 112; *Charleston v. Stacy*, 10 Vt. 562.

3. *School Dist. v. Tebbetts*, 67 Me. 239; *Bailey v. Butterfield*, 14 Me. 112.

4. See *Tappan v. People*, 67 Ill. 339.

5. See *Snyder v. State*, 21 Ind. 77; *Pep- per v. State*, 22 Ind. 399; 85 Am. Dec. 430; *Fry v. State*, 27 Ind. 348; *Taggart v. State*, 49 Ind. 42; *Neal v. State*, 49 Ind. 51; *Scotten v. State*, 51 Ind. 52;

*Cabel v. McCafferty*, 53 Ind. 75; *Caldwell v. Fayette County*, 80 Ind. 99; *Vanarsdale v. State*, 65 Ind. 176; *Solano County v. Neville*, 27 Cal. 465; *Tappan v. People*, 67 Ill. 339; *Dodge v. People*, 113 Ill. 491.

The recovery is in trust for the district by which the tax was levied. *Tappan v. People*, 67 Ill. 339.

An official bond is not a "contract for the payment of money," within statutory provisions requiring actions on such contracts to be brought in the name of the party really interested. *Morrow v. Wood*, 56 Ala. 1. See *Skinner v. Bedell*, 32 Ala. 44; *Rouse v. Moore*, 18 Johns. (N. Y.) 407; *Galway v. Stinson*, 4 Hill (N. Y.) 136; *Looney v. Hughes*, 26 N. Y. 514.

Under the *Alabama Code*, § 163, the official bond of a tax collector is properly made payable to the state, and an action thereon may be maintained by the county, as the person injured, on account of the default of the collector. *Dudley v. Chilton County*, 66 Ala. 593.

In *Wake County v. Magnin*, 78 N. Car. 181, the court held that an action upon the official bond of a county treasurer for the recovery of money belonging to the school fund of the county, collected by him and not paid over, is properly brought in the name of the board of commissioners of the county.

6. See *Clifton v. Wynne*, 80 N. Car. 145; *Gauntt v. State*, 81 Ind. 137; *Walton v. Jones*, 7 Utah 462.

In *Gibson County v. Harrington*, 1 Blackf. (Ind.) 260, it was held that county commissioners may sue a delinquent tax collector, even though the collector of the county is required to pay over to the county treasurer, and not to the county commissioners; but that they must assign non-payment to the county treasurer as a breach of the collector's duty.

In *North Carolina*, to recover an amount due the county by a county treasurer, the action should be brought

Proof of the receipt of the money by the collector, and of his delinquency in not paying it over, is sufficient to sustain the action,<sup>1</sup> and to cast upon him the burden of showing that he has rightfully disposed of it.<sup>2</sup>

The defense of set-off will not be allowed the collector in an action against him by the state.<sup>3</sup>

A claim against a collector for taxes collected by him and not paid over is a fiduciary debt, within the bankrupt law, and is not barred by his discharge in bankruptcy.<sup>4</sup>

on the relation of the commissioners, and not by the succeeding treasurer. *Wescott v. Thees*, 89 N. Car. 55.

A district attorney has authority, under the *California* Act of May 17th, 1861, to bring an action upon the official bond of a tax collector of a county, for moneys due both to the county and the state, on his own volition, with or without instructions from the comptroller, the county court, or the board of supervisors. *People v. Love*, 25 Cal. 520.

But in *Mississippi*, where the proper officer fails to institute the action, it may be brought by any taxpayer who renders himself responsible for the costs. *State v. Harris*, 52 Miss. 686.

In *French v. State*, 53 Miss. 651, it was held that in an action on the bond of a tax collector, under Code *Mississippi* 1871, § 1752, the declaration is bad, if it does not contain the allegation that the person on whose relation the suit is instituted is a taxpayer, and fails to aver that he is a citizen of the state.

1. *Coons v. People*, 76 Ill. 383. And see *Boothbay v. Giles*, 64 Me. 403; *Trescott v. Moan*, 50 Me. 347; *Cheshire v. Holland*, 13 Gray (Mass.) 321; *Houston County v. Dwyer*, 59 Tex. 113; *Ferrisburg v. Martin*, 60 Vt. 330.

But proof of a mere commitment to the collector, and a failure to account, is not sufficient. *Boothbay v. Giles*, 64 Me. 403.

The comptroller's statement of the amount due from a tax collector to the state, is *prima facie* evidence against the collector and his sureties, but not conclusive. *Anderson v. State*, 8 Heisk. (Tenn.) 13; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Wood v. State*, 8 Heisk. (Tenn.) 329. And see *Johns v. State*, 55 Md. 350.

Evidence of the contents of the collector's books to show payment for taxes, cannot be given, when no reason is shown for not producing them. *State v. Lewenthall*, 55 Miss. 589.

In the prosecution of a collector, for

converting money collected by him as taxes, it may be shown that he received sums of money from different individual taxpayers. *State v. Dale*, 8 Oregon 229.

In *U. S. v. Hunt*, 105 U. S. 183, it was held that a duly certified treasury transcript of the collector's accounts is admissible in evidence, although it contains no dates as to when the money was collected, it being certified to cover the period of his bond.

2. *Coons v. People*, 76 Ill. 383. And see *Carpenter v. Corinth*, 62 Vt. 111; *Houston County v. Dwyer*, 59 Tex. 113.

He may show allowances and releases upon the trial. *Pettitt v. State*, 8 Heisk. (Tenn.) 320. And instructions from the comptroller or other superior officer may be shown where set up in defense. *Allbright v. Governor*, 25 Tex. 689.

If the collector has abstracted the record of his receipts and payments of taxes required by *Mississippi* Code 1880, §§ 517-19, his sureties cannot require that the state, after establishing his collection of the amount claimed, shall prove that he has not settled with the auditor. *Gibson v. State*, 59 Miss. 341.

3. *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *Shaver v. Robinson*, 59 Ala. 195; *Finnegan v. Ferdinandina*, 15 Fla. 379; *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 442; *Cobb v. Elizabeth City*, 75 N. Car. 1; *Wilson v. Lewistown*, 1 W. & S. (Pa.) 428; *State v. Baldwin*, 14 S. Car. 135.

Where the proportion of the land tax due to the county has not been paid, the collector, in an action on his official bond, cannot set off county orders against the claim. *Byers v. State*, 2 Ohio 106.

4. *Richmond v. Brown*, 66 Me. 375; *Morse v. Lowell*, 7 Met. (Mass.) 152.

Fiduciary debts like those of the public against a tax collector, may be proved in bankruptcy, equally with other debts,



The Statute of Limitations begins to run against an action for breach of a collector's bond from the time of the breach, and not from the date of the bond.<sup>1</sup> Mere delay short of the statutory period, in enforcing the bond against a defaulting tax collector, does not release his sureties, nor impair their right of subrogation.<sup>2</sup>

(c) **The Measure of Damages.**—The tax collector is *prima facie* liable for the whole amount of his assessment roll; that is, for all the taxes committed to him for collection, in respect to which he has not exhausted his authority to enforce payment; and if he fails to pay in that amount at the proper time, the whole burden of proof is on him to show discharge, payment, or any other defense he may have in extinguishment of his liability.<sup>3</sup>

The measure of damages for taxes collected and not paid over, is the amount actually collected, with interest, deducting all payments made by the collector,<sup>4</sup> and the compensation which he is

if the creditor to whom they are due so elect; and if they are so proven, and dividends thereon are accepted, they are barred, like other debts, by the debtor's discharge. *Morse v. Lowell*, 7 Met. (Mass.) 152.

1. *Moore County v. McRae*, 89 N. Car. 95. See also *Barker v. Munroe*, 4 Dev. (N. Car.) 412; *Coomer v. Little*, Conf. Rep. (N. Car.) 92.

2. *State v. Guilbeau*, 37 La. Ann. 718; *Vermilion Parish v. Brookshier*, 31 La. Ann. 736. And see *Northumberland v. Cobleigh*, 59 N. H. 250.

**Notice to Sureties.**—Where the officers of a state knew of a tax collector's default under a previous term of office, but did not notify the surety of the collector on his bond, given on a subsequent appointment, it was held that the omission of the state officers to notify the surety of such default, is not a fraud, or fraudulent concealment of the fact by the state or its officers, and constitutes no defense to the surety in an action upon his bond for a subsequent default. *State v. Rushing*, 17 Fla. 226.

3. *Vermilion Parish v. Brookshier*, 31 La. Ann. 736; *Vermilion Parish v. Comeau*, 10 La. Ann. 695; *State v. Powell*, 40 La. Ann. 241; *Scarborough v. Stevens*, 3 Rob. (La.) 147; *Boring v. Williams*, 17 Ala. 510; *Thompson v. Stickney*, 6 Ala. 579; *Timberlake v. Brewer*, 59 Ala. 108; *Gutches v. Todd County*, 44 Minn. 383; *Houston County v. Dwyer*, 59 Tex. 113; *Swan v. State*, 48 Tex. 121; *Cordray v. State*, 55 Tex. 141; *Shaw v. State*, 43 Tex. 359; *Burnett v. Henderson*, 21 Tex. 590; *Allbright v. Governor*, 25 Tex. 687;

*Lockhart v. Houston*, 45 Tex. 317; *Morris v. State*, 47 Tex. 593; *Olean v. King*, 116 N. Y. 355; *Gorham v. Hall*, 57 Me. 58; *Howard v. State*, 8 Mo. 361; *Jackson County v. Gullatt*, 84 Ala. 243; *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372.

The safe keeping, by a collector, of tax money levied by a defunct village corporation, until someone has a right to demand and receive the same, is no breach of the bond. *Dodge v. People*, 113 Ill. 491.

The *Louisiana* revenue laws require of tax collectors the performance of certain acts as conditions precedent to the allowance of deduction lists as credits in their favor—viz.: They must verify these lists with an oath that they have exhausted all legal means for the collection of the sums upon them, and must deposit them in the recorder's office at a certain time. Unless these requirements are complied with, they are not legally entitled to be credited with the amount of these deduction lists. *State v. Viator*, 37 La. Ann. 734. See also *State v. Guilbeau*, 37 La. Ann. 718.

4. *Brunswick v. Snow*, 73 Me. 177; *James v. Governor*, 1 Ala. 605.

Where a tax collector has improperly levied upon property, and it is purchased by the owner at the tax sale, the measure of damages is the price bid at the sale, and the amount of the tax should be deducted therefrom. *Alexander v. Helber*, 35 Mo. 334. And where the collector himself purchases at the tax sale, it is the value of the goods sold, deducting the amount applied by

entitled to receive,<sup>1</sup> and including all penalties imposed upon the collector for delinquencies.<sup>2</sup>

(2) *Summary Process*—(a) *Provisions for*.—In many of the states, in order to secure the speedy payment of taxes collected, and to enable judgment to be obtained without the usual delays incident to ordinary actions, summary remedies are provided against defaulting collectors and their sureties.<sup>3</sup> Thus, summary judgment may be obtained against the collector and his sureties on motion or order to show cause,<sup>4</sup> or a warrant of distress or execution may be issued against them by the treasurer or other proper officer.<sup>5</sup>

the collector to the payment of the tax. *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396.

It is not necessary that the amount of the default of a tax collector should have been ascertained by a judgment at law; such default may be ascertained and determined, and the lien enforced, by a proceeding in equity. *Knighton v. Curry*, 62 Ala. 404.

1. *Brunswick v. Snow*, 73 Me. 177.

2. *Christian v. Ashley County*, 24 Ark. 142; *Tappan v. People*, 67 Ill. 339.

Penalties may also be recovered of sureties for the collector. *Tappan v. People*, 67 Ill. 339.

In *Johnson v. Thompson*, 4 Bibb (Ky.) 294, it was held that a judgment against a principal is not admissible evidence against his deputy, when he was not a party to the suit, and is liable to the principal without a judgment.

3. See *Weimer v. Bunbury*, 30 Mich. 201; *Boring v. Williams*, 17 Ala. 510; *Bassett v. Governor*, 11 Ga. 207; *Vermilion Parish v. Brookshier*, 31 La. Ann. 736; *Akers v. Burch*, 12 Heisk. (Tenn.) 606.

The power to collect taxes is not exhausted by the receipt of the money by the collector. Its purpose is to raise money for the use of the government, and, whoever may have possession of it, the power to use appropriate means to secure its proper application, continues until its actual disbursement. *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272.

4. *Carmichael v. Hays*, 66 Ala. 543; *Armstrong v. State, Minor* (Ala.) 160; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *De Soto County v. Dickson*, 34 Miss. 150; *Akers v. Burch*, 12 Heisk. (Tenn.) 606; *Mallory v. Miller*, 2 Yerg. (Tenn.) 113.

In *Alabama*, the motion may be made in the name of the county, and is not required to be in the name of the treasurer, *Stamphill v. Franklin County*,

86 Ala. 392; and a judgment by default in such summary proceedings is conclusive as to the amount then due. *State v. McBride*, 76 Ala. 51.

A motion against a tax collector carries with it the right to judgment against the securities. *Brown v. State*, 8 Heisk. (Tenn.) 871.

In *Missouri*, the practice is for the county court to ascertain the balance due from the collector to the county, and order its payment, and on his failure to respond, to render judgment against him at the next term, and order execution to issue thereon. *Owens v. Andrew County Ct.*, 49 Mo. 372.

5. *Crawford v. Carson*, 35 Ark. 565; *Bassett v. Governor*, 11 Ga. 207; *Smyth v. Titcomb*, 31 Me. 281; *Tremont School Dist. v. Clark*, 33 Me. 482; *Scarborough v. Stevens*, 3 Rob. (La.) 147; *Weimer v. Bunbury*, 30 Mich. 201; *Bringard v. Stellwagen*, 41 Mich. 54; *Myers v. Com.*, 34 Pa. St. 270; *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272.

And if the treasurer neglects to issue his warrant of distress against the collector, *mandamus* lies to compel him. *Waldron v. Lee*, 5 Pick. (Mass.) 323.

In *Phillips v. Robbins*, 59 Mo. 107, it was held that where one is both collector and sheriff, a writ may issue against him to the sheriff of an adjoining county, without further proof that the sheriff of the proper county is disqualified.

No particular form is prescribed by the *Louisiana* statute, for a warrant or execution on behalf of the state, against a delinquent tax collector. *Scarborough v. Stevens*, 3 Rob. (La.) 147.

*Necessity of Return*.—An officer levying on an extent against a delinquent tax collector, under the *Vermont* statute, is not required to make a return; and such return, if made, can be varied by parol evidence. *Hackett v. Amsden*, 57 Vt. 432.

And, further, the bond is made a lien on all the real estate of both principal and sureties.<sup>1</sup> The defenses that are allowed to be set up may be limited.<sup>2</sup> In some states the certificate or statement of certain officers is made sufficient evidence to establish the amount due by the collector, in the absence of rebutting testimony.<sup>3</sup> Some of the statutes, in case of delay or non-payment, authorize the imposition of a penalty of a certain per cent. on the amount due by the collector;<sup>4</sup> others, the imprisonment or removal from office of the collector.<sup>5</sup> It has been held that upon

**Not a Tax Sale.**—The sale of the land of a defaulting tax collector, under a warrant from the county commissioners, is not a sale for taxes, and not covered by the law relating to tax sales. The warrant has no return day, and is effectual as long as the commissioners may choose, and when it is irregular, no one but the defaulter can take advantage of it, and the commissioners may buy the land for the benefit of the county and lease or sell it at pleasure. *Schuykill, etc., R. Co. v. McCreary*, 58 Pa. St. 304.

**Lien of Treasurer's Warrant.**—In *Pennsylvania*, the lien of a treasurer's warrant levied on the collector's real estate has priority over a subsequent judgment. *Stauffer v. Lancaster County*, 1 Watts (Pa.) 300.

1. See *Wilder v. Butterfield*, 50 How. Pr. (N. Y. Supreme Ct.) 385; *Butler County v. Henry*, 3 Pen. & W. (Pa.) 26; *Warner v. Emory*, 3 Yeates (Pa.) 50; *Irby v. Livingston*, 81 Ga. 281.

The statutory lien created by the approval and recording of a collector's bond, attaches not only to the lands then owned by the principal, but also to after acquired lands, the same as in the case of a judgment. *Crawford v. Richeson*, 101 Ill. 351; *Baker v. Schuessler*, 85 Ala. 541.

Under the *Illinois* statutes, a homestead not exceeding one hundred dollars in value, owned and occupied by the collector as his residence, is exempt from the statutory lien of his bond, but if it exceeds that value, the excess is subject to the lien; and evidence of a homestead right is competent, under a general denial, as going to show that the bond was never a lien on the land. *Crawford v. Richeson*, 101 Ill. 351.

But in *Georgia*, the homestead is liable for the collector's default. *Davis v. State*, 60 Ga. 76.

**Discharge of Lien.**—Payment to the proper officer discharges the lien. *Russell's Appeal*, 59 Pa. St. 401.

**Subrogation of Sureties.**—In *Irby v. Livingston*, 81 Ga. 281, it was held that one who buys property of a defaulting tax collector, after his bond is given, takes it subject to the lien of the bond, and to the right of the sureties thereon to reimburse themselves out of the proceeds of the property.

2. See *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318.

3. *Prather v. Johnson*, 3 Harr. & J. (Md.) 487; *Billingsley v. State*, 14 Md. 369; *State v. Powell*, 40 La. Ann. 241; *Johnson v. Thompson*, 4 Bibb (Ky.) 294; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272.

The treasurer's certificate to an account against the collector of state taxes, authenticates itself. *Milburn v. State*, 1 Md. 1.

4. See *State v. Lewenthall*, 55 Miss. 589; *Owens v. Andrew County Ct.*, 49 Mo. 372.

Where damages on the amount due by the collector are allowed, they are a legal incident to the collection of the tax and need not be specially claimed in the declaration, but will follow a recovery of the amount in default. *State v. Lewenthall*, 55 Miss. 589.

5. See *Hartland v. Hackett*, 57 Vt. 92; *Daggett v. Everett*, 19 Me. 373; *Com. v. Ruff*, 3 Rawle (Pa.) 95.

Under *Georgia* Rev. Code, § 918, the governor may vacate the commission of a defaulting tax collector, and fill the vacancy. *State v. Frazier*, 48 Ga. 137.

In *Vermont*, the two remedies given to a town against a delinquent tax collector are to be regarded as elective and not concurrent; and if the town procures an extent to be issued against a defaulting collector, on which he is imprisoned and held, an action cannot be maintained on his bond, for the reason that the prosecution of one remedy is a bar to the other. *Hartland v. Hackett*, 57 Vt. 92.

proof of delinquency of the collector, *mandamus* will lie to compel him to pay over.<sup>1</sup>

(b) *Nature and Validity.*—The collector, by accepting the office, and his sureties by giving the bond under the existing laws providing for such summary remedies, impliedly agree to make them a part of the contract.<sup>2</sup> They are upheld upon the ground of necessity,<sup>3</sup> and are not in contravention of the constitutional provisions prohibiting anyone from being deprived of property without due process of law,<sup>4</sup> and guaranteeing trial by jury.<sup>5</sup> But there should

1. See *State v. Staley*, 38 Ohio St. 259; *Smyth v. Titcomb*, 31 Me. 272; *People v. Brown*, 55 N. Y. 180; *State v. Rahway*, 44 N. J. L. 587.

It is not a ground for refusing a writ, that the collector has, by his voluntary and wrongful act in paying over the money to the supervisors of the town, subjected himself to loss, or made the performance of his duty difficult or inconvenient. *People v. Brown*, 55 N. Y. 180.

In *People v. Mead*, 36 N. Y. 224, it was held on application for a *mandamus* to compel a county treasurer to pay over moneys assessed and collected to pay certain bonds, that he might show that the necessary assent of the taxpayers of the town to the issue of the bonds was never obtained.

2. See *Weimer v. Bunbury*, 30 Mich. 201; *Chappee v. Thomas*, 5 Mich. 53; *State v. Carleton*, 1 Gill (Md.) 249; *Whitehurst v. Coleen*, 53 Ill. 247; *Hoke v. Henderson*, 4 Dev. (N. Car.) 1; *Cotten v. Ellis*, 7 Jones (N. Car.) 545; *Bunting v. Gales*, 77 N. Car. 283; *Philadelphia v. Com.*, 52 Pa. St. 451; *Bennett v. McWhorter*, 2 W. Va. 441; *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *Head v. University*, 19 Wall. (U. S.) 526; *People v. Van Eps*, 4 Wend. (N. Y.) 387; *Lewis v. Garrett*, 6 Miss. 434; *Pratt v. Donovan*, 10 Wis. 378.

The bond is to be read as if the provisions of the statute were set forth at large in it, and had thereby received the express assent of the parties. *Cooley on Taxation* (2d ed.), p. 717.

The collection of the revenues is under the controlling power of the legislature, and sheriffs and their bondsmen are affected with notice thereof, and subject to its exercise. *Worth v. Cox*, 89 N. Car. 45; *Prairie v. Worth*, 78 N. Car. 169; *Oates v. Darden*, 1 Murph. (N. Car.) 500; *Prairie v. Jenkins*, 75 N. Car. 545.

The sureties on the collector's bond,

therefore, are not subject to summary remedies other than those accepted by them by giving their bond under a statute providing for such remedies. See *Boughton v. State*, 7 Humph. (Tenn.) 193; *Mallory v. Miller*, 2 Yerg. (Tenn.) 103.

But the collector himself may be subjected to a change of remedies or to new remedies imposed by subsequent statutes. *Morrow v. Wood*, 56 Ala. 1; *U. S. v. Cheeseman*, 3 Sawyer (U. S.) 424; *Com. v. Toms*, 45 Pa. St. 408.

3. *Tift v. Griffin*, 5 Ga. 185; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318.

In *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272, the court, by Curtis, J., said: "Probably there are few governments which do, or can, permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding."

4. *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *Weimer v. Bunbury*, 30 Mich. 201; *Bringard v. Stellwagen*, 41 Mich. 54.

**Unreasonable Searches and Seizures.**

—Statutes authorizing summary process against delinquent tax collectors and their sureties, do not violate constitutional provisions prohibiting unreasonable searches and seizures. *Weimer v. Bunbury*, 30 Mich. 201.

5. *Tift v. Griffin*, 5 Ga. 185. See also *Ex p. Randolph*, 2 Brock. (U. S.) 447; *Harper v. Elberton*, 23 Ga. 566; *Boring v. Williams*, 17 Ala. 510; *Gorham v. Hall*, 57 Me. 58.

The adjustment of the balance due from accounting officers is not necessarily a judicial controversy; there is a distinction in this respect between claims of government for its taxes, and

be notice and a hearing of some kind upon the question of delinquency; <sup>1</sup> and proof of delinquency in some form is essential.<sup>2</sup>

(c) **Construction and Applicability.**—As summary processes against defaulting collectors are in derogation of common law, a strict compliance with all statutory provisions is required, and no intendments will be taken in their favor.<sup>3</sup>

of other claims. *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272.

Any legal process which was originally founded in necessity, and has been consecrated by time and approval and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative law of the land. *State v. Allen*, 2 McCord (S. Car.) 56; *Weimer v. Bunbury*, 30 Mich. 201.

1. Cooley on Taxation (2d ed.), p. 721. And see *Walker v. Chapman*, 22 Ala. 116; *Stamphill v. Franklin County*, 86 Ala. 392; *Armstrong v. State*, Minor (Ala.) 160. Notice would appear to be necessary in case of a motion for judgment. See *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318.

Notice of the motion for judgment is regarded as serving the double purpose of process and pleading. But the technical precision and accuracy of a declaration at common law is not required. *Timberlake v. Brewer*, 59 Ala. 108.

In *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272, it was said that matters which, from their nature, are subject to suit at common law, or in equity or admiralty, cannot be withdrawn from judicial cognizance. See also *Myers v. Com.*, 34 Pa. St. 270.

2. *Weimer v. Bunbury*, 30 Mich. 201; *Frary v. Dakin*, 7 Johns. (N. Y.) 75; *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Newsom v. Hart*, 14 Mich. 233; *Platt v. Stewart*, 10 Mich. 260; *Morgan County v. Lutman*, 63 Mo. 210; *Machiasport v. Small*, 77 Me. 109; *Crawford v. Carson*, 35 Ark. 565.

A mere recital in a warrant against a collector, that he is in default in the payment of taxes, is a statement of a legal conclusion, and not a sufficient statement of jurisdictional facts to authorize its issue. *Weimer v. Bunbury*, 30 Mich. 201.

To authorize a recovery of money collected but not paid over, it is not necessary that the evidence should show, with mathematical precision, the exact amount collected. The presumption must be, in the absence of proof to the

contrary, that he did his duty, and collected all the taxes which he ought to have collected; and when the entire amount of taxes assessed, the amount allowed for errors and insolvency, and the amount of payments made to the county treasurer, are established, enough is shown to authorize a recovery. *Dudley v. Chilton County*, 66 Ala. 593.

Under the *Georgia* statutes, where a tax collector denies that he owes any part of the money for which execution against him has issued, he may, by filing an affidavit of illegality, cause an issue to be formed which must be tried; and in such case, the trial should proceed, even though no counsel appear for the municipality. *Bridges v. Dooly County*, 83 Ga. 275.

But it is within legislative power to prescribe and establish the rules of evidence in suits against collectors and their sureties, on all contracts entered into subsequent to the legislative provision. *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318. And see *Phillips v. Robins*, 59 Mo. 107; *Johnson v. Thompson*, 4 Bibb (Ky.) 294.

In *Scofield v. Perkerson*, 46 Ga. 360, the court held that the issuing of executions by the comptroller general, to collect the public revenues of the state, is the act of the executive department of the government; and the courts have no power to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize the process of execution to issue against defaulting officers or agents, or to restrain that department in pursuing this course. See also *Eve v. State*, 21 Ga. 50; *Manning v. Phillips*, 65 Ga. 548; *Goldsmith v. Kemp*, 58 Ga. 106.

3. *Prather v. Johnson*, 3 Har. & J. (Md.) 487; *Sprigg v. State*, 54 Md. 480; *Mallory v. Miller*, 2 Yerg. (Tenn.) 113; *Boughton v. State*, 7 Humph. (Tenn.) 193; *Governor v. Powell*, 23 Ala. 579; *De Soto County v. Dickson*, 34 Miss. 150; *Smyth v. Titcomb*, 31 Me. 272; *Tremont School Dist. v. Clark*, 33 Me. 482; *Daggett v. Everett*, 19 Me. 373; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Tift v. Griffin*, 5 Ga. 185; *Bassett v.*

It has been held that summary process lies against the collector only while he remains in office.<sup>1</sup> These summary remedies cannot be had upon the official bond unless it is in the statutory form; upon a mere common-law bond only the usual common-law remedies may be had.<sup>2</sup> Summary process will not lie against a collector for failure to collect, where the commitment and warrant were not such as authorized him to compel payment.<sup>3</sup>

The state may elect between an action against the collector and his sureties on his official bond and a summary process.<sup>4</sup> Compulsory process against the treasurer, or other officer, whose duty

Governor, 11 Ga. 207; *Walden v. Lee* County, 60 Ga. 296; *Cahn v. Wright*, 66 Ga. 119; *Nashville v. Smith*, 86 Tenn. 213; *Ex p. Christian*, 23 Ark. 641; *Lawson v. Pulaski County*, 3 Ark. 1; *Carnall v. Crawford County*, 11 Ark. 604; *Christian v. Ashley County*, 24 Ark. 142; *Crawford v. Carson*, 35 Ark. 565; *Lee v. State*, 22 Ark. 235; *Bringard v. Stellwagen*, 41 Mich. 54; *Houghton County v. Rees*, 34 Mich. 481; *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441; *Denison v. Smith*, 33 Mich. 155; *Clark v. Adams*, 33 Mich. 159; *Clark v. Lichtenberg*, 33 Mich. 307; *Smalley v. Lighthall*, 37 Mich. 348; *Alverson v. Dennison*, 40 Mich. 179; *Myers v. Com.*, 34 Pa. St. 270; *Warner v. Emory*, 3 Yeates (Pa.) 50.

Under the *Georgia* statutes, an execution may be issued against a defaulting collector for the amount of taxes collected by him after they have been credited to him as insolvent. *Reid v. Wright* (Ga. 1880), 9 S. E. Rep. 834.

If the statute has not been complied with, the officer issuing the process becomes a trespasser. *Weimer v. Bunbury*, 30 Mich. 201.

In *State v. McBride*, 76 Ala. 51, it was held that the summary remedy by notice and motion against a defaulting tax collector, provided for by the *Alabama* code, may be pursued, even though the default occurred prior to the adoption of the code.

1. *Owens v. Andrew County Ct.*, 49 Mo. 372.

Summary process cannot be had against one who has been ousted on *quo warranto* as a usurper. *Hartley v. State*, 3 Kelly (Ga.) 233. See Cooley on Taxation (2d ed.), p. 721.

2. See *Mallory v. Miller*, 2 Yerg. (Tenn.) 113; *State v. Starnes*, 5 Lea (Tenn.) 545; *Lee County v. Walden*, 68 Ga. 664.

Nor will judgment be rendered by motion, where the bond is dated more

than a year after the collection. *De Soto County v. Dickson*, 34 Miss. 150.

But where the statute required the bond to be double the amount of the taxes to be collected, the court held that because the bond was made for less than the requisite amount, it is no valid objection why judgment should not be rendered by motion. *Mabry v. Tarver*, 1 Humph. (Tenn.) 94.

3. *Pearson v. Canney*, 64 Me. 188; *Weimer v. Bunbury*, 30 Mich. 201.

In *Snow v. Winchell*, 74 Me. 408, it was held that a certificate to a town treasurer, by the assessors, that they had delivered to the collector the list of the assessments of a tax "with a warrant in due form of law," will justify the treasurer in issuing a warrant of distress against the collector for a failure to collect and pay the taxes into the treasury as required by law, whether the warrant so delivered to the collector was in fact a good one or not. *Distinguishing Pearson v. Canney*, 64 Me. 188.

4. *Akers v. Burch*, 12 Heisk. (Tenn.) 606; *Gorham v. Hall*, 57 Me. 59. And see *Mallory v. Miller*, 2 Yerg. (Tenn.) 113.

A judgment for unpaid taxes is for the benefit of the state, and collection may be enforced under it, even though, through the delay of the collector, the right of the state to exact unpaid taxes from him and his sureties, has accrued. Until the satisfaction of the judgment by motion on the collector's bond, the state has a right to resort to both remedies. *Akers v. Burch*, 12 Heisk. (Tenn.) 606.

**Not Concurrent Remedies.**—The two remedies against a delinquent tax collector, by imprisonment on an extent, and by suit on his official bond, are elective and not concurrent. *Hartland v. Hackett*, 57 Vt. 92.

In *Hellings v. Com.*, 5 Rawle (Pa.) 64, it was held that when the statute

it is to issue summary process against the defaulting collector, has been upheld.<sup>1</sup>

(d) *Procedure*.—The proceeding is generally brought in the name of the officer or political division to which the bond is payable,<sup>2</sup> and is prosecuted by the officer from whom the money is unlawfully withheld.<sup>3</sup> In general, facts which warrant the issuing of the process must appear upon its face.<sup>4</sup>

In a summary process against the tax collector and his sureties, it has been held that the principal is a necessary party to the notice.<sup>5</sup> Nothing but the tax and such penalties as have been imposed can be recovered.<sup>6</sup>

points out a specific remedy against a collector who embezzles taxes, indictment will not lie.

1. *Waldron v. Lee*, 5 Pick. (Mass.) 323. And see *Crawford v. Carson*, 35 Ark. 565; *Tremont School Dist. v. Clark*, 33 Me. 482.

Illegality in the assessment are no defense to an application for such a process. *Tremont School Dist. v. Clark*, 33 Me. 482.

It is within the discretion of the court, when applied to for compulsory process against a treasurer to compel him to issue a warrant against a collector, to withhold or grant it according to the justice of the case. *Waldron v. Lee*, 5 Pick. (Mass.) 323.

2. *Nabors v. Governor*, 3 Stew. & P. (Ala.) 15; *Stamphill v. Franklin County*, 86 Ala. 392; *Mayberry v. State*, 1 Stew. (Ala.) 266; *Lyon v. State Bank*, 1 Stew. (Ala.) 466; *Colgin v. State Bank*, 11 Ala. 222; *Walker v. Chapman*, 22 Ala. 116; *Hardaway v. Chairman County Ct.*, 5 Humph. (Tenn.) 557; *Bassett v. Governor*, 11 Ga. 207; *Scarborough v. Stevens*, 3 Rob. (La.) 147.

In *Boring v. Williams*, 17 Ala. 510, it was held that a summary proceeding against a tax collector is properly instituted in the name of the county treasurer. And in *Wheat v. State*, Minor (Ala.) 199, it was held that it may be had in the name of the state, even though the collector's bond is executed in the name of the governor.

In *Shepherd v. Hamilton County*, 8 Heisk. (Tenn.) 380, the court held that the motion for non-payment of school moneys collected by a tax collector, ought to be in the name of the county trustee, and a motion in the name of the county is erroneous.

It has been held in *Alabama*, that notices to a delinquent tax collector and his sureties, of a motion to be made for

judgment against them, need not be in the name of the state nor directed to any officer. *Armstrong v. State*, Minor (Ala.) 160.

3. See *Scofield v. Perkerson*, 46 Ga. 360; *Stamphill v. Franklin County*, 86 Ala. 392; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Weimer v. Bunbury*, 30 Mich. 201; *Bringard v. Stellwagen*, 41 Mich. 54; *Scarborough v. Stevens*, 3 Rob. (La.) 147.

4. *Weimer v. Bunbury*, 30 Mich. 201. And see *Wilson v. Lilly*, 1 Blackf. (Ind.) 358.

In *Pennsylvania*, the warrant of a county treasurer, committing a delinquent collector of taxes, need not show what prior proceedings were had, or that the board of commissioners were in session; nor need it run in the name of the commonwealth. *Com. v. Ruff*, 3 Rawle (Pa.) 95.

*Objections Must Be Specific*.—On the trial of a motion against a delinquent tax collector, an objection to the admissibility of the comptroller's certificate, without pointing out specific grounds of objection, does not enable the defendant to assign for error that the certificate was not under seal. *Carlton v. State*, 8 Heisk. (Tenn.) 16.

5. *Governor v. Powell*, 23 Ala. 579. And see *Orr v. Duvall*, 1 Ala. 262; *Mason v. Brazier*, 1 Ala. 635; *James v. Auld*, 9 Ala. 462; *Logan v. Barclay*, 3 Ala. 361.

In *Waldron v. Lee*, 5 Pick. (Mass.) 323, it was held that where an alternative *mandamus* issues against a treasurer, to compel him to issue summary process against a collector, it is not necessary to make the collector a party, or to give him notice.

6. *Covington, etc., Bridge Co. v. Mayer*, 31 Ohio St. 317. And see *Walker v. Chapman*, 22 Ala. 116; *Reid v. Wright* (Ga. 1889), 9 S. E. Rep. 834.

The recovery is limited to the amount

(e) **The Judgment.**—It has been held that the judgment must show the facts necessary to give the court jurisdiction, and to establish the liability of the defendants.<sup>1</sup> It is conclusive as to the amount due from the collector to the state;<sup>2</sup> so that neither he nor his sureties can, in any subsequent action, set up credits which might have been put in as a defense to the tax suit.<sup>3</sup>

Where the collector's bond is a lien upon the lands of himself and his sureties, the latter have an equitable right to require that the former's lands shall be first resorted to.<sup>4</sup> Indeed, by some statutes, the estate of a collector is required to be exhausted before resort can be had to the property of his sureties.<sup>5</sup>

d. UPON HIS OFFICIAL BOND—(See also BONDS, vol. 2, p. 448; PUBLIC OFFICERS, vol. 19, p. 378; SURETYSHIP, vol. 24, p.

of taxes actually received by the collector. *Weimer v. Bunbury*, 30 Mich. 201.

The remedy given by statute to the county against the tax collector, for money collected and not paid over, does not extend to the recovery of damages for his negligence in failing to collect moneys which he could and ought to have collected. *Dudley v. Chilton County*, 66 Ala. 593.

Under the *Alabama* statute of 1822, in a proceeding against a delinquent tax collector, the measure of damages is the amount of the county taxes unpaid, with 15 per cent. damages without interest. *James v. Governor*, 1 Ala. 605.

1. *Graham v. Reynolds*, 45 Ala. 578. And see *Smith v. Branch Bank*, 5 Ala. 26; *Andrews v. Branch Bank*, 10 Ala. 375; *Barclay v. Barclay*, 42 Ala. 345; *Connolly v. Alabama, etc., R. Co.*, 29 Ala. 373.

2. *State v. McBride*, 76 Ala. 51; *Jones v. State*, 14 Ark. 170.

**Review.**—Where the proceeding is judicial, it is subject to review by *certiorari*. *Owens v. Andrew County Ct.*, 49 Mo. 372.

3. *State v. McBride*, 76 Ala. 51.

**Payment of Judgment.**—In *Pettitt v. State*, 8 Heisk. (Tenn.) 320, it was held that credit may be obtained by a tax collector, from the comptroller, after the rendition of judgment against him.

A sheriff who collects money on executions issued by the comptroller general, against a defaulting tax collector, must pay it to the comptroller directly, and he has no right to retain it until claims of third persons thereto can be passed upon by a court. The courts have no authority over the comptroller's judgment. *Reid v. Wright* (Ga. 1889), 9 S. E. Rep. 834.

When a tax collector's property, seized in execution by the state, is released on a forthcoming bond, the bond, whether regularly taken or not, is no satisfaction of the debt; its forfeiture is a fraud on the state, of which the official sureties cannot avail themselves. Their only remedy is to pay and make the amount out of the forfeited bond, if they can. *Copley v. Dinkgrave*, 7 La. Ann. 595.

4. *Crawford v. Richeson*, 101 Ill. 351.

This is so, even where the collector's lands have passed into the hands of innocent purchasers. *Crawford v. Richeson*, 101 Ill. 351.

Where sureties appropriate the tax moneys to their own use, they are placed in the position of principal debtors, and their property should be sold in the enforcement of the lien of the bond, before any sale of the collector's property; but if a deficiency should remain after a sale of their property, then the real estate of the collector may be resorted to. *Wilder v. Butterfield*, 50 How. Pr. (N. Y. Supreme Ct.) 385.

5. See *Crawford v. Richeson*, 101 Ill. 351; *Phillips v. Robbins*, 59 Mo. 107.

Where the lien of a collector's bond attaches to land, a part of which was acquired after the recording of the bond, and such lands have been sold to different persons and at different times, it is proper to order their sale in the inverse order of their alienation. *Crawford v. Richeson*, 101 Ill. 351.

In *Phillips v. Robbins*, 59 Mo. 107, it was held that a sheriff's return, that the proceeds of a sale of the collector's property are not enough to satisfy the debt, is sufficient to show an exhaustion of his estate and to authorize a levy on that of his securities.



714).—The general rules of suretyship are applicable to the liability of a collector and his sureties upon his official bond.<sup>1</sup>

Where the undertaking of the sureties is that the tax collector shall pay over all moneys collected by him, they are liable for all moneys collected, whether with or without a warrant,<sup>2</sup> and without regard to any irregularity in the tax list,<sup>3</sup> or the legality of the tax or assessment.<sup>4</sup>

In general, the sureties' liability extends only to the breach of some duty described in the bond, or which was attached to the office at the time of making the bond.<sup>5</sup> But, of course, the rule is otherwise where by statute the bond is required to be, and is, conditioned for the faithful performance of all duties, as well

Under the *Georgia* statutes, one who buys property of a defaulting tax collector after his bond is given, takes subject to the lien created by the bond, and to the rights of the sureties thereon to reimburse themselves out of the proceeds of the property. *Irby v. Livingston*, 81 Ga. 281.

1. *Boothbay v. Giles*, 68 Me. 162. See also SURETYSHIP, vol. 24, p. 714.

Where each of the sureties of a tax collector has obligated himself for a specified sum, each can be held for that sum only, and all of them can be held for no more than the full amount due by the collector to the state. *Vermilion Parish v. Brookshier*, 31 La. Ann. 736.

**Death of Collector.**—In the event of the death of a defaulting collector, the sureties on his bond may be sued in the first instance. *Scott v. Dewees*, 2 Tex. 153; *Ennis v. Crump*, 6 Tex. 85.

2. *Johnson v. Goodridge*, 15 Me. 29. And see *Prince v. McNeill*, 77 N. Car. 398.

3. *Johnson v. Goodridge*, 15 Me. 29; *Ford v. Clough*, 8 Me. 334; *Orono v. Wedgewood*, 44 Me. 49; *Williamston v. Willis*, 15 Gray (Mass.) 427; *State v. Rushing*, 17 Fla. 226; *Burks v. Wontertine*, 6 Bush (Ky.) 20; *Moss v. Riddle*, 5 Cranch (U. S.) 351; *Ham v. Greve*, 34 Ind. 18; *State v. Woodside*, 8 Ired. (N. Car.) 104; *New Hampshire Sav. Bank v. Varnum*, 1 Met. (Mass.) 34; *Frier v. State*, 11 Fla. 300; *State v. Middleton's Sureties*, 57 Tex. 185. See generally, SURETYSHIP, vol. 24, p. 714.

One of the duties of a collector is to pay the treasurer all the money received upon the taxes committed to him for collection, though received under a defective warrant, and a neglect to do so is a breach of his bond conditioned to secure a faithful performance of his

duties, and the securities in the bond having entered into the same covenant as the principal, are equally reliable for such breach. *Brunswick v. Snow*, 73 Me. 177.

4. *Moore v. Allegheny City*, 18 Pa. St. 55.

5. *Mechem Pub. Off.*, § 306, and cases cited; *Lafayette v. James*, 92 Ind. 240; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Eaton v. Kelly*, 72 N. Car. 110; *Prince v. McNeill*, 77 N. Car. 398. And see *Holt v. McLean*, 75 N. Car. 347, *State v. Long*, 8 Ired. (N. Car.) 415; *State v. Brown*, 11 Ired. (N. Car.) 141; *Jones v. Montfort*, 3 Dev. & B. (N. Car.) 73; *State v. Gibbs*, 2 Jones (N. Car.) 326; *Evans v. Blalock*, 2 Jones (N. Car.) 377. See also, in respect of duties imposed on the officer during his term, by acts passed after execution of his bond, *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424; *Com. v. Toms*, 45 Pa. St. 408.

In *Crumpler v. Governor*, 1 Dev. (N. Car.) 52, a sheriff had given four bonds, but the condition of no one of them expressly provided for the payment of state taxes, the non-payment of which was the breach alleged. All of them contained general words, "faithfully executed the office," etc. It was held that these words did not extend beyond the duties specially described and provided for in the preceding clause.

In *White v. East Saginaw*, 43 Mich. 567, it was held that the sureties of a sheriff were not bound for his default in the performance of duties as a tax collector, imposed upon him by a law passed after the execution of the bond.

**Special Bond.**—In *McLean v. State*, 8 Heisk. (Tenn.) 270, the court held that the general bond of a tax collector will not be intended to include money collected for railroad taxes, where the law

additional duties imposed by subsequent legislation, as those existing when the bond was given.<sup>1</sup>

For any delinquencies occurring before or after the time for which the sureties are bound, they are not liable;<sup>2</sup> but they are liable for money in the official possession of the collector at the time the bond was given, though it was collected before that time.<sup>3</sup>

It must be shown that the collector actually received the money for taxes and failed to account for it, to establish the liability of his sureties; it is not sufficient to establish a mere commitment of the tax list to the collector and his failure to account.<sup>4</sup>

Where the bond is voluntarily executed, it becomes a valid

requires a special bond, expressly to cover said collection. And see also *State v. Starres*, 5 Lea (Tenn.) 545.

1. *Morrow v. Wood*, 56 Ala. 1; *Board of Education v. Quick*, 99 N. Y. 138. Compare *Brewer v. King's Sureties*, 63 Ala. 511.

In *Dawson v. State*, 38 Ohio St. 1, it was held that where a bond is conditioned for the faithful performance of the duties "according to law," it embraces whatever duties are required of the officer during the term covered by the bond, whether the statute requiring them was passed before or after the execution of the bond.

In *State v. Bradshaw*, 10 Ired. (N. Car.) 229, the court held that where a statute requires a bond from an officer, for the faithful discharge of his duty, and a new duty is attached to the office by statute, such bond, given subsequently to the latter statute, embraces a new duty and is a security for its performance; unless where, when the new duty is attached, a bond is required to be given specifically for its performance. See also *Cameron v. Campbell*, 3 Hawks (N. Car.) 285; *Crumpler v. Governor*, 1 Dev. (N. Car.) 52; *Governor v. Barr*, 1 Dev. (N. Car.) 65; *Governor v. Matlock*, 1 Dev. (N. Car.) 214.

2. *Conover v. Middletown*, 42 N. J. L. 382; *Patterson v. Freehold*, 38 N. J. L. 255; *Farrar v. U. S.*, 5 Pet. (U. S.) 373.

In *Wilson v. Glover*, 3 Pa. St. 404, it was held that an agreement to discharge a surety of a tax collector and accept another in his place, does not discharge him, until the agreement has been performed, and the substituted surety has given bond, the new security being required to be one which would have been good, if given in the first place.

**Misapplication of the Funds After They Have Reached the Treasurer.**—

Thus, the sureties are not liable for a misapplication of the funds after they have legally reached the treasurer. *State v. Middleton's Sureties*, 57 Tex. 185; *Hetten v. Lane*, 43 Tex. 279; *People v. Smith*, 12 Ill. 281; *U. S. v. January*, 7 Cranch (U. S.) 572; *U. S. v. Boyd*, 5 How. (U. S.) 48; *U. S. v. Girault*, 11 How. (U. S.) 28; *Jones v. U. S.*, 7 How. (U. S.) 681; *Pickering v. Day*, 2 Del. Ch. 333; *Boring v. Williams*, 17 Ala. 525; *Porter v. Stanley*, 47 Me. 515; *Miller v. Com.*, 8 Pa. St. 444; *Lyndon v. Miller*, 36 Vt. 329; *Chapman v. Com.*, 25 Gratt. (Va.) 742. See generally, *SURETYSHIP*, vol. 24, p. 714.

**For What Sureties are Liable.**—Where each of the sureties of a tax collector has obligated for a specific sum, each can be held for that sum only, and all of them can be held for no more than the full amount due by the collector to the estate. *Vermilion Parish v. Brookshier*, 31 La. Ann. 736.

When the same person is town collector and town treasurer, and as treasurer pays to the state treasurer the school fund and school tax, and charges it as paid by him as collector, and it is allowed to him in his settlement of collections, the town cannot hold the sureties on his collector's bond therefor. *Norridgewock v. Hale*, 80 Me. 362.

3. *Conover v. Middletown*, 42 N. J. L. 382.

4. *Boothbay v. Giles*, 64 Me. 403; *Trescott v. Moan*, 50 Me. 347; *Cheshire v. Holland*, 13 Gray (Mass.) 321.

To determine the liability of the bondsmen of a tax collector, it is necessary to ascertain what tax bills were delivered to him during the time named in the bond, the amount collected by him on the same, and when collected,

security for taxes, and the sureties are bound thereby, even though the bond is not required by law.<sup>1</sup> The acceptance of the bond is a sufficient consideration to cover all official delinquencies.<sup>2</sup> The bond is binding, whether the collector is an officer *de jure* or *de facto*.<sup>3</sup>

The general rule that an extension of time granted to a principal debtor by the creditor, without the consent of his sureties, operates to discharge them, does not apply to the sureties on the bond of a collector, for the reason that an extension of time for the collection of taxes is regarded as beneficial to the sureties.<sup>4</sup>

**6. Compensation of Collectors**—(See also PUBLIC OFFICERS, vol. 19, p. 378).—It is for the legislature to fix the compensation of collectors, and they are entitled only to those fees and costs which are expressly given them by law;<sup>5</sup> and this is true, not-

the amount paid by him to the treasurer, and when paid; and where the report of a referee does not furnish these facts, it must be recommitment. *Ferrisburg v. Martin*, 60 Vt. 330.

1. *State v. Matthews*, 57 Miss. 1; *State v. Harney*, 57 Miss. 863. And see *Harris v. State*, 55 Miss. 50; *Stevens v. Allmen*, 19 Ohio St. 485.

2. *Boothbay v. Giles*, 68 Me. 160. And see *Trescott v. Moan*, 50 Me. 347; *Scarborough v. Parker*, 53 Me. 252.

3. *Waters v. Edmondson*, 8 Heisk. (Tenn.) 384; *Vermilion Parish v. Brookshier*, 31 La. Ann. 736.

A condition in a collector's bond that the principal obligor shall well and faithfully execute his office as collector, estops the sureties upon the bond, as well as the collector himself, from denying that the principal obligor had been appointed collector. *Billingsley v. State*, 14 Md. 369.

A collector's bond, perfect on its face, containing no conditions, cannot be avoided by the sureties, upon the ground that they signed it on condition that it should not be delivered unless it was executed by another person who did not sign. *Richardson v. Rogers*, 50 How. Pr. (N. Y.) 403.

The condition of the bond securing the faithful collection of the public taxes, given by a sheriff in September, 1874, who was elected the preceding August, embraces the taxes to be collected for the fiscal year preceding the 1st of April, 1875, and not the taxes due and collected for the year ending April, 1874. The collection of the latter is secured by his former bond, if he was sheriff at that time. *State v. McNeill*, 74 N. Car. 535.

In *State v. Baldwin*, 14 S. Car. 135, where there was no law limiting the tenure of office of the county treasurers, a county treasurer and the sureties on his official bond were held liable for a defalcation committed by said treasurer more than two years after the execution of the bond.

4. See *Cooley on Taxation*, p. 502; *State v. Carleton*, 1 Gill (Md.) 249; *Crawford v. Richeson*, 101 Ill. 351; *Bennett v. McWhorter*, 2 W. Va. 441. But see *Johnson v. Hacker* (Tenn. 1874), 2 Cent. L. J. 625; *State v. Roberts*, 68 Mo. 234.

The renewal of a warrant for the collection of taxes, extending it beyond the time originally fixed for its return, will not release the sureties on the official bond of the collector. *Olean v. King*, 116 N. Y. 355.

5. *State v. Brewer*, 64 Ala. 287; *Miner v. Solano County*, 26 Cal. 115; *Solano County v. Neville*, 27 Cal. 465. And see *Com. v. Scott*, 7 Pa. Co. Ct. Rep. 409.

The power to fix the compensation of local and municipal officers is often delegated to the board or body to which is intrusted the transaction of local and municipal affairs. See *Hughes v. People*, 82 Ill. 78; *Broadwell v. People*, 76 Ill. 554.

Where the questions upon which a collector's right to commissions depend, are left to his discretion, his determination is binding upon the courts. *San Mateo County v. Maloney*, 71 Cal. 205.

**Excessive Fees.**—In *Garber v. Conner*, 98 Pa. St. 551, it was held that an officer who has no right to charge fees of any kind, is not subject to a penalty

withstanding that in a particular case the fees provided by law are not adequate compensation for the work done.<sup>1</sup>

Where the sheriff or treasurer is *ex officio* collector, and his compensation is fixed as sheriff or treasurer, he is not entitled to any additional compensation as collector.<sup>2</sup> Where there is no provision as to the fees of a collector, they are generally to be determined by the auditing body of the state or municipality imposing the tax.<sup>3</sup>

The collector sometimes receives a fixed salary;<sup>4</sup> but the more usual method of compensation is the allowance of commissions proportionate to the amount collected.<sup>5</sup> These commissions are sometimes allowed to be deducted from the taxes collected,<sup>6</sup> in

imposed upon officers taking greater or other fees than those provided for by law.

Where the accounts of the collector have been settled, and through inadvertence he has credited himself with excessive commissions, his accounts may be readjusted, and the same proceedings may be taken against him to compel him to refund, as are admissible to recover a balance of the amount collected. *Wilson v. State*, 51 Ark. 212.

A collector is entitled to retain only his original costs and commissions, though the taxpayer is required to pay double the amount of taxes, costs, and commissions, in order to effect a redemption. *Ramsey v. State*, 78 Tex. 602.

1. *Labette County v. Franklin*, 16 Kan. 450; *Thralls v. Sumner County*, 24 Kan. 594; *Miner v. Solano County*, 26 Cal. 115; *Board of School Com'rs v. Wasson*, 74 Ind. 134; *Treasurers v. Burger*, 3 Rich. (S. Car.) 357; *Garber v. Conner*, 98 Pa. St. 551. And see *Richmond v. Brown*, 66 Me. 373; *People v. Besson*, 6 N. Y. Supp. 135; 53 Hun (N. Y.) 632; *Gilchrist v. Wilkesbarre*, 142 Pa. St. 114; *People v. Long*, 13 Ill. 629.

If a sheriff receives interest on tax money deposited by him in a bank, it is a perquisite derived from his office, and he cannot retain it in addition to the compensation allowed him by the county board. *Hughes v. People*, 82 Ill. 78.

In *Treasurers v. Burger*, 3 Rich. (S. Car.) 357, it was held that commissioners of the poor cannot allow, for collecting the poor rates, a higher percentage than that fixed by law, but may allow the collector, for services not within the scope of his duties as collector, a further compensation.

2. *Hughes v. People*, 82 Ill. 78; *Broadwell v. People*, 76 Ill. 555; *Price v. Adamson*, 37 Mo. 151; *Lane v. Coos County*, 10 Oregon 124.

3. *State v. Baldwin*, 14 S. Car. 135. And see *Shaver v. Robinson*, 59 Ala. 195.

They cannot be determined by the verdict of a jury. *State v. Baldwin*, 14 S. Car. 135.

**Fees for Collection of State Tax.**—Fees allowed a city officer for the collection of a state tax are not the property of the city. *Bright v. Hewes*, 18 La. Ann. 666.

4. See *Castle v. Lawlor*, 47 Conn. 340; *Board of School Com'rs v. Wasson*, 74 Ind. 134; *People v. Besson*, 6 N. Y. Supp. 135; 53 Hun (N. Y.) 632.

A statute giving a collector a certain sum for collecting taxes, in lieu of all other compensation, means that he is to receive that sum for his services for one year, and not for the collection of all the taxes that become payable during the year, and he is therefore a salaried officer. *Castle v. Lawlor*, 47 Conn. 340.

5. See *State v. Drew*, 16 Fla. 303; *Gorman v. Boise County*, 1 Idaho 647; *Fountain County v. La Tourette*, 60 Ind. 460; *Randolph County v. Trogdon*, 75 N. Car. 350; *Garber v. Conner*, 98 Pa. St. 551; *Com. v. Scott*, 7 Pa. Co. Ct. Rep. 409; *Davidson County v. De Grove*, 2 Coldw. (Tenn.) 494.

The fees are sometimes the same as those allowed executive officers for collection under execution. See *Labette County v. Franklin*, 16 Kan. 450; *Thralls v. Sumner County*, 24 Kan. 594; *Board of School Com'rs v. Wasson*, 74 Ind. 134.

6. See *Shaver v. Robinson*, 59 Ala. 195; *Wilson v. State*, 51 Ark. 212; *Waycross v. Board of Education*, 87

which case each tax must bear the expense of its own collection.<sup>1</sup> But the commissions are usually added to the tax and collected from the taxpayer, unless otherwise expressly provided for.<sup>2</sup> Where the commissions are to be collected from the taxpayer, no liability attaches to the state therefor, and where, at a sale of land for taxes, the land falls to the state, the collector is entitled to no fees.<sup>3</sup>

A defaulting collector is, of course, entitled to nothing for his services.<sup>4</sup> And when no services have been rendered, there can be

Ga. 22; *Jonas v. Cincinnati*, 18 Ohio 318.

Under the *Tennessee* statutes, where lands sold for unpaid taxes are bid off by the collector in the name of the treasurer as superintendent of public instruction, for the use of common schools, the fees are paid to the officers out of the common-school fund by the treasurer on the warrant of the comptroller. *Akers v. Burch*, 12 Heisk. (Tenn.) 606.

**Priority of Claim.**—Under the *Nevada* revenue act, the auditor, assessor, and tax collector are preferred creditors, and entitled to their pay for assessing and collecting the taxes before the money collected is distributed among the several funds to which it properly belongs. *Grimes v. Goodell*, 3 Nev. 79.

1. In *Shaver v. Robinson*, 59 Ala. 195, it was held that even though the constitution requires that the money derived from the poll tax shall be applied exclusively in aid of the public-school fund, it must nevertheless bear expense of its own assessment and collection. And the auditor has no power to direct a tax collector to retain from a poll tax collected during the current year, the commissions earned by collecting a poll tax from a preceding year. See also *State v. Drew*, 16 Fla. 303; *Waycross v. Board of Education*, 87 Ga. 22; *Davidson County v. De Grove*, 2 Coldw. (Tenn.) 494.

In *Bagley v. Shoppach*, 47 Ark. 72, it was held that tax collectors are entitled to a fee for a certificate of each tract sold, even though they include several tracts in one certificate upon request of the taxpayer.

2. See *Board of School Com'rs v. Wasson*, 74 Ind. 134; *Garber v. Conner*, 98 Pa. St. 551; *State v. Guilbeau*, 37 La. Ann. 718; *Payne v. Washington County*, 25 Fla. 798; *State v. Brewer*, 64 Ala. 287; *Merrill v. Marshall County*, 74 Iowa 24; *Thralls v. Sumner County*, 24 Kan. 594; *Cheever v. Merritt*, 5

*Allen* (Mass.) 563; *Seidenstricker v. State*, 2 Gill (Md.) 374; *Fitch v. Elko County*, 8 Nev. 271; *State v. Gaines*, 4 Lea (Tenn.) 352. But see to the contrary, *Jonas v. Cincinnati*, 18 Ohio 318.

In *Board of School Com'rs v. Wasson*, 74 Ind. 134, it was held that commissions of tax collectors, which are collectible out of the property of the taxpayer, can be deducted from the amount of the tax, interest, and penalty, only when the sum realized is insufficient to pay both the tax and the commissions.

**Increase or Decrease of Rate.**—In *People v. Lee*, 28 Hun (N. Y.) 470, it was held that a constitutional provision prohibiting the increase or decrease of fees, percentages, or allowances of public officers during their term of office, does not prevent the exemption of taxpayers from the payment of fees in addition to the tax, such fees being payable in the first instance by the taxpayer, and not by the government.

3. *State v. Brewer*, 64 Ala. 287; *State v. Kinne*, 41 N. H. 238; *Dean v. State*, 54 Tex. 313. See also *Miner v. Solano County*, 26 Cal. 115. *Compare Payne v. Washington County*, 25 Fla. 798; *Akers v. Burch*, 12 Heisk. (Tenn.) 606.

**Each Subject Must Pay Its Own Expense.**—Where lands of several non-residents are advertised in the same advertisement, to be sold for taxes, the collector cannot legally exact the whole expense from one of them; and if he does so, he is liable in an action of *assumpsit* for the recovery of the excess. *Findley v. Adams*, 2 Day (Conn.) 369.

4. *Vermilion Parish v. Brookshier*, 31 La. Ann. 736.

Other officers who have performed services and incurred expenses, are entitled to their fees, notwithstanding the fact that the sales made by the collector were void through his disregard of statutory regulations. *Akers v. Burch*, 12 Heisk. (Tenn.) 606.

no claim for commissions.<sup>1</sup> Where the statute allows commissions upon collections actually made, no compensation can be recovered for expenses incurred in ineffectual efforts to collect.<sup>2</sup> Ordinarily, however, reimbursements for reasonable and necessary expenses will be allowed.<sup>3</sup>

Where the commissions or fees are payable by the government, claims therefor are generally required to be audited by a designated officer before they become a public liability.<sup>4</sup> Where the fees are added to the tax and collected from the taxpayer, the same methods are pursued for their collection as for the collection of the tax itself.<sup>5</sup>

1. See *Wheatley v. Covington*, 11 Bush (Ky.) 18; *Labette County v. Franklin*, 16 Kan. 450; *Vermilion Parish v. Brookshier*, 31 La. Ann. 736; *Anderson v. Hawks*, 70 Miss. 638; *Smith v. New York*, 37 N. Y. 518.

In *Com. v. Scott*, 7 Pa. Co. Ct. Rep. 409, it was held that a collector is not entitled to commissions on an abatement allowed by law to the taxpayer for prompt payment.

In *Randolph County v. Trogon*, 75 N. Car. 350, it was held that an outgoing sheriff is entitled to the commissions on the amount of taxes he pays over to his successor in office, and that such successor is not entitled to commissions thereon. See also *Bright v. Hewes*, 18 La. Ann. 666.

In *Boggs v. Placer County*, 65 Cal. 561, it was held that a tax collector can recover fees only for taxes collected by himself, and not for taxes recovered by a suit brought by the district attorney on behalf of the county.

In *Aplin v. Baker*, 84 Mich. 113, it was held that a delinquent taxpayer is not liable for the expense of unnecessary trouble in serving several different subpoenas issued by a county clerk against several distinct lots owned by the taxpayer; he is liable for the cost of one subpoena only.

2. *Gordon v. Lafayette County*, 74 Mo. 426; *Thralls v. Sumner County*, 24 Kan. 594; *Titus v. Howard County*, 17 Kan. 363; *Labette Co. v. Franklin*, 16 Kan. 450; *Miles v. Miller*, 5 Neb. 269. And see *Gilchrist v. Wilkes Barre*, 142 Pa. St. 114.

In *Wheatly v. Covington*, 11 Bush (Ky.) 18, it was held that a tax collector cannot recover damages because he has been prevented from performing the services of his office, whereby he would have earned the compensation attached thereto. In

*Aldrich v. Pickard*, 14 Lea (Tenn.) 456, it was held that the compensation of a collector who sells land for taxes, does not depend upon the validity of the sale.

3. See *Joslyn v. Tracy*, 19 Vt. 569; *People v. Long*, 13 Ill. 629; *Titus v. Howard County*, 17 Kan. 363; *Carville v. Additon*, 62 Me. 459; *Gilchrist v. Wilkes Barre*, 142 Pa. St. 114; *Titus v. Howard County*, 17 Kan. 363; *Thatcher v. People*, 79 Ill. 597; *Taylor v. Umatilla County*, 6 Oregon 402; *O'Grady v. Barnhisel*, 23 Cal. 287.

In *Philadelphia v. Flanigen*, 47 Pa. St. 21, it was held that a receiver of taxes has no power to bind the state for advertising fees in excess of the amount appropriated therefor, or to advertise otherwise than as directed by the council.

4. See *PUBLIC OFFICERS*, vol. 19, pp. 378, 537. And see also *Mathesie v. Knox County*, 82 Ind. 172; *Shaver v. Robinson*, 59 Ala. 195; *State v. Brewer*, 64 Ala. 287; *Akers v. Burch*, 12 Heisk. (Tenn.) 606.

Where the county treasurer, by mistake or otherwise, retains a less per cent., for making a collection, than he is entitled to, he is entitled to an order from a county board for repayment of the amount to which he was entitled, in excess of the amount actually retained. *Harrison County v. Benson*, 83 Ind. 469. But if the commissioners of a county allow an excessive claim for printing the delinquent list, the same cannot be recovered back, where the list was before them, and there was no mistake of fact. *Warren County v. Gregory*, 42 Ind. 32.

5. See *Board of School Com'rs v. Wasson*, 74 Ind. 134; *Thralls v. Sumner County*, 24 Kan. 594; *Baker v. Kelley*, 11 Minn. 480; *Wilcox v. Gladwin*, 50 Conn. 77.

**XV. TAX SALES—1. Personal Property.**—The provisions of the statutes in regard to notice of the time and place of the sale are generally mandatory.<sup>1</sup> It has been held that where the collector is also constable, his notification of the sale is not vitiated by his adding to his signature the word “constable” instead of “collector.”<sup>2</sup> When the officer is required to keep the property a specified time before offering it for sale, in order that the owner may have an opportunity to redeem, the sale is illegal if the full time be not given.<sup>3</sup> And, on the other hand, if the sale be made after the expiration of the time limited by statute for the purpose, it is irregular, and the officer becomes a trespasser *ab initio*.<sup>4</sup> The officer may adjourn the sale in his discretion; his powers for that purpose being identical with those of an officer having an execution for collection.<sup>5</sup> But the adjournment must be to a definite time; and a sale before the time to which the adjournment is made, is void.<sup>6</sup> Where the officer who sells becomes himself the purchaser, the sale is voidable at the instance of the owner of the goods.<sup>7</sup> The property should be sold in separate parcels, and only so much should be sold as is required to pay the taxes, charges, and costs.<sup>8</sup>

1. *Lyle v. Jacques*, 101 Ill. 644; *Ward v. Carson River Wood Co.*, 13 Nev. 44.

As to the requisites of notice of the sale in *Massachusetts*, see *Rawson v. Spencer*, 113 Mass. 40; *Barnard v. Graves*, 13 Met. (Mass.) 85.

*Vermont* Rev. Stat., p. 530, §§ 10, 11, requiring the officer to keep the goods four days before advertising the sale, and to give six days' notice before selling, does not restrict him to that time, though he may not advertise and sell in less time. But he must advertise and sell within a reasonable time after the four and six days, respectively, have expired. *Clemons v. Lewis*, 36 Vt. 674.

In *Maine*, the collector is not required to sell the distrained property within the limits of the town in which it is first seized by him. *Carville v. Additon*, 62 Me. 459.

2. *Barnard v. Graves*, 13 Met. (Mass.) 85.

3. *Lefavour v. Barlett*, 42 N. H. 555; *Mason v. Thomas*, 36 N. H. 302; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309.

4. *Brckett v. Vining*, 49 Me. 356; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396.

Where the statute requires the sale to be made within seven days after seizure, a sale not made until twenty days thereafter is void. *Noyes v. Haverhill*, 11 Cush. (Mass.) 338.

5. *Spear v. Tilson*, 24 Vt. 420.

6. *Buzzell v. Johnson*, 54 Vt. 90. Here the sale was had at ten a. m., under an adjournment until one p. m.; this was held to be irregular and to render the officer a trespasser. And it mattered not that the property sold well, was applied to the plaintiff's taxes, and that the plaintiff's attorney was present, knew of the mistake, and said nothing.

But where the hour named in the notice of adjournment was 4 a. m. instead of 4 p. m., and the officer rectified the mistake sometime in the morning of the day on which the sale occurred, it was held that this mistake was obvious and not calculated to mislead anyone, and that the officer in making the sale was not a trespasser. *Wheelock v. Archer*, 26 Vt. 379.

7. *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396.

8. In *Shimer v. Mosher*, 39 Hun. (N. Y.) 153, the sale was adjudged void and the officer a trespasser *ab initio*, for these reasons: The property, consisting of a horse and six watches, was sold in one parcel; it was not within the view of, or exposed to, the bidders; and it was struck off to a bidder before anyone else could possibly make a bid, although many expressed a desire to do so.

In *Ward v. Carson River Wood Co.*, 13 Nev. 44, the officer was required by the statute to sell “a sufficient amount

**2. Lands—*a*.** POWER TO SELL.—A county, city, or other municipal corporation has no power to enforce the collection of taxes by a sale of lands, in the absence of an express grant to that effect.<sup>1</sup> A grant of power to “assess and collect taxes,” does

of the property to pay the taxes, charges,” etc. He sold two thousand cords of wood, the entire quantity, though there was no proof that this course was necessary in order to pay the sum due, and it was held to be irregular—he should have offered the wood for sale by the cord, and sold only so much as was sufficient to pay the taxes, charges, etc.

In *Leaton v. Murphy*, 78 Mich. 77, the defendant, a township treasurer, sold two horses, the property of the plaintiff, under a tax warrant. The horses were sold together and bought in by a brother of the defendant for the amount of the taxes. The horses were not a matched team; nor did it appear that it was better for the interest of the parties to sell them together, and from an appraisal, it appeared that either of the horses was worth more than the taxes due. The sale was declared void.

For a case of sale of a note and mortgage for taxes, and purchase of the same by the maker for an amount less than their face value, see *Irby v. Blain*, 31 Kan. 716.

In *Kansas*, it is held that where the sheriff holds a tax warrant issued by a county treasurer and levies it previous to the return day of the warrant, but does not sell the property until three days after the return day, the sale is not void because made after the return day. *Blain v. Irby*, 25 Kan. 499.

The words “the distress shall be openly sold” as used in *Maine Rev. Sts.*, ch. 6, § 104, are not to be construed as authorizing the officer to sell any additional articles after enough has been sold to pay the sum due. Where the officer, after selling enough to pay the sum due, sells other personal property distrained, he will not become a trespasser *ab initio* as to any of the articles sold, except such as he has sold in excess of his authority. See *Seekins v. Goodale*, 61 Me. 400, explaining *Williamson v. Dow*, 32 Me. 559.

**Return.**—In *Connecticut*, the officer's return is not required to specify the day of the week on which the sale was had. *Picket v. Allen*, 10 Conn. 145.

In *New Hampshire*, the tax collector's warrant is not a returnable pro-

cess. *Hoitt v. Burnham*, 61 N. H. 620; *Kelley v. Noyes*, 43 N. H. 209; *Johnson v. Allen*, 48 N. H. 235.

1. *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Merriam v. Moody*, 25 Iowa 163; *Dubuque v. Harrison*, 34 Iowa 163; *McInerny v. Reed*, 23 Iowa 410; *Ham v. Miller*, 20 Iowa 450; *Bergen v. Clarkson*, 6 N. J. L. 352.

In *Sharp v. Speir*, 4 Hill (N. Y.) 76, the court, by Bronson, J., said: “A corporation must show a grant, either in terms or by necessary implication, for all the powers which it attempts to exercise. And especially must this be done when it claims the right, by taxing or otherwise, to divest individuals of their property without their consent.”

In *Beaty v. Knowler*, 4 Pet. (U. S.) 152, which was a case of a corporation sale of lands for taxes, the court, by McLean, J., remarked: “That a corporation is strictly limited to the exercise of those powers which are especially conferred upon it; the exercise of the corporate franchise being restrictive of individual rights cannot be extended beyond the letter and spirit of the act of incorporation.” And he subsequently adds: “The power to impose a tax on real estate and to sell it where there is a failure to pay the tax, is a high prerogative and should never be exercised where the right is doubtful.” Referring to this observation Bronson, J., in *Sharp v. Speir*, 4 Hill (N. Y.) 76, said: “The justice of the remark is obvious. Every statute derogatory to the rights of property or that takes away the estate of a citizen, ought to be strictly construed. It should never have an equitable construction.”

And in *Merriam v. Moody*, 25 Iowa 163, the court, by Dillon, C. J., said: “The rule of law denying to these corporations constructive power to sell the property of the citizen, except where the power is unmistakably given, and the further rule of law that if there fairly exists a doubt concerning the power, the doubt is to be resolved against the existence of the power, in favor of the public and against the corporation, are founded in the highest wisdom and sanctioned by universal experience.”

And Mr. Blackwell, in his work on



not carry with it the power to collect by sale.<sup>1</sup> Nor will the power be inferred from an express provision in the charter that the collection of the taxes "shall be enforced as may be provided for by ordinances of the city."<sup>2</sup>

But where the grant of the power "to assess and collect" is accompanied by provisions distinctly and unequivocally assuming the existence of the power to sell, it must be regarded as a legislative interpretation recognizing the existence, of such power.<sup>3</sup> And when the power to sell is given, it is to be strictly construed. Thus, power given to a city to sell lands for taxes imposed thereon, does not authorize a sale for taxes which by the charter are to be imposed upon owners and occupants merely, and not upon their land;<sup>4</sup> nor will a power given to sell for taxes authorize a

Tax Titles (4th ed.) 448, says that a corporation, whose powers in this respect are more strictly construed than those of the state, "cannot sell the goods or lands of the delinquent unless there is an express grant in its charter."

See the following cases where the right was given in express terms: *Haskel v. Burlington*, 30 Iowa 232; *Augustine v. Jennings*, 42 Iowa 198; *Ide v. Finneran*, 29 Kan. 569; *Placerville v. Wilcox*, 35 Cal. 21; *Jennings v. Rudd*, 40 Ga. 49.

The power to sell lands for taxes levied by a municipality situated in one of the territories of the *United States*, is to be found in the act of Congress, not in the ordinances of the municipality. The latter can neither increase nor vary it, nor impose any terms or conditions which can affect the validity of a sale made within the authority conferred by the statutes. *Thompson v. Roe*, 22 How. (U. S.) 422.

1. *McInerney v. Reed*, 23 Iowa 410; *Dubuque v. Harrison*, 34 Iowa 163; *Merriam v. Moody*, 25 Iowa 163; *Ham v. Miller*, 20 Iowa 450. In this last case it is said the power to "provide for the assessment of all taxable property" or "to collect taxes," does not include that of selling and conveying in case of non-payment. This power, so high, delicate and important in its nature and character, must not rest upon an implication so remote, nor depend for the mode and manner of its exercise upon the mere will or discretion of the city council; and especially is this so, where the charter, as in this instance, fails to leave this or any kindred matter to such discretion or will. And in *Paine v. Spratley*, 5 Kan. 525, following the above decisions, the court said: "One ground (and perhaps the

most important and valid, and, in our opinion at least, a sufficient one) upon which these decisions rest, is that such power of sale is not a necessary incident to the power to 'levy and collect,' nor indispensable to the objects and purposes of a municipal corporation. The power to levy and collect can be exercised and enjoyed, and the objects of the corporation secured, without the power of sale . . . as for instance by judicial proceedings."

2. *Merriam v. Moody*, 25 Iowa 163; *Paine v. Spratley*, 5 Kan. 525.

3. *St. Louis v. Russell*, 9 Mo. 508. In this case the charter of St. Louis gave to the city council the power "to levy and collect taxes upon all persons and property made taxable by law for state purposes." The court said: "If this section of the act were alone on the subject, there might be room for contending that the sale of land was not the only, or the necessary, mode by which the tax could be collected, and therefore, the power of sale would not arise by implication from the granted power 'to levy and collect.' But we regard the eighth section of the sixth article of the charter as a legislative interpretation of this power 'to levy and collect taxes.' That section provides that the mayor and council shall have power by ordinance to direct the manner in which any property, real or personal, advertised for sale, or sold for taxes by authority of the corporation, may be redeemed. This is a clear and distinct recognition of the power in the city to sell land for the non-payment of taxes, and is sufficient to remove any doubt which the general phraseology of the previous article might create." See also *Carondelet v. Picot*, 38 Mo. 125.

4. *Sharp v. Speir*, 4 Hill (N. Y.) 76.

sale for a mere assessment for benefits.<sup>1</sup> There exists a well-recognized distinction between a tax, properly so called, and an assessment.<sup>2</sup>

In the absence of clear legislative intent that the grant of the power to sell shall have a retrospective operation, a prospective operation only will be given it.<sup>3</sup>

*b. PRIMARY LIABILITY OF PERSONALTY.*—In some of the states, the personalty is made primarily liable for the taxes, recourse to the realty being allowed only in the event of failure of the officer, after diligent search, to discover personalty sufficient to satisfy the demand. And when the delinquent has personalty within the jurisdiction, out of which the taxes may be satisfied, equity will, at his instance, enjoin the sale of his lands;<sup>4</sup> or if a sale has been made, it will be set aside, and the execution of a deed restrained.<sup>5</sup> But this right to have the personalty first exhausted, is a personal right, of the violation of which the tax-

1. *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Allen v. Galveston*, 51 Tex. 302.

2. See *supra*, this title, *Taxes and Taxation; Their Nature*; also *infra*, this title, *Local Assessments*; *Allen v. Galveston*, 51 Tex. 302; *Sharp v. Speir*, 4 Hill (N. Y.) 76.

3. *Dallam v. Oliver*, 3 Gill (Md.) 445. See also *STATUTES*, vol. 23, p. 447.

4. *Abbott v. Edgerton*, 53 Ind. 196; *Johnson v. Hahn*, 4 Neb. 139, *overruling* *Hallenbeck v. Hahn*, 2 Neb. 377. In *Nebraska*, since the act of legislature of 1877, lands may be sold without first exhausting the personalty. *Lancaster v. Rush*, 35 Neb. 119.

5. *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269; *Stondenmire v. Brown*, 57 Ala. 481; *Driggers v. Cassady*, 71 Ala. 529; *Johnson v. Hahn*, 4 Neb. 139; *Wilhelm v. Russell*, 8 Neb. 120; *Richardson County v. Miles*, 7 Neb. 118 (it is otherwise in this state since 1877); *Lancaster v. Rush*, 35 Neb. 119; *Helms v. Wagner*, 102 Ind. 385; *Michigan Mut. L. Ins. Co. v. Kroh*, 102 Ind. 515; *Volger v. Sidener*, 86 Ind. 545; *Morrison v. Bank of Commerce*, 81 Ind. 335; *Sharpe v. Dillman*, 77 Ind. 280; *Bowen v. Donovan*, 32 Ind. 379; *McWhinney v. Brinker*, 64 Ind. 360; *Ring v. Ewing*, 47 Ind. 246; *Catterlin v. Douglass*, 17 Ind. 213; *Cones v. Wilson*, 14 Ind. 465; *Ellis v. Kenyon*, 25 Ind. 134; *Schrodt v. Deputy*, 88 Ind. 90; *Hutchins v. Moody*, 37 Vt. 313; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88; 17 Am. Dec. 502; *Wheeler v. Bramel* (Ky. 1888), 8 S. W. Rep. 199; *Julian v. Stephens* (Ky. 1889), 11 S. W. Rep. 6.

Under the *Alabama Rev. Laws* of

1868, lands could be sold for taxes only when reasonable search failed to discover personalty; and no property was exempt from sale for taxes, though it might be exempt from taxation. Accordingly, a sale of lands is invalid when it is shown that the officer made no search nor personal demand, and that the person against whom the taxes were assessed had personalty sufficient to pay them, though it was exempt from taxation. *Doe v. Minge*, 56 Ala. 121.

A complaint to enjoin the execution of a deed for the lands sold, which avers that the owner at the time of the sale had sufficient personalty in the county out of which taxes could have been made, is good on demurrer. *Morrison v. Bank of Commerce*, 81 Ind. 335.

In *Indiana*, in an action to set aside the sale of the land, relief will not be granted until the amount of the taxes has been paid or tendered to the purchaser. *McWhinney v. Brinker*, 64 Ind. 360; *Harrison v. Haas*, 25 Ind. 281; *Volger v. Sidener*, 86 Ind. 545.

Where the deed fails to show that the personalty of the delinquent had been exhausted before the sale of land, or that he had no such property, it is not admissible as evidence of title, until such facts are shown *aliunde*. *Smith v. Kyler*, 74 Ind. 575; *Woolen v. Rockafeller*, 81 Ind. 208; *Ward v. Montgomery*, 57 Ind. 276; *Keeper v. Force*, 86 Ind. 81; *Pitcher v. Dove*, 99 Ind. 175.

And the testimony of the auditor of the county wherein such lands are

payer alone may complain, and of which no third party will be allowed to take advantage.<sup>1</sup> If personal property sufficient to discharge the taxes is levied on, and lost solely through the neglect or misconduct of the officer, a sale of the land is void, and equity will cancel the deed thereto.<sup>2</sup> Usually, proper evidence is required, in the form of a return, that an attempt has been made to subject the personality in compliance with the statute, before proceedings can be instituted for the sale of the realty.<sup>3</sup> In some of

situations, "that the records in his office showed there was no personal property assessed" to the delinquent in but one of two years in which the taxes on the lands became delinquent, is insufficient to prove the facts necessary to be established under the law for the purpose of showing the legality and validity of the sale, and to entitle the deed made in pursuance thereof to be admitted in evidence. *Smith v. Kyler*, 74 Ind. 575.

In *Jones v. McLain*, 23 Ark. 432, it was held that a recital by the officer in his deed to the purchaser that the taxpayer failed to pay on demand, and "not knowing of any personal property" whereon to levy, he proceeded to levy on and advertise the lands for sale, is not a direct and satisfactory mode of reciting that sufficient personality could not be found; but that for the purposes of the case, such recital may be treated as sufficient to put upon the taxpayer the burden of showing that he had, at the time the lands were levied upon, sufficient personality liable to be taken by the collector, and within his reach upon such reasonable diligence as the law imposes upon him, to satisfy the taxes.

In *Iowa*, the deed is conclusive that the officer complied with his duty in attempting to make the tax by a sale of personality, before selling the realty. *Stewart v. Corbin*, 25 Iowa 144.

It has been held that although the sale of the realty is ineffectual to convey title, yet it is effectual to transfer the lien of the state, and is, therefore, not absolutely void, *Sinclair v. McClure*, 111 Ind. 467; *State v. Casteel*, 110 Ind. 174; *Scarry v. Lewis*, 133 Ind. 96; and that a complaint to set aside the sale, and to enjoin the auditor from issuing a deed on that ground, will not lie. *Sinclair v. McClure*, 111 Ind. 467.

1. *Frost v. Flick*, 1 Dakota 131. In this case it was held that although the Laws of *Dakota*, 1868, 1869, ch. 25, § 59, provide that no lands "belonging to

any person shall be sold for taxes while personal property belonging to such party can be found," the sale will not be enjoined because the plaintiff's grantor, who was the owner of the land when the tax was levied, has personal property subject to execution.

2. *Campbell v. Wyant*, 26 W. Va. 702.

3. In *Tennessee*, it is essential to the validity of the sale of lands that it should appear on the record of the court by which the order of sale is made, that the officer had returned that there were no goods and chattels of the delinquent out of which the taxes could be made. *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

In *Alabama*, the affidavit which the officer is required to make and enter in the book filed by him in the office of the probate judge, as to his inability to find personal property after diligent search, is a jurisdictional fact, without which the court has no power to grant an order to sell the land. And if it is not made until after the sale of the land, it cannot retroact so as to impart validity to the sale or decree. *Simms v. Greer*, 83 Ala. 263; *Feagin v. Jones*, 94 Ala. 597; *Wartensleben v. Haithcock*, 80 Ala. 565; *Fleming v. McGee*, 81 Ala. 409.

Under the *Texas* statute, June 2d, 1873 (Pasch. Dig. 7775), the sheriff, on receiving from the comptroller the delinquent list for his county and finding no personality belonging to the delinquent, is required to certify that fact to the district clerk when filing the list with him, and the failure of the sheriff so to certify that he finds no personal property, will be fatal to subsequent proceedings under the statute. *Belden v. State*, 46 Tex. 103.

Where the statute prescribes the form of the officer's return, and does not make it necessary that he should state that he was unable to collect the taxes assessed on land out of the personality, the return need not contain such a statement. It will suffice if it follow the

the states, it is not necessary that the officer before selling the land shall first exhaust the personality.<sup>1</sup>

c. PROCEEDINGS BEFORE SALE—NOTICE.—The various proceedings which must precede a sale of lands for non-payment of taxes have already been set forth. The first step required of the officer who is to sell, is that he shall give notice of his intention to do so.<sup>2</sup> This notice, usually, is required to state a description of the property, the amount of the tax,<sup>3</sup> for what year

form prescribed; in which case, it will be presumed that he did his duty in proceeding first against the personality. *Taylor v. People*, 7 Ill. 349; *Ottawa v. Macy*, 20 Ill. 413; *Job v. Tebbetts*, 10 Ill. 376; *Goodrich v. Minonk*, 62 Ill. 121.

1. *West v. Duncan*, 42 Fed. Rep. 430; *Smith v. Jones*, 40 Ga. 39; *Plant v. Eichberg*, 65 Ga. 64; *Dyer v. Boswell*, 39 Md. 465 (at least in the case of state taxes). In *Nebraska*, since the act of 1877 took effect, the county treasurer may sell the realty without first exhausting the personality. *Kittle v. Shervin*, 11 Neb. 65; *Lancaster County v. Rush*, 35 Neb. 119.

The estate which the owner has in lands in the city of Newark, may be sold for personal taxes against him before resorting to his personality. *State v. Newark*, 42 N. J. L. 38; *Martin v. Carron*, 26 N. J. L. 228.

In *Mississippi*, a tax sale of lands may not be resisted on the ground that the tax debtor had personal property in the county, out of which the taxes might have been made. The statute prescribes the order in which the two classes of property are to be sold, but its observance is not a pre-requisite to the power of sale in the officer. *Virden v. Bowers*, 55 Miss. 1.

2. "That the law should direct a public sale of property without notice to be given, would be a perfect anomaly and would lead to consequences so mischievous that we could not, without the strongest necessity, be justified in imputing such a course to the legislature; especially where there has been no judicial proceeding, and where a man's highest estate, his land, is to be forfeited and lost to him by the summary process of distress, and sold for the non-payment of taxes." *Carr, J., in Nalle v. Fenwick*, 4 Rand. (Va.) 585. See also *Marx v. Hanthorn*, 30 Fed. Rep. 579; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

3. Amount of Tax.—*Washington v. Pratt*, 8 Wheat. (U. S.) 681. And a slight error in stating the amount of

the tax in the notice is fatal. *Knowlton v. Moore*, 136 Mass. 32. As for instance, publishing the amount as \$4.12, when in fact it was only \$3.30. *Alexander v. Pitts*, 7 Cush. (Mass.) 503.

Where the advertisement gave as the sum due, the whole amount, including both state and county tax, and the latter was illegal and therefore not due, the sale was adjudged void. *Clarke v. Strickland*, 2 Curt. (U. S.) 439.

But in *Thweatt v. Black*, 30 Ark. 732, it was held that an erroneous advertisement of land for the taxes of three years, when only the taxes for one year are due, will not vitiate, if the mistake is discovered, and the lands are sold for only the taxes that are in fact due. In this case it was said that any advertisement is essential to the authority of the collector to sell delinquent lands, but mere informalities or unimportant variances from the law will not invalidate the sale.

If, however, such a mistake is not corrected, but is carried into the sale, it will be fatal. *Kinsworthy v. Mitchell*, 21 Ark. 154.

In *Bonham v. Weymouth*, 39 Minn. 92, in a column headed merely "Amt." were placed the figures "26," "25," "27," opposite the respective descriptions, without anything to indicate what they were intended to represent—whether dollars, cents, or something else. It was held not a sufficient statement of the amounts—the most that could be claimed being that it would inform parties interested that the amount of taxes was either so many dollars or so many cents, but which would be entirely a matter of conjecture or surmise.

In *Tolman v. Hobbs*, 68 Me. 316, the record of the state treasurer declared: "Previous to said sale, I caused notice of the time and place of sale, and lists of said tracts intended for sale, with the amount of said unpaid taxes, interest and costs, on each parcel, to be published three weeks successively as follows, viz.: 1. In the *Kennebec Journal*,

assessed,<sup>1</sup> time and place of sale,<sup>2</sup> and that the sale will be

the state paper, a list of all said tracts. 2. In the Ellsworth American, a newspaper printed in the county of Hancock, a list of all said tracts which lie in that county." It was held that the record did not show that the treasurer published in such papers the amount of such taxes, etc., as required by the law, but only a list of the lands taxed.

**Transposition of State and County Taxes.**—It seems that the transposition in the advertisement of the state and county taxes, is not an error that affects the validity of the sale. *Scott v. Watkins*, 22 Ark. 556.

**Abbreviations in Indicating Dates and Amounts.**—Under *Alabama* Code of 1886, § 583, authorizing abbreviations to be employed in indicating dates and amounts in tax sales of real estate, abbreviation by a peculiar mode of designating fractions, known by the court to be not infrequently used, are permissible. *Riddle v. Messer*, 84 Ala. 236.

**Kind and Purpose of the Tax.**—A misdescription in regard to the purpose and kind of tax for which the land is to be sold, is generally fatal. Thus in *Pierce v. Richardson*, 37 N. H. 307, in the advertisement the tax was called "money tax," when in fact it was a "state, county, and school tax;" the error was held fatal.

And in *Langdon v. Poor*, 20 Vt. 13, the advertisement described the tax as being "for the purpose of making and repairing and building bridges," whereas the tax authorized by the statute was "for the purpose of making and repairing road and building bridges." The sale under the advertisement was declared void.

1. **The Year.**—A misstatement of the year for which the tax was assessed, and for the non-payment of which the land is to be sold, is fatal, although the notice states correctly the amount of the tax. *Knowlton v. Moore*, 136 Mass. 32.

2. **Time and Place.**—It is essential to the validity of the sale that the notice should state the time and place of sale. *Blalock v. Gaddis*, 33 Miss. 452; *Henderson v. White*, 69 Tex. 103. And an omission in this regard is not aided by a recital in the deed that the land was offered at public auction at the time and place and in the manner required by law.

Where the notice wholly omits to

mention the place of sale, a tax deed founded upon such sale will be adjudged defective and set aside if challenged before the running of the Statute of Limitations. *Corbin v. Young*, 24 Kan. 199; *Russell v. Hudson*, 24 Kan. 571.

But if the statute prescribes the form of notice, it is sufficient to follow it, although it does not specially name the place of sale; that being otherwise fixed. *Clark v. Mowyer*, 5 Mich. 462; *Wisner v. Davenport*, 5 Mich. 501. See also *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

The *Maryland* Local Code applicable to the city of Baltimore, does not direct where the sale shall take place. But the purpose and object of giving notice of a sale being to inform the owner of the land and the public of the place as well as the time where and when the sale is to take place, that they may attend and bid if they think proper, both time and place should be certain and fixed. Accordingly, a notice which states that the sale will take place at the courthouse or "at such other place as may hereafter be designated," is fatally defective. *Matter of Tax Sale of Lot No. 172*, 42 Md. 196.

A notice for the sale "on the 4th day of April next," posted Jan. 31st, 1874, and published in a newspaper three weeks successively in February 1874, indicates sufficiently the time of sale, although the year is not named. *Taft v. Barrett*, 58 N. H. 447.

Where the officer's return showed that he gave the required notice of the "time" of sale, but did not state that he gave notice of the "place" of sale as well, the sale was declared invalid. *Lovejoy v. Lunt*, 48 Me. 377.

Where the notice stated that the sale would be "at the court house in Warren," but failed to add the words "Trumbull County," the notice was nevertheless held sufficient; the court taking judicial notice of the fact that at the date of the advertisement there was no township in the state by that name except in that particular county. *Sheldon v. Coates*, 10 Ohio 278.

Where a delinquent tax list is headed "office of the county treasurer," dated "July 10th, 1878," and recites that "so much of the following lands as may be necessary will on the

public.<sup>1</sup> The manner of giving notice is by advertisement in newspapers, or posting in public places, or both; and some statutes, in addition, provide for personal notice. Generally speaking, any error or omission in any of these particulars will vitiate the sale. The power of the officer to sell is a naked power, not coupled with an interest; and in all such cases, the law requires that every prerequisite to the exercise of that power must precede its exercise.<sup>2</sup> The description must be sufficiently specific to clearly identify the premises.<sup>3</sup> Failing to give the name of the owner when

third day of September and next succeeding days be sold," etc., "at my office for the taxes of the year 1877," it was held that such notice is not misleading as to time and place of sale. *Ireland v. George*, 41 Kan. 751.

1. Statement that Sale Will Be "Public," or "At Public Auction."—*Hafey v. Bronson*, 33 Kan. 598; *Hoffman v. Groll*, 35 Kan. 652; *Belz v. Bird*, 31 Kan. 139. These cases hold that an omission to state in the notice that the sale will be "at public auction," as required by the statute, will not render the sale absolutely void, but voidable merely.

2. *Early v. Doe*, 16 How. (U. S.) 610; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Hobbs v. Clements*, 32 Me. 67; *Elliot v. Doe*, 24 Ala. 508.

In *Gomer v. Chaffee*, 6 Colo. 314, *Elbert, C. J.*, for the court, said: "The power of an officer making a tax sale is purely statutory. A statutory power must be exercised according to statutory directions. In no class of cases has this rule been more strongly insisted upon than in case of tax sales. A substantial, and in many cases, a strict compliance with the provisions of the law preparatory to and authorizing the sale, is a condition of the power and essential to its rightful exercise."

In *Brown v. Veazie*, 25 Me. 359, the court, by *Whitman, C. J.*, said: "Sales of real estate for the non-payment of taxes must be regarded, in a great measure, as *ex parte* proceedings. The owner is to be deprived of his land thereby; and a series of acts preliminary to the sale are to be performed, to authorize it on the part of the assessors and collector, to which his attention may never have been particularly called; and experience and observation render it notorious that the amount paid by the purchasers at such sales is uniformly trifling in comparison with the real value of the property sold. In

this very instance the purchaser at the collector's sale bought, for less than \$17, an estate valued by the assessors at \$900. It has, therefore, been held, with great propriety, that to make out a valid title under such sales, great strictness is to be required, and it must appear that the provisions of law preparatory to and authorizing such sales, have been punctiliously complied with." And in *Cooley on Taxation* (2d ed.), p. 470, it is said to be an accepted axiom when tax sales are under consideration, that "a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings, but special reasons make it peculiarly applicable to tax sales." Quoted with approval in *Dane v. Glennon*, 72 Ala. 160.

But in *Doe v. Lucey*, 1 Murph. (N. Car.) 311, it was held that the acts making it the duty of the sheriff to advertise the sale in some newspaper printed in the state, and at three public places in the county, and to set forth the location of the land, the names of the owners, etc., are merely directory to that officer. His neglect to observe these directions may make him liable in damages at the suit of the party injured by his neglect, but it will not affect the title of the purchaser unless there is collusion between him and the officer.

And under a statute of *Mississippi*, it seems that no defect or error in the advertisement will of itself invalidate the sale. *Virden v. Bowers*, 55 Miss. 1.

3. Description of Premises.—*Keely v. Sanders*, 99 U. S. 441; *Nason v. Ricker*, 63 Me. 381; *Thibodaux v. Keller*, 29 La. Ann. 508. The principal objects in giving notice are: (1) To apprise the owner of a proceeding

which, unless arrested by the payment of the tax, will divest him of his property; (2) to give notice to persons desirous of purchasing, so they may know the particular property to be sold. It is not sufficient that such a description should be given in the advertisement as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale is informed of every fact necessary to enable him to fix a value upon the property, yet the sale will be void unless the same information has been communicated to the public in the notice. Its defects, if any, exist in the description of the property to be sold, and cannot be cured by any communication made to bidders on the day of sale by the auctioneer. *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349. An erroneous published description which is calculated to mislead, is insufficient to constitute notice. *Knight v. Alexander*, 38 Minn. 384; 8 Am. St. Rep. 675.

The fact that a parcel of land, advertised and sold as one lot, was divided into six lots by heavy stone walls, does not invalidate the sale where the tract as a whole is described correctly. *Howland v. Pettay*, 15 R. I. 603.

In *Georgia*, it is held that the sale is not void because the lands are described as wild, when in fact they are improved, as the collector has power to issue execution against either. *Gardner v. Donalson*, 80 Ga. 71.

In *Iowa*, it is held that the fact that the description of certain lands was omitted by mistake from the list of lands advertised for sale for delinquent taxes, will not vitiate the sale, provided the taxes were in fact due. *Shawler v. Johnson*, 52 Iowa 473. See also *Allen v. Armstrong*, 16 Iowa 508; *Hurley v. Powell*, 31 Iowa 64; *Madson v. Sexton*, 37 Iowa 562.

A description of the land to be sold as "80 x 143 feet in Wilson's addition in S. 29, T. 23, R. 4," though so uncertain and indefinite as to render a sale ineffective, is sufficiently certain to carry a lien. *Millikan v. Lafayette*, 118 Ind. 323.

Where the pamphlet containing the catalogue of property to be sold for delinquent taxes contains merely the part of a map, which map describes the bounds of a particular piece of property, without further description, such

description is inadequate; and especially so when by the appearance of the map itself the exact bounds of the property are uncertain. *Smith v. Walker*, 56 N. Y. Super. Ct. 391.

Where a parcel of land, which, by the ancient division of the town, was embraced in "lot 6" was assessed and sold under a different description contained in a new map of the town, which had been recognized by the town officers and the citizens, but which had not been formally adopted, it was held that the owner was not affected by the sale, if he did not know of the map, but recognized the parcel as part of "lot 6" and so described it to the assessor. *Richter v. Beaumont*, 67 Miss. 285.

In *Hunt v. State*, 48 N. J. L. 613, the description was as follows: "Third ward, Chapman, Julia A.; cost 1.50; int. 24.22; tax 177.23; total 202.95." This was the only advertisement of eight tracts of land. It was held, there being no notice to purchasers to indicate whether one or eight lots were to be sold, and no description by which they could be identified, that the sale was void.

A description as "No. 5 of lot 4, section 20, township 28, north, and of range 22, east," is too vague and indefinite to afford the requisite notice to the landowner or others interested, notwithstanding the *Wisconsin* Laws, ch. 105, providing for such descriptions in the assessors' books and maps. *Murphy v. Hall*, 68 Wis. 202.

The description "60 acres, part of the North half, section 13," is too vague and uncertain. In this case the court says: "Which 60 acres? is an inquiry to be naturally made." *Treon v. Emerick*, 6 Ohio 391. See also *Lafferty v. Byers*, 5 Ohio 458; *Douglas v. Dangerfield*, 10 Ohio 152.

A description as a certain number of lots of certain dimensions in a certain square between certain streets, without giving their respective numbers, is too vague to identify the property. *Martin v. New Orleans*, 30 La. Ann. 293. See also *Carmichael v. Aiken*, 13 La. 205; *Jacques v. Kopman*, 6 La. Ann. 542.

Where the property was described as "house and lot bought of David Harris," such person being only one of three grantors, and merely joined in the deed for the purpose of releasing whatever interest he might have in right of his wife, the description is

required,<sup>1</sup> or designating the lands as belonging to another than the true owner, is such an error as will invalidate the sale.<sup>2</sup> If the lands are described as situate in a certain county, when in fact two-thirds of the tract are in another county, the sale is void so far as regards the latter.<sup>3</sup> There is no objection to employing abbreviations in the description, provided they are intelligible and identify the premises.<sup>4</sup> The notice must be published in the papers,<sup>5</sup> and at the intervals, and for the length of time,<sup>6</sup> specified

both imperfect and inaccurate. *Whitmore v. Learned*, 70 Me. 276.

A description of premises as "two thirds of block 4, in Bass' out lots" is bad for uncertainty. It is not a description of any particular parcel of land. *Bidwell v. Coleman*, 11 Minn. 78.

A notice describing property as block 54 "lot 112 pt." does not give the owner of "lot 112" notice that it is proposed to sell his lot. *People v. McGuire* (Bklyn. City Ct.), 8 N. Y. Supp. 852.

A description as "except 1264 acres in the Southeast corner of subplot 1, lot 1, North section Robinson's reserve" is meaningless and void for uncertainty. *Pickering v. Lomax*, 120 Ill. 289.

Where the lands were described as being situated in range No. 3, East, instead of 3 West, their true description, the advertisement was held to be fatally defective. *Patrick v. Davis*, 15 Ark. 363.

For other cases in which the question of a sufficient description has been passed upon by the courts, see *Coombs v. O'Neil*, 1 McArthur (D. C.) 405; *Woods v. Freeman*, 1 Wall (U. S.) 398; *Griffin v. Creppin*, 60 Me. 270; *Greene v. Lunt*, 58 Me. 518; *Brown v. Veazie*, 25 Me. 359; *French v. Patterson*, 61 Me. 203; *Bingham v. Smith*, 64 Me. 450; *Smith v. Messer*, 17 N. H. 420; *Cruger v. Dougherty*, 1 Lans. (N. Y.) 464; *State v. Galloway Tp.*, 44 N. J. L. 145; *State v. Woodbridge*, 42 N. J. L. 256; *Henderson v. Oliver*, 32 Iowa 512; *Iowa Land Co. v. Sac County*, 39 Iowa 124; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153; *Lafferty v. Byers*, 5 Ohio 458; *Henderson v. Staritt*, 4 Sneed (Tenn.) 470; *Gardner v. Brown*, 1 Humph. (Tenn.) 354; *Finley v. Gaut*, 8 Baxt. (Tenn.) 148; *Currie v. Fowler*, 5 J. J. Marsh. (Ky.) 145; *Alvord v. Collin*, 20 Pick. (Mass.) 418; *Sargent v. Bean*, 7 Gray (Mass.) 125; *Wills v. Auch*, 8 La. Ann. 19; *Morris v. Davis*,

75 Ga. 169; *Cooper v. Holmes*, 71 Md. 20; *McQuade v. Jaffray*, 47 Minn. 326.

1. *Farnum v. Buffum*, 4 Cush. (Mass.) 260; *Styles v. Weir*, 26 Miss. 187.

2. *Milner v. Clarke*, 61 Ala. 258.

Where the lands were described as belonging to D. and P., when in fact they had never belonged to such parties, but had been owned by D. ever since their severance from the public domain, the notice was adjudged void. *Denègre v. Gèrac*, 35 La. Ann. 952.

3. *Williams v. Harris*, 4 Sneed (Tenn.) 332.

Under a statute declaring that "when the name of the place in which such lands lie may have been altered by any act of this commonwealth within three years next preceding such advertisement, the collector shall express not only the present name, but the name by which the same was last known," it was held that where lands have, within the time specified, been taken from one town and annexed to another, the name of the former town as well as of the latter must be expressed in the advertisement. *Porter v. Whitney*, 1 Me. 306.

4. *Sibley v. Smith*, 2 Mich. 486.

5. *Hughey v. Horrel*, 2 Ohio 231; *Doe v. Sweetser*, 2 Ind. 649; *Russell v. Gilson*, 35 Minn. 366; *Eastman v. Linn*, 26 Minn. 215; *Reimer v. Newel*, 47 Minn. 237; *Isaacs v. Shattuck*, 12 Vt. 668; *Bussey v. Leavitt*, 12 Me. 378; *Hart v. Smith*, 44 Wis. 213; *Weer v. Hahn*, 15 Ill. 299. In this last case the statute required the publication to be in the "nearest newspaper to the county," and it was held that the question of the nearest paper must be determined by comparing the distances between the places of publication and the county line.

6. *Martin v. Barbour*, 34 Fed. Rep. 701; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Pope v. Headen*, 5 Ala. 433; *Farrar v. Eastman*, 10 Me. 191; *Delogny v. Smith*, 3 La. 418; *Kellogg v. Mc-*



in the statute. Where the notice is required to be published for three weeks, publication in a daily paper on Monday and Thursday of each week, for three successive weeks, is sufficient—it need not be inserted in every issue of the paper.<sup>1</sup> But two insertions in a weekly paper is obviously not a compliance with a law requiring publication three times in ten days.<sup>2</sup> If the requirement is

Laughlin, 8 Ohio 114; *Caston v. Caston*, 60 Miss. 475; *Allen v. Smith*, 1 Leigh (Va.) 231; *Cummings v. Holt*, 56 Vt. 384; *Finley v. Gaut*, 8 Baxt. (Tenn.) 148; *Henderson v. Starritt*, 4 Sneed (Tenn.) 470; *Wistar v. Kammerer*, 2 Yeates (Pa.) 99.

Where the deed shows upon its face that the requisite notice was not given, it is void. *Moore v. Brown*, 4 McLean (U. S.) 211; *affirmed* 11 How. (U. S.) 414; *Dow v. Chandler*, 85 Mo. 245.

In *Kane v. Brooklyn*, 114 N. Y. 586, the notice, in pursuance of which the plaintiff's property was sold, was dated and first published, on the 15th of March. The day of sale specified therein was the 14th of April. It was held that this was a compliance with the *New York* Laws of 1885, ch. 405, § 1, requiring the sale to be at a time "not less than thirty days after the first publication."

Under *Maryland* Code, art. 4, § 874, both the day of giving the notice or making its first publication and the day of sale, should be excluded in computing the thirty days' notice of sale provided for. *Steuart v. Meyer*, 54 Md. 454.

Where the statute required the treasurer, on or before September 1st, to send a notice to certain newspapers for publication, and the notice sent by that officer was dated September 15th, the error was held to be immaterial; the provisions of the statute relating to the preparation and delivery of the notice were mandatory in so far only as to require it to be delivered in time to be published for the prescribed time preceding the sale. *Chamberlain v. Taylor*, 36 Hun (N. Y.) 24. See also *Stout v. Coates*, 35 Kan. 382.

**Proof of Publication.**—The county auditor's certificate that the delinquent list was published for four consecutive weeks prior to December 1st, does not show a compliance with 1 Kerwin's *Ohio* Sts. 630, requiring the delinquent list and notice of sale to be published for four weeks between the first day of October and the first day of December. *Magruder v. Esmay*, 35 Ohio St. 221.

See also *Ramsay v. Hommel*, 68 Wis. 12; *Morris v. Carmichael*, 68 Wis. 133.

The certificate of a printer that the notice given by the officer was published for thirty days beginning February 21st, 1869, is not sufficient proof that the notice was published "once a week for four weeks," as required by the *Maryland* Code, art. 81, § 56. The proof in this particular must be affirmative and certain and nothing left to inference and conjecture. *Prince George's County v. Clarke*, 36 Md. 207.

In *Fitch v. Pinckard*, 5 Ill. 69, to prove the notice and advertisement, newspapers were introduced, published in 1837, containing the notice and advertisement dated "1836." It was held that it was not permissible to show by parol that the date was a mistake and that it was intended for 1837.

Under a statute requiring the first publication of the notice in a newspaper to be eight weeks before the day of sale, the date of the paper is ordinarily to be considered as the date of its publication. And evidence tending to prove that the paper was actually printed and ready to be delivered on the afternoon of the day before such printed date, and was actually delivered to the subscribers in the place of its publication that afternoon or evening, and the remainder were left in the post office that night directed to the other subscribers, and went by the mail of the next morning; that the whole edition was about four or five hundred—from fifty to seventy-five for the village subscribers—is not competent evidence to show that the paper was published the day before its date. *Schoff v. Gould*, 52 N. H. 512.

In *Kansas*, where the proof of the publication of notice is not transmitted to the county treasurer within the time prescribed by the statute, the charge for such publication may not be included in the amount for which the property is sold. And if it is included, the sale will be void. *Fox v. Cross*, 39 Kan. 350.

1. *Thurston v. Miller*, 10 R. I. 358.

2. *Person v. O'Neal*, 32 La. Ann. 228.

that the publication shall be "once a week for at least twelve successive weeks," a period of twelve full weeks or eighty-four days must intervene the time of the first notice and the day of sale.<sup>1</sup> A law requiring publication "once a week" is complied with, and its object effectuated, by an insertion on any day of the week—it need not be on any particular day of the week.<sup>2</sup> When the language of the statute is, that publication shall be "immediately" after a certain day, it should be made so soon thereafter as may be reasonably done, and a delay of fifty days, no reason being assigned therefor, confers no authority to sell.<sup>3</sup> And it has been held that by a provision for three months notice, is meant the three months immediately preceding the sale, as otherwise the notice might be at such an interval of time as to render nugatory nearly all the objects to be attained by giving notice.<sup>4</sup> The notice may be published in a supplement, provided its circulation is co-extensive with that of the paper itself.<sup>5</sup> Non-compliance with a requirement that the publication shall be in several languages, is fatal to the notice and the sale founded thereon.<sup>6</sup> The question whether a particular place is a "public

1. *Early v. Doe*, 16 How. (U. S.) 610. In this case the first insertion was on Saturday, 26th Aug.; the last, on Wednesday, 15th Nov., the day of sale—being a period of 82 days only—and the sale was declared illegal.

2. *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349. In this case the act of Congress under which land in the city of Washington was sold, required that public notice of the time and place of sale should be given by advertising "once a week" in some newspaper in the city for three months. Notice of the sale was published for three months; but in the course of that period eleven days at one time, ten days at another, and eight days at another, transpired in succeeding weeks, between the insertions of the advertisement. The notice was published Monday, the 6th of January, and was not published again until Saturday, the 18th of January, leaving an interval of eleven days. Still the publication on Saturday was within the week preceding the notice on the 6th, and this was sufficient. The court said: "It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of the week."

3. *Doe v. Flagler*, 1 Ind. 542.

4. *Delogny v. Smith*, 3 La. 418. The publication of the notice of a tax sale required by *Kansas Gen. Sts.* of

1868, § 82, ch. 107, need not be continuous up to the day of sale. *Watkins v. Inge*, 24 Kan. 612; *McCurdy v. Baker*, 11 Kan. 111; *Whitaker v. Beech*, 12 Kan. 492.

Where the advertisement is required to be published three months, two irregular advertisements for that space of time may not be coupled together so as to authorize the sale, although a verbal consent to this course was given by the delinquent. *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269. In this case, the officer on the 4th of January advertised the property to be sold on the 1st of February following, but having ascertained this notice to be too short, did not sell the land on the day fixed, but in the first publication made after that time, changed the time of sale in the advertisement, and fixed it for the first Monday of April following, at which time the sale took place. The delinquent taxpayer was personally notified by the officer of the different time fixed for the sale, and consented to it. It was held upon the circumstances of the case that the collector was not invested with authority to sell.

5. *Zahradnicek v. Selby*, 15 Neb. 579; *Davis v. Simms*, 4 Bibb (Ky.) 465; *Tully v. Bauer*, 52 Cal. 487.

6. *Delogny v. Smith*, 3 La. 418; *Young v. Martin*, 2 Yeates (Pa.) 312; *Wistar v. Kammerer*, 2 Yeates (Pa.) 99.

place," within the meaning of a statute regulating the posting of notices of sale, is held to be a question partly of fact and partly of law. The nature and situation of the place, and the uses to which it is applied are matters of fact to be settled by the jury; when these are settled, whether the place will be considered a public place within the intent of the statute, is purely a question of law.<sup>1</sup> When the law expressly requires printed notices to be

1. What is a "Public Place." — Tidd v. Smith, 3 N. H. 178. In this case the court held, as a matter of law, that a shoemaker's shop was not a public place within the statute. This case was followed in Cahoon v. Coe, 57 N. H. 576, when two of the judges held as a matter of law, that upon the evidence reported, each of the six dwelling houses in Wentworth's Location was a public place, although the jury had found that there was no public place in that township; and the remaining judge who sat in the case concurred in the result.

In Hoitt v. Burnham, 61 N. H. 620, the defendant proved the posting of notices at a certain inn, and at the post office in the town of Dover, and the court ruled as a matter of law that *prima facie* both might be regarded as public places. No evidence was introduced as to the character of either place.

And in Scammon v. Scammon, 28 N. H. 419, it is held, that for the purpose of posting a notice, a meeting-house is *prima facie* a public place.

The words "public place" mean such places as in comparison with others in the same town are those where the inhabitants and others most frequently meet, or resort, or have occasion to be, so that a notice there would for that reason be most liable to be seen. Russell v. Dyer, 40 N. H. 173. See also Wells v. Burbank, 17 N. H. 411; Alger v. Curry, 40 Vt. 437; Austin v. Soule, 36 Vt. 645.

In Cambridge v. Chandler, 6 N. H. 271, the advertisement was put upon a board that was fixed in the sand by the side of a certain river. There was no settlement nor inhabitant in Cambridge at that time. Hunters were accustomed to pass up and down the river. There was a public highway laid out through that place, leading from another point in that state to the State of Maine. It was held that the notice was not posted in a public place.

A notice of the sale posted "at the courthouse door and at three other of

the most public places in the county," is a compliance with the requirement of the Maryland Code, art. 81, § 59, that the notices shall be put up "at the courthouse door and at the most public places in such county." It is not required that the notice shall be put up at all of the most public places in the county. Prince George's County v. Clarke, 36 Md. 207.

Failure by the county treasurer to post a notice of a tax sale "in a conspicuous place in his office," as required by Wisconsin Rev. Stat., § 1130, will render invalid a deed founded upon such sale. Morrow v. Lander, 77 Wis. 77.

An affidavit of the posting of the notice in four specified places, "the same being four public places in the village of N.," etc., does not show that it was posted in four public places in the county, since the places may have been public so far as the village was concerned, and yet not public so far as the whole county was concerned. Ramsay v. Hommel, 68 Wis. 12. See also Hilgers v. Quinney, 51 Wis. 62; Jarvis v. Silliman, 21 Wis. 600; Wisconsin Cent. R. Co. v. Wisconsin River Land Co., 71 Wis. 94.

And where the officer's affidavit does not show a proper posting of the notices, the fact that they were duly posted may not be shown by parol at the trial of an action involving the validity of the tax title, as this would be calculated to defeat the object of the statute in requiring the affidavit to be filed and preserved in the clerk's office. Iverslie v. Spaulding, 32 Wis. 394, *distinguishing* Adams v. Wright, 14 Wis. 408.

In Ireland v. George, 41 Kan. 751, it was held that where some evidence is offered tending to show that a delinquent tax notice was duly posted in four public places as required by law, such evidence is conclusive when approved by the trial court; and in the absence of all proof, such duty is presumed to have been performed. See also Hart v. Smith, 44 Wis. 213.

**Time of Posting.**—In proving the

posted, a sale under a written notice is void.<sup>1</sup> By "delinquent," in a statute providing for personal notice of the proposed sale, is meant the legal owner.<sup>2</sup> A mortgagee is such an owner and entitled to notice.<sup>3</sup> And notice of sale to one tenant in common does not operate as notice to the others, nor prejudice their rights.<sup>4</sup> Whether the requirements of the statute respecting notice of sale have been complied with, is usually a mixed ques-

posting of a notice, by the officer, of the time and place of sale, in some convenient and public place within his precinct, three weeks before the time of sale as required by *Massachusetts R. S.*, ch. 8, § 27, the time when such notice was posted must be established with certainty, and its contents must be sufficiently shown, in order to identify it with the notice required to be published by the 24th section of the same chapter. *Farnum v. Buffum*, 4 Cush. (Mass.) 260.

An affidavit of the collector that an advertisement of the lands had been posted up more than eight weeks, is no evidence that the lands have been duly advertised. The affidavit should state the time when the advertisement was posted up, so that it may be seen whether the posting was made in due season. *Nelson v. Pierce*, 6 N. H. 194.

1. *Lagroue v. Rains*, 48 Mo. 536. In this case the court said: "There are doubtless good and sufficient reasons why the notice should be printed. Some persons can read printing who cannot read writing. Printed notices are calculated to attract more attention, impart more information, and give greater facility for examining into what land is to be sold or has become delinquent. Everything that has a tendency to inform the community and promote competition in these sales is essential. But without giving reasons, it is sufficient for us to know that the law absolutely demanded that the handbills posted up should be printed, and that the officers disregarded and disobeyed its express mandates. If they could make one kind of substitution, they could another, and no person could ever know how or where to look for the protection of his rights."

2. *Hill v. Nicholson*, 92 N. Car. 24. The written notice to the owner or his agent, prescribed by *Louisiana Act No. 47* of 1873, is an essential prerequisite of the sale, and in its default, the sale is absolutely void. *Villey v. Jarreau*, 33 La. Ann. 291. Accordingly, a sale

of property assessed in the name of another person than the true owner, preceded by notices given to the party assessed and not to the true owner, is absolutely void. *Lague v. Boagni*, 32 La. Ann. 912. See also *Workingman's Bank v. Lannes*, 30 La. Ann. 871.

In *McPhee v. Venable*, 77 Ga. 772, the ordinance provided that personal notice should be given to "the owner, or the tenant in possession, if the owner is unknown." The owner was a non-resident, but had a resident agent, who was so known to be by the officer, he having paid the taxes on the lot for several years, and his name being entered on the city books as the agent of the owner. It was held that the notice required should have been given to him.

Where the statute requires notice to be served upon the owner, his agent or representative, or left at his residence, after the death of the owner, the notice must be given to his heirs, or personal representative, and a notice addressed to his "estate" and left at his former residence, confers no jurisdiction to order a sale, when it is shown that he had been dead many years, that his estate had been finally settled and distributed, and that the lands were at the time of the assessment in the possession of purchasers from his heirs. *Carlisle v. Watts*, 78 Ala. 486.

3. *Hill v. Nicholson*, 92 N. Car. 24; *Whitehurst v. Gaskill*, 69 N. Car. 449; 12 Am. Rep. 655; *Ex p. McCay*, 84 N. Car. 63.

4. *Howze v. Dew*, 90 Ala. 178.

Where an estate was owned by several heirs, and the collector levied upon the entire estate, and advertised it for sale, and gave notice to only one of the heirs, the sale was adjudged void for want of notice to the other heirs. It seems, however, that had the collector levied only on the interest of the heir who was notified, and advertised his interest for sale, the sale would have been good. *Thurston v. Miller*, 10 R. I. 358.

tion of law and fact, in the determination of which both court and jury have a voice.<sup>1</sup>

d. CONDUCT OF SALE—(I) *Time and Place*.—A sale held at a time<sup>2</sup>

1. *Cooley v. O'Connor*, 12 Wall. (U. S.) 391.

2. *Vernon v. Nelson*, 33 Ark. 748; *Allen v. Ozark Land Co.*, 55 Ark. 549; *McGehee v. Martin*, 53 Miss. 519; *Mead v. Day*, 54 Miss. 58; *Harkreader v. Clayton*, 56 Miss. 384; *Mayer v. Peebles*, 58 Miss. 628; *Caston v. Caston*, 60 Miss. 475; *Haynes v. Heller*, 12 Kan. 381; *Eutrekim v. Chambers*, 11 Kan. 368; *Park v. Tinkman*, 9 Kan. 615; *Doe v. Allen*, 67 N. Car. 346; *Den v. Rose*, 4 Dev. (N. Car.) 549; *Essington v. Neill*, 21 Ill. 139; *Dougherty v. Crawford*, 14 S. Car. 628; *Roddy v. Purdy*, 10 S. Car. 137; *Chandler v. Keeler*, 46 Iowa 596; *Conrad v. Darden*, 4 Yerg. (Tenn.) 307; *Gomer v. Chaffee*, 6 Colo. 314. If the statute does not specify the time and place, but provides that the sale shall be at a time and place to be stated in the notice of sale, a sale at another time or place than that stated in the notice is void. *Prindle v. Campbell*, 9 Minn. 212; *Sheehy v. Hinds*, 27 Minn. 259.

Under the *Ohio* Act of 1822, the sale must be on the day named in the advertisement, or, if made on a subsequent day, the reason therefor must appear in the officer's return. *Wilkins v. Huse*, 10 Ohio 140.

In *Bestor v. Powell*, 7 Ill. 119, the statute required the sale to be made on the "second Monday succeeding the term of the court" at which judgment against the land was rendered, and it was held that the statute intended the second Monday after the first day of the term. It was, however, intimated that a sale made on the second Monday after the close of the term, would not be objectionable. But the latter position was denied in *Hope v. Sawyer*, 14 Ill. 253, where it was held that the sale must be made on the second Monday succeeding the commencement of the term of the court, and if not made on that day, the sale is invalid. Followed in *Polk v. Hill*, 15 Ill. 131, where it was held that if more than two weeks intervene between the commencement of the term and the sale, the sale is void.

Where the statute directed the sale to be made on the first Monday in July "and the next ensuing days," and the officer's certificate recited that he

sold on the first Monday in July "and the next ensuing days," but failed to show on which of these days the tract in controversy was sold, or how long the sale continued, the omission was deemed fatal; as the statute authorized the owner to redeem within a certain time from the date of sale, if the day of sale does not appear, this valuable right may be lost. *Bloomstein v. Brien*, 3 Tenn. Ch. 55.

Where the tax deed shows that the land was sold two days before the time advertised for sale, the deed on its face shows that there is not a valid sale. *Cook v. Pennington*, 15 S. Car. 185.

While the sale may, under the character of the City of Kansas, be continued from day to day, the officer must begin it on the day for which the notice was given; and if not begun then, his power to sell becomes *functus officio*. *Sullivan v. Donnell*, 90 Mo. 278.

In *Spear v. Ditty*, 8 Vt. 419, it was held that where the officer advertises the sale to take place at a particular time and place, and his return states it to have been held in the town and on the day designated, it will be presumed, in the absence of proof to the contrary, that it was held at the precise time and place named.

Under the *Kansas* laws of 1860, when lands have been duly advertised for sale at the regular sale days, and are not sold on those days by reason of injunction or other judicial proceeding, they may be sold at any time after the dissolution of the injunction, or restraining order, upon ten days' notice. *Patterson v. Carruth*, 13 Kan. 494. See also *Jordan v. Kyle*, 27 Kan. 190; *Morrill v. Douglass*, 17 Kan. 291.

The auditor general of *Michigan* may not directly or indirectly postpone tax sales beyond the time fixed by law. *People v. Auditor Gen'l*, 41 Mich. 28.

In *Shell v. Duncan*, 31 S. Car. 547, *South Carolina* Gen. St., § 592 was construed as empowering the comptroller general to postpone the time of the sale in question.

Under section 558 of the *Mississippi* Code of 1880, providing that if from any cause the sale shall not be made at the time appointed by law, it may be had thereafter, in the same or a subsequent

or place <sup>1</sup> other than that prescribed by law, cannot be sustained. Manifestly, the object of naming a day and place is that the public may then and there assemble and have an opportunity to bid, and thus insure a fair sale. This object would be defeated if the officer were permitted to sell either at another time

year, at any time designated therefor by order of the board of supervisors of the county, the board may not, on the day fixed by law for the sale, make an order relieving the officer of the duty to sell on that day, and fixing a future day for such sale. Any such order and sales made in pursuance thereof are nullities. The purpose of the statute was to provide for failures to sell land at the time prescribed by law. It sprang from the apprehension that by inadvertence or oversight, some land might escape sale at the regular time, and was intended especially for such cases. *Brougher v. Conley*, 62 Miss. 358.

The treasurer may, under section 776 of the *Iowa* Revision, when, from certain named causes, the property cannot be duly advertised and offered for sale on the first Monday in October, make the sale on the first Monday of the next succeeding month in which it can be made, allowing time for publication. *Eldridge v. Kuehl*, 27 Iowa 100; *Sully v. Kuehl*, 30 Iowa 274; *Easton v. Savery*, 44 Iowa 654.

And the reasons or causes why the sale was not held on the first Monday in October, but at such subsequent time, need not appear of record. *Sully v. Kuehl*, 30 Iowa 275.

And where the deed recites that the sale was begun on the first Monday of December, instead of on the first Monday of October, the presumption is that the causes recognized by the statute for commencing the sale on the first Monday of some month subsequent to October, existed. *Eldridge v. Kuehl*, 27 Iowa 100; *Love v. Welch*, 33 Iowa 192; *Easton v. Savery*, 44 Iowa 654.

Under the *Arkansas* revenue laws, in force in 1867, it was only as to lands of non-residents that the county court was empowered, upon failure of the officer to sell on the day fixed by law, to order the sale to be had on a different day. *Spain v. Johnson*, 31 Ark. 314. See also *McDermott v. Scully*, 27 Ark. 226; *Hogins v. Brashears*, 13 Ark. 242.

In *Doe v. Allen*, 67 N. Car. 346, it was held that the sheriff's power to sell

lands for taxes being given on the condition that it be exercised within a certain time, the legislature may not, by a private act, empower him to sell after the expiration of the time allowed by law.

A sale made at 10 o'clock a. m., March 9th, 1887, instead of between the hours of 12 m. and 5 p. m., as required by Revision N. J. 1040, § 1, is validated by act March 23d, 1887, confirming all sales theretofore or thereafter made, although not made during the hours prescribed. *State v. Landis Tp.*, 50 N. J. L. 374.

**Sale Before Default.**—Where the statute provides that the taxes are to be paid on or before the first day of May of each year, and lands delinquent are to be sold on the second Monday of the same month, a sale after the first day, but before the second Monday, of May, is void; the days intervening between said dates are intended as days of grace to the taxpayer, and no final default can occur until the latter date. *Davis v. Schmidt*, 68 Miss. 736. See also *Orr v. Tasvacier*, 21 Iowa 68; *Person v. O'Neal*, 32 La. Ann. 228.

1. *Park v. Tinkham*, 9 Kan. 615; *Richards v. Cole*, 31 Kan. 205.

Where the statute requires the sale to be made before the courthouse door, a sale made within the courthouse cannot be upheld. *Rubey v. Huntsman*, 32 Mo. 501. In this case it was said: "It is immaterial whether it was more convenient to all persons or better in any respect to sell within than before the courthouse. The law has prescribed the place of sale and that is the only proper place. It is so because the law has said so, and there can be no reasoning about it." *Followed in McNair v. Jensen*, 33 Mo. 312. See also *Vasser v. George*, 47 Miss. 713.

**Where Statute is Silent as to Place—Extent of Officer's Power.**—In *Rice v. Johnson*, 20 Ga. 639, the statute was silent as to the place of sale, but it was held that the power of the officer must nevertheless be restricted to this extent—the sale is to be held at that place where there will be the best

or at another place.<sup>1</sup> As it is the officer's duty to conduct the sale for the best interests of all concerned, he may adjourn the sale, if he deems it necessary.<sup>2</sup> But the adjournment must be to a definite time;<sup>3</sup> and there can be no legal sale before the time to which the adjournment is made.<sup>4</sup> An adjournment "from day to day," means from one day to its succeeding day.<sup>5</sup>

(2) *Must Be by Proper Officer.*—The statute of each state designates the officer who is to make the sale—being usually the sheriff, treasurer, auditor, or the collector himself. A sale by any other than the officer named for the purpose, or his deputy, is unauthorized and void.<sup>6</sup>

chance for the sale accomplishing the objects of the grant of the power to sell—viz., the collection of the tax, and its collection at the least cost to the taxpayer—the place where the property is situated, or some place in that vicinity, as the courthouse of the county is such place, and a sale out of the county is unauthorized.

In *Rhode Island*, where the statute is silent as to the place of sale, a sale at the sheriff's office about twenty miles from the lands sold, will be upheld, where it appears that the officer acted in good faith, that no objection was made by complainant to the place of sale during the time the advertisement was running, and no steps were taken to set it aside for more than five years after the sale. *Howland v. Pettey*, 15 R. I. 603.

1. See cases cited in notes to this section.

2. *Wells v. Austin*, 59 Vt. 157; *Butler v. Delano*, 42 Iowa 350.

Under the *Iowa Rev. Sts.*, §§ 764, 773, and *Laws of Extra Sess.* 1861, p. 32, when lands have been once properly advertised for sale, the sale may be made at any time thereafter, pursuant to adjournments regularly made, without a further advertisement. *Hurley v. Street*, 29 Iowa 429.

And the tax deed is at least *prima facie* evidence that a proper adjournment was made to the day on which the sale took place. It is not essential that such adjournment should be shown by the records. *Bullis v. Marsh*, 56 Iowa 747. See also *Lorain v. Smith*, 37 Iowa 67.

But proof that the alleged sale took place at a time to which there had been no adjournment of a prior sale, will overcome the *prima facie* evidence of the sale presented by the deed. *Thompson v. Ware*, 43 Iowa 455.

In *Plympton v. Sapp*, 55 Iowa 195,

the answer averred that the sale "was held upon the 17th day of March, 1870, a day not authorized by law therefor." The time fixed by law was the first Monday of October. The plaintiff insisted that March 17th may have been a legal day for the sale, because there may have been an adjournment from the day appointed by law. But the court held that the averment precluded the supposition that it may have been an authorized day by reason of an adjournment.

3. *Buzzell v. Johnson*, 54 Vt. 90.

4. *Buzzell v. Johnson*, 54 Vt. 90. In this case the adjournment was to one o'clock in the afternoon, and the sale was made at ten o'clock in the forenoon. It was held that the sale could not be sustained, notwithstanding the property sold well, and that the owner's attorney was present, knew of the collector's mistake, and said nothing. *Butler v. Delano*, 42 Iowa 350.

5. *Burns v. Lyon*, 4 Watts (Pa.) 363. But at the same time, it was held in this latter case that, although the *Pennsylvania* act authorizing the sale of unseated lands for taxes, provides for an adjournment of the sale "from day to day," yet a title is good that is founded on a sale made by adjournment to a certain day, which does not immediately succeed the first. The uniform practice in the state requires such a construction.

6. In *Louisiana*, a sale may be made by the deputy of the collector. *Villey v. Jarreau*, 33 La. Ann. 291.

Under the *Virginia* statute of 1813-1814, a sale of land forfeited for non-payment of taxes, may be made either by the sheriff or his deputy, but whichever officer makes the sale, that officer alone is competent to make the conveyance to the purchaser. *Chapman v. Doe*, 2 Leigh (Va.) 329; *Wilsons v. Doe*, 7 Leigh (Va.) 22.

In *Pennsylvania*, after the expiration of the treasurer's term of office and the appointment and qualification of his successor, a sale by him of unseated lands is void.<sup>1</sup>

In *Arkansas*, the collector for a particular year is the only officer authorized to collect the taxes for that year, and although his term expires before the day fixed for the sale of lands for such taxes, no one other than himself or his deputy may sell; it is only when the collector dies, or is removed from office, or is otherwise disqualified to act, that the actual collector may sell in such case.<sup>2</sup>

Where a county is divided, after land therein is assessed for taxes and returned delinquent, and before they are sold, and by such division the land is included within a new county, the sale for such taxes should be made by the proper officer of the old county.<sup>3</sup>

(3) *Quantity to Be Sold—And in What Parcels.*—In many of the states are found statutes limiting the power of the officer to sell land for taxes to so much as will pay the taxes and charges. If the officer disregards the provision, the sale will be void.<sup>4</sup> It has been said that, in the absence of any statute limiting the officer's

The *New York* Act of 1850, repealed N. Y. R. S., pt. I., tit. 3, ch. 13, arts. 2 and 3, in regard to the assessment and collection of taxes, but with the proviso that the repeal should not affect "any tax levied or assessed prior to the year 1849, nor any proceeding for the collection thereof by a sale of the lands taxed or otherwise," and changed the proceedings for the collection of non-resident taxes by transferring the authority from the comptroller to the treasurer. It was held that a sale made by the treasurer in 1852, pursuant to the act of 1850, for taxes levied in 1849, but returned to the comptroller before the date of the repealing act just referred to, was valid. *Ensign v. Barse*, 107 N. Y. 329.

In *Illinois*, a sale by a city collector under a judgment against the lands for taxes rendered in March, 1870, before the present constitution of that state was adopted and went into effect, is not void because not made by some general officer of the county authorized to receive taxes. The constitutional provision is not retrospective, and does not apply to judgment for taxes before it became operative and before the necessary and appropriate legislation was had under such provision. *Garrick v. Chamberlain*, 97 Ill. 620.

The sheriff of St. Louis county is, by virtue of his office, required to collect the revenue, but when he does so it is not in his capacity as sheriff. In a

suit brought by him in his capacity as collector, and to his use as such, it was held that the process was properly served by him as sheriff, and that under an execution upon the judgment in his favor as collector he properly sold the land and made the deed as sheriff; that as sheriff he was not a party to the suit for taxes, and that as collector his interest therein was not such as to disqualify him from acting in his capacity as sheriff. *Webster v. Smith*, 78 Mo. 163.

1. *Cuttle v. Brockway*, 32 Pa. St. 45.

2. *Hogfins v. Brashears*, 13 Ark. 242; *Twombly v. Kimbrough*, 24 Ark. 459.

In *California*, a sheriff whose term of office has expired has no right to collect the state and county taxes as unfinished business—and therefore no right to make a sale—from the assessment list which came into his hands while in office. *Fremont v. Boling*, 11 Cal. 380.

3. *Hilliard v. Griffin*, 72 Iowa 331; *Collins v. Storm*, 75 Iowa 36; *Austin v. Holt*, 32 Wis. 478.

4. *Stead v. Course*, 4 Cranch (U. S.) 403; *Ainsworth v. Dean*, 21 N. H. 400; *Clarke v. Rowan*, 53 Ala. 400; *Loomis v. Pingree*, 43 Me. 299; *Straw v. Poor*, 74 Me. 53.

Where two town lots, one improved, the other unimproved, worth about \$500, were sold together for a tax of \$4.00, the sale was declared illegal. *O'Brien v. Coulter*, 2 Blackf. (Ind.) 421.



power in this particular, a restriction to the quantity requisite to pay the sum due, would be intended by the law.<sup>1</sup> And in one instance a law requiring the whole land to be sold, in all cases, without regard to the fact that a division thereof might be practicable without injury, and the taxes paid by a sale of part, was adjudged unconstitutional.<sup>2</sup> On the other hand, under a statute making it optional with the officer to sell the whole or a part, a sale of the whole was upheld, although a part might conveniently have been sold.<sup>3</sup>

The provision, found in some of the states, that the officer shall "only sell the smallest quantity which any purchaser will take and pay the taxes and costs," being intended for the protection of the taxpayer, is mandatory upon the officer; and a sale of the land in

So where two tenements on the same lot, worth each several thousand dollars, were sold to satisfy a tax of less than one hundred dollars, the sale was held to be absolutely null and void. *Doane v. Chittenden*, 25 Ga. 103. See also *Morris v. Davis*, 75 Ga. 169.

In *Maine*, in order to authorize the sale of the whole, it must distinctly appear of record that the sale of the whole was required to pay the taxes and charges. *French v. Patterson*, 61 Me. 209; *Whitmore v. Learned*, 70 Me. 276; *Lovejoy v. Lunt*, 48 Me. 378; *Wiggin v. Temple*, 73 Me. 380; *Straw v. Poor*, 74 Me. 53; *Brookings v. Woodin*, 74 Me. 222.

In *Ives v. Lynn*, 7 Conn. 505, it was held that when the officer's deed recites that he sold "sufficient" of the land to discharge the taxes and costs, the presumption is that he did his duty and sold no more than was necessary.

In the *Maine* statute, the language that the officer is to sell "so much of such real estate or interest as is necessary to pay the tax," etc., means that he is to sell an undivided fraction of the whole; as for instance, one-fourth, one-third, one-half. To sell a separate and distinct portion of the farm, as, for example, that portion which composes the pasture, will be as illegal as to sell the whole when it is only necessary to sell a part. *Allen v. Morse*, 72 Me. 502.

In *New Hampshire*, where the rights of third parties have not intervened, the officer's return that he exposed the whole to sale, may be amended, conformably to the truth, so as to show that he in fact offered for sale only so much of the lot as was necessary to discharge the taxes and charges. *Jaquith v. Putney*, 48 N. H. 138. See also *Bishop v. Cone*, 3 N. H. 513.

In *Missouri*, the sale may not be impeached in a collateral proceeding, for the neglect of the officer to sell the land, by its smallest legal subdivision. *Flynn v. Edwards*, 36 Fed. Rep. 873; *Wellshear v. Kelley*, 69 Mo. 419; *Brown v. Walker*, 85 Mo. 262.

1. *Guisebert v. Etchison*, 51 Md. 478; *Margraff v. Cunningham*, 57 Md. 585; *Brinson v. Lassiter*, 81 Ga. 40; *Cooley on Taxation* (2d ed.), p. 490.

In *Dyer v. Boswell*, 39 Md. 471, it was said that "art. 81, § 60 of the code of that state, providing that the officers shall sell no more of any tract of land than may be sufficient to discharge the taxes and legal charges due thereon, merely asserts a general principle which is applicable to sales made by sheriffs and collectors, and has been often enforced upon grounds of equity and reason, which forbid such officers from selling *en masse* a whole tract of land to pay a small sum of money when the sale of one or two acres would be sufficient." In this case the collector sold a tract containing one hundred acres, worth about \$1,500, to satisfy the sum of \$1.25, state taxes, without attempting to sell a portion thereof, set apart by a sufficient and certain description, and the sale was declared void.

2. *Martin v. Snowden*, 18 Gratt. (Va.) 100.

3. *Southworth v. Edmands*, 152 Mass. 203.

In *Lawton v. U. S.*, 21 Ct. of Cl. 44, where the law charged each tract with a distinct tax, the sale of two tracts was held to be not illegal, although the receipts from either were more than sufficient to pay the taxes on both. See also *State v. Sargent*, 12 Mo. App. 236.

one parcel to the highest bidder is illegal.<sup>1</sup> But if the least quantity that any one is willing to take for the sum due is the whole, then the sale of the whole will be upheld.<sup>2</sup>

With reference to the parcels or lots in which the lands may be sold, the general rule is, the sale must follow the assessment list.<sup>3</sup>

A sale of several parcels of land, separately assessed, or in fact distinct, *en masse* for a gross sum, is irregular and cannot be upheld, and a deed showing that this course was pursued, is void upon its face.<sup>4</sup>

1. *French v. Edwards*, 13 Wall. (U. S.) 506; *Mora v. Nunez*, 10 Fed. Rep. 634; *LeRoy v. Reeves*, 5 Sawyer (U. S.) 102; *Carpenter v. Gann*, 51 Cal. 193; *Hewell v. Lane*, 53 Cal. 213; *Gillis v. Barnett*, 38 Cal. 393; *Frink v. Roe*, 70 Cal. 297; *Reynolds v. Lincoln*, 71 Cal. 183.

2. *State v. Galloway Tp.*, 44 N. J. L. 145; *Hewes v. McLellan*, 80 Cal. 393.

3. *Ballana v. Forsyth*, 13 How. (U. S.) 18; *McQuesten v. Swope*, 12 Kan. 32; *Hayden v. Foster*, 13 Pick. (Mass.) 492; *State v. Sargeant*, 76 Mo. 557; *Corburn v. Crittenden*, 62 Miss. 125.

*Moulton v. Doran*, 10 Minn. 67, was an action to set aside the sale on the ground that the property was sold as one entire tract, while there were several distinct lots. The sale was upheld, however, because it conformed to the assessment, the assessment not having been questioned, and the statute making a distinction between errors in the assessment and errors in the sale, not permitting the assessment to be questioned after the sale was made.

4. *Nason v. Ricker*, 63 Me. 381; *Wallingford v. Fiske*, 24 Me. 390; *Andrews v. Senter*, 32 Me. 394; *Terrell v. Groves*, 18 Cal. 149; *Tucker v. Whittlesy*, 74 Wis. 74; *Woodburn v. Wireman*, 27 Pa. St. 18; *Morton v. Harris*, 9 Watts (Pa.) 319; *Pack v. Crawford*, 29 Ark. 489; *Pettus v. Wallace*, 29 Ark. 476; *Montgomery v. Birge*, 31 Ark. 491; *Cocks v. Simmons*, 55 Ark. 104; *Crane v. Randolph*, 30 Ark. 579; *Penn v. Clemans*, 19 Iowa 372; *Boardman v. Bourne*, 20 Iowa 134; *Byam v. Cook*, 21 Iowa 392; *Ferguson v. Heath*, 21 Iowa 438; *Harper v. Sexton*, 22 Iowa 442; *Ackley v. Sexton*, 24 Iowa 321; *Ware v. Thompson*, 29 Iowa 67; *State v. Richardson*, 21 Mo. 420; *Walker v. Moore*, 2 Dill. (U. S.) 256; *Keene v. Barnes*, 29 Mo. 377; *Long v. Wolf*, 25 Kan. 523; *Farnham v. Jones*, 32 Minn. 7; *Brown v. Setzer*, 39 Minn. 317; *San-*

*born v. Mueller*, 38 Minn. 27; *Hayden v. Foster*, 13 Pick. (Mass.) 492; *Barnes v. Boardman*, 149 Mass. 106. As to what constitutes a "tract" or "parcel," in *Iowa*, see *Martin v. Cole*, 38 Iowa 141.

Each parcel of a person's land separately assessed is only liable to sale for its own specific tax. *State v. Hand*, 41 N. J. L. 517.

In *Illinois*, where several adjoining tracts are levied upon, it is the duty of the sheriff to offer each tract separately, and if no bids are made for one tract, to add another to it, and so on until all the pieces are offered, and if no bid is made, then to sell all the tracts *en masse* for a reasonable bid. *Douthett v. Kettle*, 104 Ill. 356. See also *Phelps v. Conover*, 25 Ill. 309; *Morris v. Robey*, 73 Ill. 462.

Section 521 *Mississippi* Code, provides that the officer "shall first offer forty acres, and if the first parcel so offered does not produce the amount due, then he shall add another similar subdivision and so on until the requisite amount is produced." And where the officer in selling a one-hundred acre tract first offered forty acres, then another forty acres, then the remaining twenty, without receiving a bid, and then sold the whole tract, the sale was held to be void, notwithstanding section 525 of the code declaring in effect that no defense shall avail against a tax title, unless it is shown that the taxes were paid before the sale. *Griffin v. Ellis*, 63 Miss. 348.

As to the method of selling under section 38 of the *Mississippi* Act of 1841, see *Hodge v. Wilson*, 12 Smed. & M. (Miss.) 500; *Boisgerard v. Doe*, 23 Miss. 122; *Ray v. Murdock*, 36 Miss. 692; *Raskins v. Doe*, 24 Miss. 431.

In *Missouri*, a sale under a special execution, issued on a judgment for back taxes, may not be collaterally impeached because two lots were sold together, the judgment being rendered for a specific amount against each of

But several parcels adjoining, and lying in compact form, which are used and occupied as a single tract, may, for the purposes of taxation, be listed and valued together, and sold for a single consideration and as a single parcel.<sup>1</sup>

When the lots are sold separately, the purchaser is entitled to a deed reciting the fact, so that it may appear that the sale was conducted as required by law.<sup>2</sup> It seems, however, that where the same party buys two separate and distinct parcels, including them in one deed will not necessarily raise a presumption that they were sold *en masse*.<sup>3</sup>

The sale will not be set aside on the ground that the land was sold *en masse*, when no such objection is made in the petition and no relief asked upon that ground.<sup>4</sup>

Where several parcels are assessed as an entirety, at a gross sum, they must be sold together; the tax may not be arbitrarily apportioned, and the parcels sold separately, each for its proportionate share of the tax.<sup>5</sup> And such a sale may not be upheld by testimony that the apportionment of the tax was a fair one.<sup>6</sup>

Without express statutory authority, the officer may not, when the assessment is of the entire tract, sell an undivided interest in the land, so as to constitute the purchaser a tenant in common with the owner, unless perhaps, where the interest of the delinquent is already an undivided one; if less than the whole is sold, it must be a designated portion by metes and bounds.<sup>7</sup>

(4) *Illegal and Excessive Taxes and Charges—Omitting Back Taxes.*—If part of the taxes for which the land is sold is illegal,

the lots. *Howard v. Stevenson*, 11 Mo. App. 410.

In *Walker v. Boh*, 32 Kan. 354, the deed recited that the east half of northeast quarter of section 9, the northeast quarter of section 11, and other sections, were bid off for \$4.51 for the east half, and \$8.27 for the northeast quarter of section 11, and so on. It was held that this did not show a sale in gross.

It seems that a grantee in good faith from the purchaser of lands sold *en masse*, will be protected if he had no notice of the irregularity. *Martin v. Ragsdale*, 49 Iowa 589.

1. *Dodge v. Emmons*, 34 Kan. 732; *Mack v. Price*, 35 Kan. 144; *Hall v. Dodge*, 18 Kan. 277; *McQuesten v. Swope*, 12 Kan. 32; *Brien v. O'Shaughnessy*, 3 Lea (Tenn.) 724; *State v. Landis Tp.*, 50 N. J. L. 374; *Howland v. Pettey*, 15 R. I. 603. When the use and nature of the lots require them to be regarded as one parcel, the law will so treat them. *Weaver v. Grant*, 39 Iowa 294; *Green v. Wheeler*, 41 Iowa 85.

In *Springer v. U. S.*, 102 U. S. 586,

it was held to be not improper for the collector to sell in one parcel, a homestead containing two city lots, surrounded by a common inclosure.

2. *State v. Richardson*, 21 Mo. 420.

3. *Towle v. Holt*, 14 Neb. 221.

In *Gage v. Bailey*, 102 Ill. 11, the fact that several lots were included in one certificate of purchase was held to avoid no evidence that they were not sold separately as required by law.

In *Waddingham v. Dickson*, 17 Colo. 223, the deed conveyed title to several tracts, and showed that they were advertised separately, and that the purchasers offered to pay for them separately; this was held sufficient to show that they were sold separately.

4. *Wallace v. Berger*, 25 Iowa 456.

5. *Wyman v. Baer*, 46 Mich. 418; *Willey v. Scoville*, 9 Ohio 43; *Shaw v. Kirkwood*, 24 Kan. 476; *Heil v. Redden*, 38 Kan. 255; *O'Neil v. Tyler* (N. Dak. 1892), 53 N. W. Rep. 434; *Allen v. Morse*, 72 Me. 502; *Morristown v. King*, 11 Lea (Tenn.) 669.

6. *Kregelo v. Flint*, 25 Kan. 695.

7. *Roberts v. Chan Tin Pen*, 23 Cal.

the sale is void; it may not be upheld to the extent of the legal taxes.<sup>1</sup> It is a presumption of law that when the land has been sold for taxes, in part illegal, some portion of the land is taken to satisfy an illegal demand, and would not have been sold at all if only what was lawful had been called for.<sup>2</sup> And so, if the sale is made for a sum in excess of the tax costs and charges, it is void.

260; *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Loud v. Penniman*, 19 Pick. (Mass.) 539; *Wall v. Wall*, 124 Mass. 65; *Sanford v. Sanford*, 135 Mass. 314; *Forster v. Forster*, 129 Mass. 559; *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Hodge v. Wilson*, 12 Smed. & M. (Miss.) 498; *Corbin v. Inslee*, 24 Kan. 154; *Auld v. McAllaster*, 43 Kan. 162; *Cragin v. Henry*, 40 Iowa 158; *Jordan v. Hyatt*, 3 Barb. (N. Y.) 275; *Harper v. Rowe*, 55 Cal. 132.

But where the owner of an undivided interest is allowed to pay the taxes on that interest, a sale of the residue is valid. *Peirce v. Weare*, 41 Iowa 378. See also *Fellows v. Denniston*, 23 N. Y. 420; *Lawrence v. Miller*, 86 Ill. 502.

And where the interests of two tenants in common in a tract of land are allowed to be assessed separately, upon default by one to pay the taxes assessed upon his undivided interest, it may be sold without a sale of the entire interest of both—the co-tenant having paid his share of the taxes. *Ronken-dorff v. Taylor*, 4 Pet. (U. S.) 346; *Paine v. Danley*, 18 Ark. 441.

In *Vermont*, it is held that if the officer's deed of land sold by him describes the land simply as so many acres of a certain lot, it passes an undivided interest in such lot equal to the proportion which the number of acres sold bears to the whole number of acres in the lot. *Sheafe v. Wait*, 30 Vt. 735.

**Locating the Part Sold.**—In *California*, the owner of the lands may designate, prior to the commencement of the sale, the portion he wishes offered; if he does not so designate, then the officer shall do so. But the designation, whether by the owner or the officer, must precede the actual sale to the purchaser; and it must be by metes and bounds, so that the purchaser may know its exact boundaries. *Roberts v. Chan Tin Pen*, 23 Cal. 259.

In *Wands v. Brien*, 13 Lea (Tenn.) 732, it was held that the designation, "eighty-four feet of this lot," does not sufficiently define the quantity of the land bid off, and is void.

Under the *Tennessee Act of 1873*, ch.

118, § 65, authorizing and requiring the officer to accept as the purchaser, the bidder who will pay the amount due for the least quantity of the tract, to be run off from the beginning corner, it is not necessary that the officer should indicate to the bidders the corner of the tract which he considers the beginning corner. *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

In *Illinois*, the quantity sold, when less than the whole, must be taken from the eastern portion of the tract, and the line drawn due north and south, and far enough west of the most eastern point of the tract to make the requisite quantity. *Spellman v. Curtenius*, 12 Ill. 409.

In an early *Pennsylvania* case, it was held that a treasurer's sale of part of a tract, and a conveyance of that part designating the quantity, but not the locality, was valid; and an unrestricted choice of locality to the purchaser was a necessary incident of the sale, and a consequence of a fair and reasonable interpretation of the statute. *Coxe v. Blanden*, 1 Watts (Pa.) 533.

1. *Libby v. Burnham*, 15 Mass. 144; *Bangs v. Snow*, 1 Mass. 181; *Drew v. Davis*, 10 Vt. 506; 33 Am. Dec. 213; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *Noble v. Indianapolis*, 16 Ind. 506; *Barker v. Blake*, 36 Me. 433; *Brown v. Snell*, 6 Fla. 741; *Young v. Joslin*, 13 R. I. 675; *People v. Hagadorn*, 36 Hun (N. Y.) 610; *Dogan v. Griffin*, 51 Miss. 782; *Beard v. Green*, 51 Miss. 856; *Gamble v. Witty*, 55 Miss. 26; *Peterson v. Kittredge*, 65 Miss. 33; *Rougelet v. Quick*, 34 La. Ann. 123; *Kemper v. McClelland*, 19 Ohio 308; *Younglove v. Hackman*, 43 Ohio St. 69; *McLaughlin v. Thompson*, 55 Ill. 249; *Drake v. Ogden*, 128 Ill. 603; *Wills v. Austin*, 53 Cal. 152; *Hardenburgh v. Kidd*, 10 Cal. 402; *McCann v. Merriam*, 11 Neb. 241; *Covell v. Young*, 11 Neb. 510; *Shattuck v. Daniel*, 52 Miss. 834; *Buttrick v. Nashua Iron, etc., Co.*, 59 N. H. 392; *Elwell v. Shaw*, 1 Me. 339; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111.

2. *Silsbee v. Stockle*, 44 Mich. 569.

It has been contended that when the excess is very small, the sale should be upheld upon the principle *de minimis non curat lex*; but this maxim applies to tax sales only in a very limited sense, the rule being that the sale is void if the excess is as much as the smallest fractional coin authorized by law.<sup>1</sup> But the fact that the

1. *Burroughs v. Goff*, 64 Mich. 464; *Case v. Dean*, 16 Mich. 12; *Hammon-tree v. Lott*, 40 Mich. 190; *Doland v. Mooney*, 79 Cal. 137; *Treadwell v. Patterson*, 51 Cal. 637; *Axtell v. Gerlach*, 67 Cal. 483; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Harper v. Rowe*, 53 Cal. 233; *Knox v. Higby*, 76 Cal. 264; *Kimball v. Ballard*, 19 Wis. 601; 88 Am. Dec. 705; *Pierce v. Schutt*, 20 Wis. 423; *Board of Regents v. Linscott*, 30 Kan. 240; *Pack v. Crawford*, 29 Ark. 489.

A tax sale for anything more than is lawfully chargeable, is a sale without jurisdiction, and therefore void. *Smith v. Ryan*, 88 Ky. 636.

A trivial sum exacted of each taxpayer becomes a matter of importance as applied to the body of the taxpayers at large, and may become important in amount to each individual owner of property by reason of the continued exactions of successive years. *Lufkin v. Galveston*, 73 Tex. 340.

Where the excess was only nine cents, the court said that "there can be no valid sale for a tax in excess of that authorized by law. The maxim *de minimis non curat lex* cannot save it." *Wells v. Burbank*, 17 N. H. 393.

Fractions which cannot be expressed in legal money of the country have been regarded as trifles. But a sum large enough to be paid in coin that may be a legal tender, and which constitutes a debt and may be collected by legal process, cannot be regarded by the law as worthless and trivial. If such a sum be a trifle, it will be difficult to draw the line and say how much a sum must be, not to be a trifle. *Glidden v. Chase*, 35 Me. 90.

In *Boyd v. Moore*, 5 Mass. 365, the sum of 41 cents was considered not a trifle. The chief justice observes that "fractions not to be expressed in the legal money of account are trifles and may be rejected."

In *Huse v. Merriam*, 2 Me. 376, an excess of 87 cents was held to render the sale void. It was contended that this sum was such a trifle as to fall within the range of the maxim *de minimis non curat lex*, but the court said

that this maxim is so vague in itself as to form a very uncertain ground of proceeding or judging, and it may be almost as difficult to apply it as a rule in pecuniary concerns, as to the interest which a witness has in the event of a cause, and in such a case it cannot apply; any interest excludes him.

In *Wisconsin*, including in the amount for which the lands are offered the sum of five cents for *United States* revenue stamp, imposed by act of Congress upon each certificate of sale, Congress having no power to impose the sum, renders the sale void. *Barden v. Columbia County*, 33 Wis. 445; *Baker v. Columbia County*, 39 Wis. 447; but in such a case the validity of the sale may not be questioned after the expiration of the period of limitation. *Milledge v. Coleman*, 47 Wis. 184.

In *Kansas*, if the proof of publication of notice of the sale is not transmitted by the printer to the county treasurer, as required by law, the printer's fees do not become a charge against the county nor against the lands, and to include them in the amount for which the land is sold, will invalidate the sale. *Fox v. Cross*, 39 Kan. 350; *Blanchard v. Hatcher*, 40 Kan. 350; *Jackson v. Challiss*, 41 Kan. 247.

In *McQuesten v. Swope*, 12 Kan. 32, the court said that whatever may be the rule when the excess is but nominal or trifling, a sale cannot stand when the excess is large and substantial.

But the words "substantial excess" are used in comparison with the total amount of the actual charges. Thus, where the actual cost of advertising was eight cents, and the sum included in the sale for that purpose was 17 cents, more than twice the legal fees, the excess was held to be substantial. *Genthner v. Lewis*, 24 Kan. 226. See also *Harris v. Curran*, 32 Kan. 580; *Hapgood v. Morten*, 28 Kan. 766.

In *Bode v. New England Invest. Co.*, 6 Dakota 499, it was held that a sale for a tax of seven mills on a dollar is void when it appears that the only tax levy made for that year was but for four mills.

recitals of the amount in the certificate of sale and deed differ, does not show that the sale was for a sum in excess of the legal amount.<sup>1</sup>

In several states, statutes have been enacted providing in effect, that a sale, otherwise regular, shall not be rendered invalid by reason of the fact that a portion only of the taxes is illegal or erroneous. The constitutionality of these statutes has been assailed, but, with one exception, they have been upheld.<sup>2</sup> In some of the states it is provided that the sale shall be made for the total amount of taxes, interest, and costs. In the notes will

If a judgment against land for taxes includes costs not due or earned at the time of its rendition, but to accrue subsequently to the entry of the judgment, the error is fatal and a sale under such judgment passes no title. *Gage v. Lyons*, 138 Ill. 571; *Combs v. Goff*, 127 Ill. 431; *Gage v. Goudy*, 141 Ill. 215.

But in *O'Grady v. Barnhisel*, 23 Cal. 287, it was held that a slight mistake by the officer in estimating the amount of taxes and costs, by which the property was sold for a small sum more than the amount actually due, will not vitiate the sale, particularly when it is not made to appear that the owner has suffered any injury by reason of the mistake.

And in *Harvard v. Day*, 62 Miss. 748, it was held that a sale for one and six-tenths of a cent in excess of the legal amount due, is not invalid where the excess is not in the levy, but occurs in the officer's calculation of the amounts of the several taxes and the aggregate thereof, and is produced by conformity to the common practice of writing down whole numbers rather than fractions where no appreciable difference results.

In *Drennan v. Beierlein*, 49 Mich. 272, ejectment was brought against the purchaser of land which was sold for 32 cents in excess of the amount of the tax, but the record did not show whether this additional sum was charged as a penalty under the name of interest, or for some other purpose, and it did not exclude the possibility that it was made up of legitimate charges for the cost of advertising, etc. It was held that in the absence of a clear showing to the contrary, it must be assumed that the charge was lawfully made. See also *Salls v. Barons*, 40 Kan. 697.

In *Crooks v. Whitford*, 47 Mich. 283, it is held that the deed cannot be held invalid on the ground that the tax

for which the land was sold exceeded the regular statutory limit, if it appears that during the period within which it was levied, extraordinary levies were authorized to which this limitation did not apply and which might have justified the tax.

In *New York*, where the officer returned four cents too much, the mistake was held not to invalidate the sale; the maxim *de minimus*, etc., being held to apply. *Colman v. Shattuck*, 62 N. Y. 353.

In *Ohio*, the sale is not affected by an overcharge of tax subsequent to the forfeiture to the state for non-payment. *Winder v. Sterling*, 7 Ohio, pt. II., 191.

1. *Doland v. Mooney*, 79 Cal. 137. In this case the amount recited in the certificate was fifty cents less than that in the deed. The court, in holding that this did not show an excessive sale, said that "if the sale was in fact for an excessive sum, that may be shown to invalidate the sale, but the presumption is in favor of the regularity of official action."

2. *Iowa*.—*Parker v. Sexton*, 29 Iowa 421; *Sully v. Kuehl*, 30 Iowa 275; *Hurley v. Powell*, 31 Iowa 64; *Genther v. Fuller*, 36 Iowa 604; *Rhodes v. Sexton*, 33 Iowa 540; *Parker v. Cochran*, 64 Iowa 757; *Corning Town Co. v. Davis*, 44 Iowa 622. And evidence of such illegal or erroneous taxes may be properly excluded on the ground of immateriality. *Eldridge v. Kuehl*, 27 Iowa 160.

The reasoning upon which these cases proceed is: If any portion of the tax is legal, the power to sell arises therefrom. The fact that erroneous or illegal taxes are associated with the valid and legal, will not defeat the power any more than if they had been entirely omitted. So long as the power and right to sell exist as to any part of the taxes, the owner is not prejudiced by the erroneous or illegal part, since his property would be

be found cases arising under these statutes, showing the effect upon the sale of omitting back taxes and of selling for an amount insufficient to pay the sum due.<sup>1</sup>

(5) *Competition at Sale—Fraud.*—The sale is required to be

sold for the valid part, and he is entitled to have the erroneous portion refunded.

By the *Mississippi* Code of 1880, § 525, a sale for an amount of taxes and costs in excess of what is due, is not invalid if there was no tender of the legal amount before the sale. *Carter v. Hadley*, 59 Miss. 130; *Corburn v. Crittenden*, 62 Miss. 125; *Lewis v. Vicksburg*, etc., R. Co., 67 Miss. 82.

Under the *Massachusetts* Gen. Sts., ch. 12, § 56, a sale is not invalid because the taxes were in part appropriated by the town to a purpose for which it could not lawfully raise money. *Southworth v. Edmands*, 152 Mass. 203.

*Michigan* Comp. L., § 1129, that no sale shall be held invalid unless it be made to appear that all legal taxes are paid or tendered, and that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown, is unconstitutional so far as it sustains sales for taxes which are in part illegal. *Silsbee v. Stockle*, 44 Mich. 561.

1. In *Nebraska*, a sale can be lawfully made only by including all the taxes, interest and costs due at the time; and a sale for a portion only, is not binding upon the owner. *O'Donohue v. Hendrix*, 13 Neb. 257; *Tillotson v. Small*, 13 Neb. 202; *McGavock v. Pollack*, 13 Neb. 535; *State v. Helmer*, 10 Neb. 25.

In *Iowa*, the fact that the land is not sold for all the delinquent taxes is an irregularity merely, which will not defeat the sale after the execution and recording of the tax deed made in pursuance thereof. *Kessey v. Connell*, 68 Iowa 430; *Hough v. Easley*, 47 Iowa 330; *Shoemaker v. Lacey*, 38 Iowa 277; *Preston v. Van Gorder*, 31 Iowa 250 (holding that one who purchases the land at a sale for part of the delinquent taxes may restrain the officer from making a sale for the remaining delinquencies); *Bowman v. Thompson*, 36 Iowa 505 (holding that where land is sold for the taxes of several years, and subsequently sold for taxes of years prior to those for which the first sale was made, the title obtained at the first sale is paramount). Compare with the foregoing cases, *Bowman v. Eckstein*, 46 Iowa 583.

In *Massachusetts*, where land is ad-

vertised for sale at the same time in the same paper by the same officer for the taxes of two successive years, and at the time and place named is sold by him to one for the tax of the earlier year, and then at the same sale, to another for the tax of the later year, the second sale is valid, and the purchaser at that sale acquires title to the land. *Keen v. Sheehan*, 154 Mass. 208.

In *Crowell v. Merrill*, 60 Iowa 53, land was sold for delinquent state and county taxes at a time when certain taxes voted in aid of a railroad were also delinquent and a lien upon the land. Subsequently, the land was again sold for the railroad tax; and after this the owner redeemed from the first sale, and instituted an action to set aside the second sale, relying upon section 871 of the *Iowa* code, providing that the sale shall be made for, and in payment of, the total amount of the taxes, etc. But it was held that the word "taxes" in this section must be construed to mean state and county taxes only, and not railroad taxes; and that the second sale for the railroad taxes must be upheld.

In *Illinois*, it is held that where the state sells land in satisfaction of a tax judgment, it may not defeat the purchaser's title by resale of the same for taxes which were due and owing at the rendition of the judgment, and which might have been included in it. Such sale must be deemed an abandonment of all back taxes. *Law v. People*, 116 Ill. 244.

See further as to presumption of abandonment, *Bradley v. Hintrager*, 61 Iowa 337. And as to presumption of payment, *McLaughlin v. Kain*, 45 Pa. St. 113.

In *Louisiana*, if the highest bid for which property offered is insufficient to pay the taxes, costs, etc., such bid must be rejected, and the officer may bid in the property for the state. And should he sell for such bid, the sale will be void for all purposes; and a transfer thereunder may be disregarded by any creditor of the owner of the property. *Renshaw v. Imboden*, 31 La. Ann. 661; *Waddill v. Walton*, 42 La. Ann. 763.

In *Kansas*, where there is no inten-

made openly, publicly, and fairly, with an opportunity for competition in the bidding.<sup>1</sup> It has been said that "It may seriously be questioned whether the legislature possesses the power to provide for the extinguishment of the owner's title by a secret or private sale."<sup>2</sup>

Generally speaking, any conduct on the part of the officer which tends to prevent the attendance of bidders, or a fair competition among those who do attend,<sup>3</sup> or any arrangement be-

tion of selling for a less sum than the taxes, costs, etc., a sale made for one cent less than the sum due will be upheld. *Ireland v. George*, 41 Kan. 751.

In *Shelley v. St. Charles County*, 28 Fed. Rep. 875, it was held that where the owner of property, knowing that the taxes levied upon it are less than required by law, allows it to be sold under a judgment for such taxes and buys it in himself, another tax may be levied upon the same land to make up the deficiency.

In *Iowa*, if the delinquent taxes are not carried forward on the tax books, as required by section 845 of code of that state, a sale for such taxes is invalid. *Gardner v. Early*, 69 Iowa 42; *Barke v. Early*, 72 Iowa 273; *Hooper v. Sac County Bank*, 72 Iowa 280; *Buckley v. Early*, 72 Iowa 289.

1. See cases cited in succeeding notes to this section. See also *supra*, this title, *Proceedings Before Sale—Notice; Conduct of Sale—Time and Place*.

In *Indiana*, a private sale of land, by the marshal of an incorporated town, for delinquent taxes, assessed by the town, is absolutely unauthorized and void. *Stevens v. Williams*, 70 Ind. 536.

In *Pennsylvania*, county treasurers may sell unseated lands only in pursuance of public notice and by open vendue—they have no authority to make private sales. *Cuttle v. Brockway*, 32 Pa. St. 45.

Under the revenue law of *Nebraska*, in force December, 1887, where lands had been advertised, and not sold for lack of bidders, the treasurer could sell the same at private sale, and was not required to give notice of, or invite competition at, such sale. *Kittle v. Shervin*, 11 Neb. 65.

But he had no right to sell at a private sale until after his report of sales of land at public sale was made, and filed in the office of the county clerk. And a tender and demand to purchase at private sale made before the report

was made and filed gave no right to the writ of *mandamus* to compel such sale. *State v. Helmer*, 10 Neb. 25.

And a deed purporting to have been founded on a private sale, must recite that the land had been previously exposed for sale at a public sale, and not sold for lack of bidders. *Ludden v. Hansen*, 17 Neb. 354.

2. Cooley on Taxation (2d ed.), ch. xv., p. 489.

3. *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Gage v. Graham*, 57 Ill. 144.

Tax sales, whenever characterized by fraud or unfairness, should be set aside, or the purchaser be required to hold the title in trust for the owner. A court of equity is the proper tribunal to afford relief. *Slater v. Maxwell*, 6 Wall. (U. S.) 268; *Schenk v. Peay*, 1 Dill. (U. S.) 267.

To allow a party to select from the tax list certain lands and become the purchaser thereof for the taxes due, without competition, is contrary to equity, and fraudulent. *Brown v. Hogle*, 30 Ill. 119.

In *Massachusetts*, a sale is not invalidated by reason of the fact that the officer announces at the sale that he hopes no one will bid more than the amount of the taxes, interest and charges, because of the difficulty in disposing of the surplus. *Southworth v. Edmands*, 152 Mass. 203.

In *Arkansas*, although the sheriff who is concerned in the purchase of lands at the sale, is liable to a penalty, to be recovered by indictment, yet when the bill simply charges that the sheriff was interested in the purchase of certain lands, without alleging that by a combination between the sheriff and the purchaser it was intended to prevent competition, or that such was the effect, or that any other person did bid, or desired to bid for himself, this does not amount to a charge of fraud. *Twombly v. Kimbrough*, 24 Ark. 460.

Inadequacy of price, without more, does not constitute a valid objection to



tween the officer and the purchaser, whereby a private sale is substituted for the public sale contemplated by the law,<sup>1</sup> operates as a fraud upon the owner and vitiates the sale. And a combination among the purchasers to the effect that they will not bid against each other, or that they will take turns in bidding, will render the sale void.<sup>2</sup> But an agreement between two or more persons to bid jointly, if not made to prevent competition,

the sale. *Slater v. Maxwell*, 6 Wall. (U. S.) 268.

In *Howland v. Pettey*, 15 R. I. 603, the complainant prayed to have the sale vacated on the ground that the price was inadequate, because of an understanding among the bidders that he was to receive the land back upon reimbursing the purchaser the price paid and costs. It was held that such an understanding was not prejudicial to the complainant; the land having been offered to him by the purchaser for the price paid, with costs and expenses, which offer he did not accept, though able to do so, and never at any time offering to redeem the land.

1. Where the officer does not sell the lands at public auction, as required by law, but simply allows persons who desire to purchase, to hand him slips of paper with the description of the lands which they wish to purchase written thereon, and the officer then at his leisure enters these lands on his books as though they had been regularly sold at public auction for the taxes delinquent, and issues to the purchaser who handed him the slips of paper, certificates in ordinary form, such a sale is illegal and voidable, if not void. *Young v. Rheinecher*, 25 Kan. 366; *Arn v. Hoppin*, 25 Kan. 707.

And the fact that the officer made sales in the foregoing manner, may be proved by witnesses who know the facts, and can testify with regard thereto from their own personal knowledge, although they may not be able to testify with respect to any particular tract of land, but only with regard to the general manner and custom of the officer in making his sales. *Young v. Rheinecher*, 25 Kan. 366.

In *Leavitt v. Watson*, 37 Iowa 93, the irregularity in the sale was, that the persons wishing to buy handed in a list of the lands to the officer, on which they were willing to pay the taxes due, and if there was no competition, such bid was received and the land treated as sold without publicly crying the bid, or publicly striking off

the land; the sale was upheld. This decision was followed in *Slocum v. Slocum*, 70 Iowa 259. But in *Butler v. Delano*, 42 Iowa 350, it was said, "that case goes to the very verge in sustaining a tax title, but not perhaps beyond what the law creating presumptions in favor of the validity of tax sales requires." Here the officer announced that the sale would be adjourned from day to day, and posted a notice to that effect, but instead of resuming the sale and adjourning it upon the following day, or any day thereafter, he made no further offer of the lands until the agent of the purchaser handed him a list of tracts belonging to certain delinquents and offering in behalf of the person whose name was placed opposite each tract, to take it for the taxes due and the officer, receiving no better offer, struck off the entire list. It was held that this did not constitute a public sale within the meaning of the statute, and should be set aside for irregularity. *Followed in Trusdell v. Green*, 57 Iowa 215; *Thompson v. Ware*, 43 Iowa 455; *Miller v. Corbin*, 46 Iowa 150; *Chandler v. Keeler*, 46 Iowa 596. See also *Burdick v. Birmingham*, 38 Minn. 482.

In *Dodge v. Emmons*, 34 Kan. 732, at a regular tax sale the officer publicly offered certain lots for sale, and none of the persons present bidding thereon, he publicly struck them off and entered them as sold to A., who had, prior to that time, given him money with the instruction that where a parcel was offered and no one else offered to buy, it should be struck off to him. The officer acted in good faith, intending no injury or fraud to anyone concerned. It was held that while the sale was not in the manner prescribed by statute, it was a sale in fact, and that the action of the officer was such as may be cured by the lapse of time.

2. *Singer Mfg. Co. v. Yarger*, 12 Fed. Rep. 487; *Kerwer v. Allen*, 31 Iowa 578; *Johns v. Thomas*, 47 Iowa 441; *Easton v. Mawkinney*, 37 Iowa 601; *Frank v. Arnold*, 73 Iowa 370.

but for the purpose of protecting their own interest, is not fraudulent.<sup>1</sup> And the mere fact that one acts as the agent of two purchasers or that two agents act for one purchaser,<sup>2</sup> or that both principal and agent are present and bid,<sup>3</sup> does not *per se* constitute a fraudulent and illegal combination. An illegal combination is not to be implied from the fact that there is no competition among the parties present.<sup>4</sup> The fraud on the part of the purchaser at the sale will not defeat the title of a subsequent purchaser for value, and without notice of the fraud.<sup>5</sup> And it has been held that the purchaser at the sale will not be affected by the fraud of others, to which he is not a party, and of which he was ignorant.<sup>6</sup>

(6) *Who May Purchase*.—(See TAX TITLES, vol. 25, p. 674.)

(7) *Terms of Sale*.—The sale must be for cash, unless credit is expressly authorized to be given.<sup>7</sup> But where there is no stipu-

**Misrepresentation by Purchaser to Prevent Competition**.—Where the purchaser prevented competition by representing that it was useless to purchase, as the owner would defeat the sale by redemption, and thereby he was enabled to buy for a trifling amount, the sale was adjudged void. *Slater v. Maxwell*, 6 Wall. (U. S.) 268.

One who induces others to refrain from bidding at the sale by representing that he desires to buy in the land for the defendant in the tax suit, who was his neighbor, and who so purchases at such sale, will be treated as the trustee for the defendant, or the latter may have the sale set aside. *Merrett v. Poulter*, 96 Mo. 237.

1. *Morrison v. Bank of Commerce*, 81 Ind. 335. See also *Hunt v. Elliott*, 80 Ind. 245; 41 Am. Dec. 794; *Phippen v. Stickney*, 3 Met. (Mass.) 384; *National Bank v. Sprague*, 20 N. J. Eq. 159.

And a combination to prevent competition is not to be implied from the mere fact of a joint purchase by two persons. *Kerr v. Kipp*, 37 Minn. 25.

But an agreement among several that they will advance funds and one shall buy, so as to prevent competition, and afterwards divide the land purchased, is fraudulent, and equity will relieve against the purchase. *Dudley v. Little*, 2 Ohio 504; 15 Am. Dec. 575.

2. *Pearson v. Robinson*, 44 Iowa 413.

3. *Jury v. Day*, 54 Iowa 573.

4. *Davis v. Harrington*, 35 Kan. 196; *Beeson v. Johns*, 59 Iowa 166. In this latter case, the court uses the following language: "There were three bidders at the tax sale and they did not bid against each other. And this consti-

tutes the only evidence there was of a fraudulent combination. We feel constrained to say this evidence is not, in our opinion, sufficient. Fraud cannot be presumed, but the contrary presumption must be indulged in, in the absence of evidence. It might well be that each bidder obtained all the land he wanted without the necessity of bidding against any one else."

5. *Van Shaack v. Robbins*, 36 Iowa 201; *Sibley v. Bullis*, 40 Iowa 429; *Huston v. Markley*, 49 Iowa 162; *Martin v. Ragsdale*, 49 Iowa 589. See also *Eldridge v. Kuehl*, 27 Iowa 161.

**Holder Under Quit-claim Deed**.—But one who holds under a quit-claim deed from the assignee of a tax certificate void for fraudulent combination, is not entitled to protection as an innocent purchaser. *Watson v. Phelps*, 40 Iowa 482; *Light v. West*, 42 Iowa 138; *Springer v. Bartle*, 46 Iowa 688; *Merrett v. Poulter*, 96 Mo. 237.

6. *Case v. Dean*, 16 Mich. 12; *Martin v. Cole*, 38 Iowa 141; *Eldridge v. Kuehl*, 27 Iowa 161.

In *Boyd v. Wilson*, 86 Ga. 379, it was held that a purchaser who is neither implicated in, nor aware of, any fraud contemplated by the selling officer, is not affected thereby.

7. *Cushing v. Longfellow*, 26 Me. 306; *Donnel v. Bellas*, 34 Pa. St. 157.

In *Kansas*, where the land is bid off by the officer for the county, it is not necessary that anything should be paid at the time therefor. *McCauslin v. McGuire*, 14 Kan. 234.

In *North Carolina*, the purchaser will get no title when he has not observed the mandate of the statute, to

pay the amount of the taxes immediately, take a receipt from the sheriff, and have the same registered. *Hays v. Hunt*, 85 N. Car. 303.

In *Indiana*, where the officer accepts in payment for the lands sold a "ditch certificate," and is subsequently sued under § 6465, R. St., of that state, which renders him liable to the holder of the certificate of sale, when the taxes for which the lands are sold have been previously paid, he is not estopped from showing that the certificate was not a cash payment and that he had no authority to receive the same. And further, in such a case, the purchaser is bound to know that the officer's act was unauthorized, and a subsequent purchaser of the certificate of sale occupies no better position than the original purchaser. *Baldwin v. Shill*, 3 Ind. App. 391.

**Pennsylvania — Surplus Bond.** — In *Pennsylvania*, by statute, if there is a surplus above taxes and costs, the officer is authorized and required to take a bond for this from the purchaser. *Donnel v. Bellas*, 34 Pa. St. 157.

Generally speaking, the bond is indispensable to the validity of the sale. *Cuttle v. Brockway*, 24 Pa. St. 145.

And payment of the whole amount of the purchase-money cannot be taken as a substitute for the bond. *Connelly v. Nedrow*, 6 Watts (Pa.) 451; but it seems that where the cost of giving the bond would exceed the surplus, it need not be given. *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328.

And where the officer charges too much costs, and thus uses the whole amount of the purchase-money to pay the taxes and costs, whereas upon a correct calculation there would have been a surplus, for which it would have been necessary for the purchaser to give bond, his not having done so under the circumstances will not affect his title. *Gibson v. Robbins*, 9 Watts (Pa.) 156.

If a bond was given, although for an amount which did not exactly correspond with the actual surplus, it will be attributed to the mistake of the officer, and will not affect the title. *Frick v. Sterrett*, 4 W. & S. (Pa.) 269.

And in *Turner v. Waterson*, 4 W. & S. (Pa.) 171, it is held that the recital in the deed of the amount for which the land was sold, is not conclusive evidence of the fact. But the purchaser may show by the sale book, and by parol evidence, that it brought a different sum, and that the bond given by him

corresponded with the actual amount produced by the sale.

In *Sutton v. Nelson*, 10 S. & R. (Pa.) 238, it was held that if the purchaser neglected to file the bond within two years after the sale, he acquired no title.

In later cases, however, it has been held that the word "file" was used in the case just mentioned carelessly for the word "deliver," on a supposition that the one would follow the other as a matter of course. If, then, the purchaser has performed his part by giving the bond, the omission of the officer to file it will not vitiate the title. *White v. Willard*, 1 Watts (Pa.) 42; *McDonald v. Maus*, 8 Watts (Pa.) 364; *Burns v. Lyon*, 4 Watts (Pa.) 363; *Dreisbach v. Berger*, 6 W. & S. (Pa.) 564.

Failure to give the bond on the purchase of unseated lands, and paying the whole purchase price to the officer, are irregularities which are cured by the limitation in the *Pennsylvania* Act of April 3d, 1804. *Rogers v. Johnson*, 67 Pa. St. 43.

The receipt of the officer for the bond is competent evidence that the bond was given. *Fager v. Campbell*, 5 Watts (Pa.) 287; *White v. Willard*, 1 Watts (Pa.) 42; *Dreisbach v. Berger*, 6 W. & S. (Pa.) 564. And as it thus becomes *prima facie* evidence, it must, in the absence of rebutting proof, like all *prima facie* evidence, be deemed conclusive. *Robinson v. Williams*, 6 Watts (Pa.) 281.

The same is true of a recital in the officer's deed, that a bond was given. *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328.

But proof is not admissible by the oath of the officer that the bond had been given and filed in the proper office, without preliminary evidence of a search for the bond and its loss. *Dreisbach v. Berger*, 6 W. & S. (Pa.) 564.

Where the deed contains a receipt for the cost of a bond, it will be presumed, after a lapse of nearly thirty years, during which time the purchaser has paid the taxes, that the bond was given as required. *Lackawanna Iron, etc., Co. v. Fales*, 55 Pa. St. 90. See also *Huzzard v. Trego*, 35 Pa. St. 9.

But in ejectment for the land, where the officer's deed recited the payment of the purchase-money in full, a receipt for which was appended to it, but did not recite a surplus bond, it was held that no presumption that a

lation for credit before the sale, it seems the fact that the purchase price was not promptly paid,<sup>1</sup> or that the officer received the promissory note of the purchaser for part of the purchase-money, will not invalidate the sale.<sup>2</sup> Where the law requires the sale to be made to the "highest bidder," this method must be pursued and the officer may not substitute another person therefor.<sup>3</sup> By the "highest bidder" in these statutes is ordinarily meant the one who will pay the taxes and the incidental expenses, for the least quantity of the land.<sup>4</sup>

*e. PROCEEDINGS AFTER SALE*—(1) *Report and Record*.—The statutes provide for a report by the officer of his proceedings in the tax sale. The return usually is required to recite the fact of notice of sale, the time of sale, the quantity of land, or the estate therein sold, the name of the purchaser, and the amount of the bid. These requirements, as well as that in regard to the time in which the return is to be made, are, as a general rule, mandatory.<sup>5</sup> If the officer omit to append to his return the affidavit prescribed, or if he omit from the affidavit a material or substantial portion

bond was given would arise either from lapse of time, the payment of taxes, or the duty of the officer to see that a bond was given, as against the evidence in the deed that the whole bid was paid in money, and that, therefore, no bond for the surplus was given. *Alexander v. Bush*, 46 Pa. St. 62. As to the contents of the bond, see *Bartholemew v. Leech*, 7 Watts (Pa.) 472.

1. *Anderson v. Ryder*, 46 Cal. 135; *Mania v. Elliott*, 51 Cal. 8.

2. *Longfellow v. Quimby*, 29 Me. 196. In this case the sale was on the usual terms for cash, and there was no understanding that the officer should not call on the purchaser for the money until it was wanted. After the sale, the purchaser paid a part of the consideration and gave his note for the balance; the officer having no occasion for the money and considering the note as good as the common currency of the country. The court said that this was unlike the case where a stipulation is made before the sale that credit is to be given to the purchaser. Here the officer, as such, was accountable for the whole sum for which the land was sold, and the taking of the note for a part of the purchase-money was a matter between the plaintiff and himself in his private character.

3. *Keene v. Houghton*, 19 Me. 368; *Bean v. Thompson*, 19 N. H. 290; 49 Am. Dec. 154; *Cardigan v. Page*, 6 N. H. 182.

Where the record of the sale shows that its terms were that the highest bid-

der shall be the purchaser, and then shows that M. was the purchaser, this is evidence that M. was the highest bidder. *Smith v. Messer*, 17 N. H. 420.

4. *Lovejoy v. Lunt*, 48 Me. 378.

5. In *Maine*, the sale is invalid if the collector's return does not show that he gave the required notice of the time and place of sale, or, if when the whole tract is sold, it does not state that this course was necessary to pay the taxes due. *Lovejoy v. Lunt*, 48 Me. 377.

A failure of the officer to state in his report the estate in the lands sold by him, when required, renders the sale absolutely void, although in all other respects regular and valid. *Braxton v. Rich*, 47 Fed. Rep. 178; *Jones v. Dils*, 18 W. Va. 759.

Section 175, Rev. Stat., *District of Columbia*, requiring the collector to report the sale to the recorder of deeds, is not superseded by the act of the legislative assembly of the *District of Columbia*, Aug. 23d, 1871; and the District is estopped from enforcing a sale of which there has been no report to the recorder, as against one who afterwards purchased the land for the full value thereof, and without notice of the sale. *King v. District of Columbia, McArthur & Mackey* (D. C.) 36.

The *Missouri Revenue Act of 1847* requires the officer after the sale to return the certified list furnished by the register with a note to each tract or lot, showing the disposition made

of it; if sold, to whom, and the amount bid, etc. Merely writing a name opposite the tract is no compliance with the requirement, and does not afford the information required by the law, nor fulfill its purpose. *Donohoe v. Hartless*, 33 Mo. 335.

In *North Carolina*, if the sheriff fails to return the land sold according to the requirements of the Revised Code, ch. 19, § 91, the sale is imperfect and may not be perfected by his afterwards doing the act. *Doe v. Allen*, 67 N. Car. 346.

In *New Hampshire*, a copy of the sale must be lodged with the town clerk within ten days after the sale, but the account of the sale need not be made by the collector himself. It is sufficient if he leaves with the proper officer a copy as stated by his clerk, if such copy be attested by himself. *Cardigan v. Page*, 6 N. H. 182.

A failure of the sheriff to return a list of the land sold within ten days, as prescribed by the *West Virginia* Act, ch. 31, § 31, and a failure of the recorder to note the time of filing such list as required by the same statute, render the sale invalid. *De Forest v. Thompson*, 40 Fed. Rep. 375.

Section 59 of the *Nebraska* revenue law does not require the treasurer to file his return of lands sold in the clerk's office of his county until the amount bid therefor has been collected and paid. *Richardson County v. Miles*, 7 Neb. 118.

The effect of the *Michigan* Comp. Laws of 1871, § 1129, is that the sale shall not be void because a return cannot be found in the proper office, unless it is shown that the return never existed. *Upton v. Kennedy*, 36 Mich. 215.

In *Rhode Island*, the collector's return is not invalidated by an omission to state the fact of notice or the amount of the bid, provided the claimant under the deed can in any way prove a compliance with the statute in these particulars. *Thurston v. Miller*, 10 R. I. 358.

In *Mississippi*, the failure of the officer to make and file with the clerk of the chancery court separate lists of the land sold on or before the first Monday of April following the sale, as directed by section 40 of the Revenue Act of 1878 of that state, does not affect the title of the purchaser at the sale, the purchaser being protected by § 8, art. 12, of the constitution of that

state, providing that "the courts shall apply the same liberal principles in favor of such titles as in sales by execution." *Wolfe v. Murphy*, 60 Miss. 1. But it was otherwise before the adoption of this constitutional provision. *Hopkins v. Sandidge*, 31 Miss. 668.

In *Tennessee*, a failure of the officer to make a return of the order of sale in due time as required by the statute, will not affect the rights of the purchaser. *Brien v. O'Shaughnessy*, 3 Lea (Tenn.) 724.

*New Jersey* Stat. 1879 (Laws 340), amended March 12, 1880 (Supp. Revision 993, § 67), in regard to sales of land, does not require that the return shall show the time of sale or an adjournment. These matters may be supplied by proof *aliunde*. Nor are copies of the certificates of sale or adjournment, with an affidavit that the copies are true, required to be annexed to the return. A copy of the notice of the sale, however, is necessary. *State v. Landis* Tp., 50 N. J. L. 374.

In *New Hampshire*, the omission of the officer to lodge, within the ten days required, with the town clerk, the newspapers containing the advertisements of the sale, will not avoid the sale, the statute in this regard being deemed directory merely. *Smith v. Messer*, 17 N. H. 420. See also *Cahoon v. Coe*, 52 N. H. 518. And where the original papers relating to the sale filed in the clerk's office are destroyed by fire, their contents may be established by any secondary evidence, where the case from its nature does not disclose the existence of other and better evidence, and it is not necessary in such a case that the record should be made up anew under the direction of the court, and copies only, used. Such records are not proper records of the court, but are merely deposited in the clerk's office. *Wells v. Jackson Iron, etc., Co.*, 47 N. H. 235. Parol evidence that the collector made a return of his proceedings to the clerk's office ten days after the sale, as required by ch. 40, § 15 of Revised Statutes of *Rhode Island*, is admissible. *Thurston v. Miller*, 10 R. I. 358.

Mr. Cooley says: "The making of this report is important to the landowner if his right to redeem is to depend upon or to be ascertained by it, and then the failure to make it will be fatal. . . . But where the case is such that a report is of no impor-

thereof, there is ground for setting aside the sale and restraining the execution of a deed in pursuance thereof.<sup>1</sup> The provisions that the officer's return shall be recorded and filed are also imperative.<sup>2</sup>

(2) *Confirmation*.—In some of the states, the sale must be reported to, and confirmed by, the court. Judicial confirmation of the sale, when required by law, is essential to a valid tax title.<sup>3</sup> No one is to be heard to oppose the confirmation who is not

tance to the landowner, he would probably not be heard to complain of a failure to make a return or of errors or imperfections in it." Cooley on Taxation (2d ed.), ch. xv., p. 513.

As to amending the return, see *French v. Edwards*, 5 Sawyer (U. S.) 266; *Jaquith v. Putney*, 48 N. H. 138; *Taft v. Barrett*, 58 N. H. 447; *Morrison v. St. Louis, etc., R. Co.*, 96 Mo. 602.

For further illustrations of these principles, see *Beale v. Brown*, 6 Mackey (D. C.) 574; *Pinkham v. Morang*, 40 Me. 587; *Shimmin v. Inman*, 26 Me. 228; *Orr v. Wiley*, 19 W. Va. 150; *Green v. Craft*, 28 Miss. 70; *Ives v. Lynn*, 7 Conn. 505; *Sumner v. Sherman*, 13 Vt. 609; *Lane v. James*, 25 Vt. 482; *Giddings v. Smith*, 15 Vt. 357; *Judevine v. Jackson*, 18 Vt. 470; *Richardson v. Dorr*, 5 Vt. 9; *Culver v. Hayden*, 1 Vt. 359; *Coit v. Wells*, 2 Vt. 318; *Spear v. Ditty*, 9 Vt. 282; *Isaacs v. Shattuck*, 12 Vt. 668; *Carpenter v. Sawyer*, 17 Vt. 121.

**Failure to Sign Return.**—In *Vermont*, the statute requires that the return of the proceedings of the collector shall be signed by him. Where the record showed a return of the sale, then a minute of the adjournment of the vendue, and then a minute that, it being found at the time to which the vendue was adjourned that all the land was sold and no mistakes made, the vendue was dissolved, and the collector signed the minutes of adjournment and dissolution only, it was held that this could not be deemed a signing of the anterior proceedings, and that the defect was fatal. *Taylor v. French*, 19 Vt. 49.

1. *Jackson v. Kittle*, 34 W. Va. 207. In this case the statute required the sheriff's affidavit to the list to be in this form: "I am not now, nor have I at any time been, directly or indirectly interested in the purchase of said real estate," etc. In the affidavit objected to the words italicized in the prescribed affidavit were omitted, and it was held

to be neither in form nor in substance the affidavit required by law. To same effect, see *Hays v. Heatherly*, 36 W. Va. 613.

2. *New York Laws 1874*, ch. 610, as amended by *New York Laws 1880*, ch. 506, providing that within thirty days after the sale the supervisors by whom the sale is made shall file a duplicate certificate in the office of the treasurer, is imperative, and a failure to file the certificate within that time invalidates the sale. *Dykman, J.*, dissenting. *Tilden v. Duden* (Supreme Ct.), 1 N. Y. Supp. 292.

In *West Virginia*, it is the official duty of the recorder to note in his office the day on which the sheriff returned thereto his list of sales of land and the certificate of the oath attached thereto. If he fails to make such note so that his office does not show when such list was returned by the sheriff, this omission is such a fact appearing upon the face of the proceedings of record in the office of the recorder as renders invalid any deed he may make to a purchaser of the land sold for such taxes. *Barton v. Gilchrist*, 19 W. Va. 223; *Simpson v. Edmiston*, 23 W. Va. 675; *McCallister v. Cottrille*, 24 W. Va. 173.

In *Vermont*, the collector of a particular land tax must cause his return of his proceedings to be recorded in the office of the town clerk within thirty days after the sale, whether the vendue was dissolved on that day or not. *Taylor v. French*, 19 Vt. 49.

In *New Hampshire*, if the return of the officer of his proceedings in making the sale, is put upon file in the clerk's office, it is not necessary that it should be copied into the record. *Gibson v. Bailey*, 9 N. H. 168.

3. *Boon v. Simmons*, 88 Va. 259.

Where, at a sale under the *Arkansas* "Overdue Tax Act" of March 12th, 1881, lands are stricken off to the state by the commissioner, the state is merely a preferred bidder, and no title passes,

adversely interested.<sup>1</sup> The decree should describe the sale accurately, so as to leave no room for doubt that the sale in question was before the court, and by it acted upon.<sup>2</sup> Where a decree is made by a court not legally constituted, but subsequently a deed is executed in pursuance of the sale by order of the proper court, and an order for possession entered, this is tantamount to a confirmation, and validates the title.<sup>3</sup> The court will refuse to confirm the sale, if it is shown that the purchaser was guilty of fraud.<sup>4</sup>

(3) *Certificate*.—As a rule the statutes make a proper certificate of sale a part of, and essential to, the sale.<sup>5</sup> It is usually required

until the sale is confirmed by the court. *Neal v. Andrews*, 53 Ark. 445.

Under ch. 384, § 63, *Maryland* Act 1872, providing that the court shall, if the proceedings appear to be regular, etc., order notice to be given to all parties by advertisement, to show cause why said sale shall not be ratified and confirmed, and if no cause be shown against the ratification, the sale shall be ratified and confirmed; but if good cause, in the judgment of said court, be shown in the premises, said sale shall be set aside, the judge may set aside such sale without said notice by advertisement, if he finds upon the preliminary examination that the proceedings are not regular and in conformity with law. *Matter of Tax Sale of Lot No. 172*, 42 Md. 196.

This order to appear, etc., is not final and conclusive; irregularities upon the face of the proceedings in relation to the sale are open to examination at the final hearing for ratification. *Prince George's County v. Clarke*, 36 Md. 206.

In *Arkansas*, it is held that all inquiry as to the validity of the tax title is cut off by a decree confirming the sale under which the title was acquired. *Boehm v. Botsford*, 52 Ark. 400. See also *Worthen v. Ratcliffe*, 42 Ark. 330.

But in *Maryland*, where the statute confers upon the courts designated a special and limited jurisdiction, although the sale may be confirmed by the court, the order of confirmation operates only to relieve the purchaser of the *onus* of proof, and to cast the *onus* of showing the illegality of the proceeding, upon the party resisting the sale. The effect, therefore, of the order of ratification is only *prima facie* in support of the sale, not conclusive; the sale under the order of confirmation affording evidence of a good title until successfully assailed by evidence showing illegality in the proceedings upon which it is founded.

*Guisebert v. Etchison*, 51 Md. 478; *Steuert v. Meyer*, 54 Md. 454; *Cooper v. Holmes*, 71 Md. 20. Until such proof is offered by the assailing party, the sale, if ratified and confirmed, stands good and effective by operation of the statute; but where it is affirmatively shown that no legal or sufficient notice was given of the time and place of sale, the *prima facie* effect of the order of ratification is overcome, and the whole proceeding is thereby rendered null and without effect. *Steuert v. Meyer*, 54 Md. 454.

The loss of such order, if properly proved, will authorize the admission of secondary evidence of its contents. And, although the docket entries show that an order of ratification was filed, it can only be determined that it was such an order, when its contents are made to appear. *Cooper v. Holmes*, 71 Md. 21.

1. *Black v. Percifield*, 1 Ark. 472.

2. *Northrup v. Devore*, 11 Ohio 359. In this case the sale was made on the 10th day of November, and the order of confirmation described a sale made on the 10th, 11th, and 12th days of December. The court held that the order afforded no evidence that the sale of November was ever acted upon by the court, and, consequently, it passed no title.

3. *Miller v. Reynolds* (Ark. 1890), 13 S. W. Rep. 597.

4. *Hunt v. McFadgen*, 20 Ark. 277. In this case, the purchaser bid off a certain tract of land for the taxes due, and refused to pay the same, whereby the officer was compelled to reoffer the land, and the same party bid off a larger quantity of the same tract for the same taxes. This was considered a fraud upon the owner, and the court refused to sanction and confirm the sale.

5. The act of Congress, 1863, pro-

to recite the fact of sale, the name of the purchaser, a description of the property, and the time when the purchaser will be entitled to a conveyance.<sup>1</sup> The certificate must be executed at the time of the sale, or at least within such time thereafter as may be rea-

viding for the levy and collection of a direct tax, contemplates a certificate in cases where the *United States* was the purchaser as fully as where the purchase was made by another. *Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *De Treville v. Smalls*, 98 U. S. 517. And the certificate is valid, though signed by only two of the three commissioners. *Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *Billings v. Starke*, 15 Fla. 297; *Hill v. Vanderpool*, 15 Fla. 128. A certificate under the *Ohio* Act of 1804, signed by the sheriff as collector and not as sheriff, is valid. *Sheldon v. Coates*, 10 Ohio 278.

In *Taylor's Sts., Wisconsin*, § 171, ch. 22, p. 440, prescribing a form for the certificate, the words at the end, "according to the facts," are no part of the form, but simply a direction to the officer as to the manner of filling out the certificate. *Manseau v. Edwards*, 53 Wis. 457.

**Certificate as Evidence.**—*Missouri* Rev. Sts., 1879, § 6836, making the certificate *prima facie* evidence of the facts therein recited, is not unconstitutional as impairing the right of trial by jury. *State v. Van Every*, 75 Mo. 530.

In *California*, the certificate is not evidence of any matters not therein recited, nor of any matter necessarily preceding its valid existence. *Hall v. Theisen*, 61 Cal. 524.

And in *New York*, the certificate is only presumptive evidence of the facts required by the statute. *Overing v. Foote*, 43 N. Y. 290.

The certificate which, by the act of Congress, 1863, the board of tax commissioners is required to give to purchasers, is *prima facie* evidence, not merely of the regularity of the sale, but also of its validity, and of the title of the purchaser. *De Treville v. Smalls*, 98 U. S. 517; *Keely v. Sanders*, 99 U. S. 441; *Sherry v. McKinley*, 99 U. S. 496.

And under the *Nebraska* Rev. Law of 1869, the certificate is presumptive evidence of the regularity of all prior proceedings, including the assessment, equalization, levy, advertisement and sale, and payment of the purchase price. *Bryant v. Estabrook*, 16 Neb. 217.

In *Iowa*, the certificate is admissible

to establish the amount of taxes due upon the lands covered thereby, for the year for which the sale was made. *Lee v. Breezly*, 54 Iowa 660. And it is competent evidence to show the manner of sale, etc., when offered by either party; but where there is a difference between the certificate and the record of sale, the former must yield to the latter. *McCready v. Sexton*, 29 Iowa 356; 4 Am. Rep. 214; *Henderson v. Oliver*, 32 Iowa 512; *Clark v. Thompson*, 37 Iowa 536. It is otherwise in *Minnesota*. *McQuode v. Jaffray*, 47 Minn. 326.

The fact that two certificates are issued by the auditor, one reciting that he had sold a single tract for a named sum, and the other that at the same sale he had sold to the same party six separate parcels, including the one named in the first certificate, for a certain other and larger sum, will not destroy the effect of the first certificate as *prima facie* evidence of the facts stated therein. *Bennett v. Blatz*, 44 Minn. 56.

And the certificate has the *prima facie* effect given it by statute, even where, on account of its loss or destruction, its contents are proved by parol. *Mitchell v. McFarland*, 47 Minn. 535.

The certificate cannot be used to prove the jurisdiction of the officer making the sale. *Smith v. Ryan*, 88 Ky. 636.

Where the certificate fails to recite any matter which under the law is a matter of substance, it is invalid as a statutory certificate of sale and a conveyance, and is incompetent evidence for any purpose in the case. *Farnham v. Jones*, 32 Minn. 7; *Gilfillan v. Hobart*, 35 Minn. 185; *Vanderlinde v. Canfield*, 40 Minn. 541.

*Tennessee* Act of 1844, ch. 92, § 1, giving effect to a sheriff's deed, does not operate to give any special force to a certificate of sale; such certificate must be accompanied by proof of all the requirements to constitute a valid sale. *Quinby v. North American Coal, etc., Co.*, 2 Heisk. (Tenn.) 596.

**1. Description.**—*Lyon County v. Goddard*, 22 Kan. 389; *Murphy v. Hall*, 68 Wis. 202; *Reinhart v. Oconto*



sonably necessary for the purpose, and if not executed until after many years, it is of no effect.<sup>1</sup> The certificate does not pass title to the land, but is simply evidence that the holder has the right to acquire a title by deed, or to receive the money necessary to effect redemption.<sup>2</sup> The owner of a valid certificate, to whom a deed fatally defective in form has been issued, and who has never been in actual possession of the land, may compel the execution of a proper deed by *mandamus*.<sup>3</sup> It is essential to the validity of a certificate executed by an officer of another state that it be shown that the person signing it is the officer authorized by the laws of that state to execute it, and that his signature thereto is genuine.<sup>4</sup> Under some of the statutes the certificate is required to be recorded; where no time is fixed for this act, it must be done within a reasonable time.<sup>5</sup> The certificate is not a negotiable instrument, and the owner's interest in the land will not pass by a mere delivery of the certificate.<sup>6</sup> In general, the statutes give the purchaser the right to assign his certificate,<sup>7</sup> and an assignment in due form vests in the assignee all the right and title

County, 69 Wis. 352; *Smith v. Blackiston*, 82 Iowa 240; *Quinby v. North American Coal, etc., Co.*, 2 Heisk. (Tenn.) 596.

1. **Time of Execution.**—*Stewart v. Minneapolis, etc., R. Co.*, 36 Minn. 355; *Gilfillan v. Chatterton*, 37 Minn. 11; 5 Am. St. Rep. 810; *Kipp v. Hill*, 40 Minn. 188.

2. **Interest and Rights Carried by the Certificate.**—*Flemister v. Flemister*, 83 Ga. 79. The certificate does not convey a legal title, but it is evidence of an equitable title, and enables the purchaser to call in the legal title. *Rice v. White*, 8 Ohio 216; *Dolph v. Barney*, 5 Oregon 191.

The certificate given under the 72d section of the *Alabama Rev. Law* of 1867, does not convey such title as will enable the purchaser to maintain ejectment, within two years after the sale, against the owner remaining in possession, *Hibbard v. Brown*, 51 Ala. 469; or the latter's tenant, or to recover the rents accruing. *Costley v. Allen*, 56 Ala. 108.

In *Iowa*, the holder of the certificate has a lien on the property, and may maintain an action to enjoin the removal of buildings therefrom; the lien dates only from the judgment, and is subject to other liens attaching prior to its rendition. *Phillips v. Myers*, 55 Iowa 265.

Under a certificate of sale of island lands by *United States* tax commissioners, the vacant marshes surrounding the island being the property of the

state, and, therefore, not taxable under the act of Congress, did not pass, and evidence may be introduced to establish the ownership of the state. *State v. Pinckney*, 22 S. Car. 484.

3. *State v. Winn*, 19 Wis. 304.

4. *Ward v. Carson River Wood Co.*, 13 Nev. 44.

5. *Reeds v. Morton*, 9 Mo. 878.

6. **Not Negotiable Instrument.**—*Horn v. Garry*, 49 Wis. 464. See also *White v. Brooklyn*, 122 N. Y. 53.

7. The mere writing of his name by the purchaser on the back of the certificate is not an indorsement within the Comp. Laws of *New Mexico*, section 2885, providing that the certificate "shall be assignable by indorsement;" the terms of the assignment should be written upon the instrument, as well as the name of the assignor. And one to whom a certificate is delivered by the purchaser with his name indorsed thereon, has no authority by reason of such delivery to write a formal assignment over the signature. *Territory v. Perea* (N. Mex. 1892), 30 Pac. Rep. 928.

But under section 894 of the *Iowa Code*, providing that notice to redeem from the sale shall be given by "the lawful holder of the certificate," when the purchaser indorses the certificate in blank and delivers it to another person with the intent to transfer the property in it, such person is the lawful holder, and it is immaterial that the assignment has not been recorded in the office of the county treasurer

under section 888 of the code. *Swan v. Whaley*, 75 Iowa 623.

And under § 54, ch. 22, *Wisconsin Laws of 1859*, a certificate might be transferred by delivery with an assignment in blank. *Hyde v. Kenosha County*, 43 Wis. 129.

Under a statute providing that the county clerk or treasurer may assign the certificates "by writing his name in blank on the back thereof . . . with his official character added," they may be assigned by the officer stamping his name and official character upon them with intent to assign. *Dreutzer v. Smith*, 56 Wis. 292; or by an assignment written upon the face of the certificate. *Potts v. Cooley*, 56 Wis. 45.

In *Wisconsin*, one to whom the certificate has been assigned by the purchaser, can transfer the same only "by a written assignment indorsed upon or attached to the same." *Jackson v. Jacksonport*, 56 Wis. 310. *State v. Winn*, 19 Wis. 304; *Horn v. Garry*, 49 Wis. 464; *Smith v. Todd*, 55 Wis. 459.

*Wisconsin Laws of 1864*, ch. 267, prohibiting the county treasurer or his deputy from purchasing a certificate held by the county, does not prohibit the treasurer or his deputy from purchasing a certificate from any other party than the county, and having a deed issued thereon to him. *Coleman v. Hart*, 37 Wis. 180.

**Certificate to One Person.—Deed to Another.**—Where the certificate is issued to one person and the deed to another, there must be some evidence of an assignment of the certificate by the original purchaser; a memorandum at the foot of the deed below the signatures of the clerk and witnesses, with no intelligible indication that it was a part of the deed, is not evidence of the assignment. *Florida Sav. Bank v. Brittain*, 20 Fla. 507.

**Assignment or Redemption.—Evidence to show.**—In *Woodman v. Clapp*, 21 Wis. 350, the certificate on which a deed was based bore this indorsement by the officer: "Received of J. C. \$3.65 in full for the tax, interest and costs on the within certificate." It was further indorsed in blank by J. C. It was held that parol evidence was competent to show whether the money was received in redemption of the lands, or as a consideration for an assignment of the certificate.

**Fraud.**—Where fraud in the sale has been established, and the assignment is also alleged to have been fraudulent,

the assignee must show affirmatively that he is a *bona fide* purchaser for value. *Light v. West*, 42 Iowa 138. And where the assignor denies that the assignment was for value, and contends that it was for another purpose than to transfer the title, he must establish it. *Bird v. Jones*, 37 Ark. 195.

**Rights of Assignee of Original Certificate as Against Purchaser of Duplicate.**—The purchaser of a duplicate certificate cannot acquire a title thereunder as against or superior to that of a subsequent assignee of the original certificate, who purchased it and obtained a deed thereon without notice of the issue of the duplicate or of the rights of the holder thereof. *Griswold v. Wilson*, 36 Iowa 156.

**Merger of Certificate in Legal Title.**—Where the legal owner of the land becomes the owner of the certificates covering the same, and afterwards releases to another all his estate, title, interest, and claim, in and to the land, his interest therein by virtue of the certificate, passes with the legal title by the conveyance, and becomes merged in the legal title, so that no valid tax deed may thereafter be issued on the certificate. *Bennett v. Keehn*, 57 Wis. 582.

**Purchase and Assignment of Certificate by Party Bound for the Taxes.**—In *Bassett v. Welch*, 22 Wis. 175, it was held that where the certificate has been purchased and assigned by the party who is bound for the tax, the assignee, to sustain a deed issued thereon, must at least show that he took without knowledge that his assignor was so bound. But whether this would be sufficient, was not determined.

The mere fact, however, that one is in possession of land, does not debar him of the right to purchase from another a certificate of the sale of that land and to obtain a deed thereunder for the purpose of relying upon the same as color of title under the statute. *Stubblefield v. Borders*, 92 Ill. 279.

**Enjoining Assignment.**—Equity will not, as a rule, interfere to restrain by injunction the assignment of the certificate where the property is liable to taxation, on the ground of irregularities in the assessment and levy, and the sale, unless the party seeking the relief shall first pay or tender the amount of taxes admitted to be due, or just, or which the court finds upon the evidence ought to be paid. *Hageman v. Cloud County*, 19 Kan. 394.

acquired by the purchaser in the land, but no more.<sup>1</sup> And the certificate in the hands of an assignee is chargeable with all the infirmities that would affect it in the possession of the original holder.<sup>2</sup> After assignment, the purchaser may not be reinvested in his ownership by fraudulently procuring the certificate to be redelivered to him, and erasing the assignment, and having a deed made to himself.<sup>3</sup> Where the owner buys his own land at an illegal sale, and assigns for a valuable consideration his certificate, he is estopped to deny the title of his assignee, or those claiming under him, on the ground that the sale was void.<sup>4</sup> Equity will not decree the cancellation of the certificate at the instance of the owner of the land for mere irregularities in the prior proceedings, especially where he makes no offer to pay the amount of taxes justly and equitably due.<sup>5</sup> Upon the death of the purchaser, the certificate will descend to the heir at law.<sup>6</sup>

**XVI. FORFEITURE FOR NONCOMPLIANCE WITH TAX LAWS**—(See also TAX TITLES)—**1. The Doctrine.**—It is provided by statute in some of the states, that lands upon which taxes are, or ought to be, assessed, shall be forfeited to the state in case of the failure or refusal of the owner to comply with specified legal requirements designed to facilitate the collection of the revenue.<sup>7</sup>

Omission to list the land for taxation,<sup>8</sup> and failure to pay the taxes within the time prescribed by law therefor,<sup>9</sup> are the causes which have been declared by statute to work a forfeiture; and in some of the states there must have been not only a failure to pay

**1. Rights of Assignee.**—*Smith v. Stephenson*, 45 Iowa 645; *McCauslin v. McGuire*, 14 Kan. 234; *Bird v. Jones*, 37 Ark. 195; *Horn v. Garry*, 49 Wis. 464.

**2. Infirmities in Certificate.**—*Watson v. Phelps*, 40 Iowa 482; *Besore v. Dosh*, 43 Iowa 211; *Light v. West*, 42 Iowa 138; *Singer Mfg. Co. v. Yarger*, 12 Fed. Rep. 487.

**3.** *Bird v. Jones*, 37 Ark. 195.

**4.** *Kinsworthy v. Mitchell*, 21 Ark. 145.

**5.** *Craig v. Pollock*, 5 Dill. (U. S.) 449; *Wood v. Helmer*, 10 Neb. 65.

**6.** *Rice v. White*, 8 Ohio 216.

**7.** *Martin v. Snowden*, 18 Gratt. (Va.) 100; *Kinney v. Beverly*, 2 Hen. & M. (Va.) 318; *Barbour v. Nelson*, 1 Litt. (Ky.) 59; *Baker v. Kelley*, 11 Minn. 480; *Morrison v. Larkin*, 26 La. Ann. 699; *State v. Thompson*, 18 S. Car. 538; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211.

In *America*, forfeitures were first directed for non-performance of tax laws by the legislature of *Virginia*, several years before the adoption of the Constitution of the *United States*, in order to determine the titles to un-

occupied lands and to promote their settlement. *Martin v. Snowden*, 18 Gratt. (Va.) 100.

**8.** *Staats v. Board*, 10 Gratt. (Va.) 400; *Hale v. Branscum*, 10 Gratt. (Va.) 418; *Wilde v. Serpell*, 10 Gratt. (Va.) 405; *Marshall v. McDaniel*, 12 Bush (Ky.) 378; *Yokum v. Fickey*, 37 W. Va. 762.

**Listing in Good Faith.**—When a taxpayer in good faith has listed the lands as his own, the lands are not forfeited because he has not complied with certain formalities in obtaining title. *Lohrs v. Miller*, 12 Gratt. (Va.) 452.

**9.** In *Louisiana*, when a collector has made out and returned the delinquent list of unpaid taxes, and this has been filed according to law in the office of the auditor of public accounts, the title to the lands vests in the state. §§ 74, 75, Act No. 114, Acts of 1869; *Hall v. Hall*, 23 La. Ann. 135. As to the later statute, see *Gorner v. Anderson*, 27 La. Ann. 338; *Morrison v. Larkin*, 26 La. Ann. 699.

Under the *Virginia* statute of 1790, providing that a failure to pay taxes should forfeit the land, it was held that it was necessary that the land

the taxes, but the land must have been exposed for sale therefor in the manner prescribed by law, and there must have been a failure to sell for want of bidders.<sup>1</sup> The forfeiture of the whole tract may take place, notwithstanding that a tenant in common has paid the portion of tax chargeable upon his undivided interest.<sup>2</sup>

The rule generally adopted is that a forfeiture vests in the state the absolute title to the property forfeited;<sup>3</sup> and if the state has two distinct titles, a subsequent sale by the state passes both titles.<sup>4</sup> But in some states the forfeiture is treated as merely vesting the title in the state as security for taxes, and the title of the owner can only be defeated by showing forfeiture and sale by the state.<sup>5</sup>

The forfeiture is to the state, and, where it has once accrued, no possession, adverse to the owner in whose name the land was forfeited, can run against the state;<sup>6</sup> but the state may direct the forfeiture to inure to the benefit of some third person by whom the taxes are paid, or otherwise, without any new grant.<sup>7</sup> Provision is usually, if not always, made for the sale by the state or county of the lands which it has acquired by forfeiture,<sup>8</sup> payment

should have been assessed, listed, returned to the auditor of public accounts, and advertised, before the forfeiture occurred. *Kinney v. Beverly*, 2 Hen. & M. (Va.) 318.

**Auditor's Certificate.**—In *Smith v. Tharp*, 17 W. Va. 221, however, the auditor's certificate of delinquency was held only *prima facie* evidence. And see *Woodard v. Sloan*, 27 Ohio St. 592.

**Indiana.**—In *Williams v. State*, 6 Blackf. (Ind.) 36, it was held that there must be proof that the requisites of the law had been complied with before title would vest in the state. See also *Barnes v. Doe*, 4 Ind. 133.

**Description.**—Payment of taxes upon land sufficiently described to identify it, will preclude a forfeiture, though the description is not accurate. *Kelly v. Salinger*, 53 Ark. 114, citing *Hershey v. Thompson*, 50 Ark. 484.

1. See *supra*, this title, *Tax Sales*.

2. *Smith v. Tharp*, 17 W. Va. 221.

3. *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Hall v. Hall*, 23 La. Ann. 135. And see *Buckley v. Osburn*, 8 Ohio 180; *Wild v. Serpell*, 10 Gratt. (Va.) 405; *McClure v. Maitland*, 24 W. Va. 561; *Yokum v. Pickey*, 37 W. Va. 762.

**When Forfeiture Is Complete.**—Forfeiture is not complete, and the title is not perfected, until all the statutory steps have been complied with. *In re Baton Rouge Oil Works*, 34 La. Ann.

255. See *Flint v. Sawyer*, 30 Me. 226; *Owens v. Owens*, 25 S. Car. 155.

A forfeiture to the state for taxes, but with right of redemption existing, does not extinguish the lien of a mortgage. *Annely v. DeSaussure*, 12 S. Car. 488.

4. *Smith v. Chapman*, 10 Gratt. (Va.) 445.

5. *Thevenin v. Slocum*, 16 Ohio 519; *State v. Herman*, 70 Mo. 441; *Guittard Tp. v. Marshall County*, 4 Kan. 388; *Schenk v. Peay*, 1 Dill. (U. S.) 668; *Bennett v. Hunter*, 9 Wall. (U. S.) 326.

Property struck off to the county does not thereby become subject to the control of the county commissioners. *Morrill v. Douglass*, 14 Kan. 307. See also *supra*, this title, *Tax Sales*.

6. *Staats v. Board*, 10 Gratt. (Va.) 400; *Hale v. Branscum*, 10 Gratt. (Va.) 418.

7. See *Thevenin v. Slocum*, 16 Ohio 519; *Wild v. Serpell*, 10 Gratt. (Va.) 405.

Parties who would avail themselves of the provisions of the act in relation to forfeited and delinquent lands, which vests title in actual occupants of land who claim under title derived from grant, must show not only possession, but title, derived from or under grant of the commonwealth, and possession within the grant. *Kenna v. Quarrier*, 3 W. Va. 210.

8. See *Buckley v. Osburn*, 8 Ohio

of the taxes charged being made out of the proceeds of the sale.<sup>1</sup> A forfeiture declared after due payment of the taxes is void, and the state takes no title to convey to a purchaser.<sup>2</sup>

**2. Constitutionality; Construction of Statutes.**—Statutes providing for forfeiture for noncompliance with tax laws are usually held to be constitutional, even where the title is vested in the state without an inquisition of office.<sup>3</sup>

Sometimes an inquisition of office, or other adjudication to which the owner is a party, is deemed necessary to divest title.<sup>4</sup> A statute will not be construed, however, to divest title without inquisition of office, except by express terms or necessary implication.<sup>5</sup>

A decree of court upon motion, after publication, adjudging

180; *Hannel v. Smith*, 15 Ohio 134; *Woodward v. Sloan*, 27 Ohio St. 592; *Miller v. Reynolds* (Ark. 1890), 13 S. W. Rep. 597; *Bender v. Dungan*, 99 Mo. 126; *Lombard v. White*, 76 Wis. 445; *Kinney v. Beverly*, 1 Hen. & M. (Va.) 531; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Newby v. Brownlee*, 23 Fed. Rep. 320.

Where land forfeited to the state was sold without a compliance with the statutory provisions in regard to such sales, it was held that the sale having resulted in a payment to the state, the former owner or owners were possessed of an equitable title, the purchaser's deed being void. *Owens v. Owens*, 25 S. Car. 155.

1. See *State v. Purcel*, 31 Ohio St. 352. Whenever forfeited land has been sold, if sold for more than the taxes due, the surplus should be placed to the credit of the former proprietor. *Thevenin v. Slocum*, 16 Ohio 519.

In *Illinois*, where a forfeiture of land to the state has occurred, the back tax and expenses with one year's interest at ten per cent. on the amount of the tax, is to be added to the amount of the current year. *People v. Smith*, 94 Ill. 226; *People v. Gale*, 93 Ill. 127; *Biggins v. People*, 106 Ill. 270; *Belleville Nail Co. v. People*, 98 Ill. 399.

2. *Davis v. Hare*, 32 Ark. 387. And see *Biscoe v. Coulter*, 18 Ark. 423.

Payment by the owner of land of the current taxes thereon, to which have been added back taxes with penalties, interest and costs, will not operate to avoid a forfeiture of the land for such back taxes. *Biggins v. People*, 106 Ill. 270.

3. *Davis v. Serpell*, 10 Gratt. (Va.) 405; *Smith v. Chapman*, 10 Gratt.

(Va.) 469; *Martin v. Snowden*, 18 Gratt. (Va.) 127; *Morrison v. Larkin*, 26 La. Ann. 699; *Hall v. Hall*, 23 La. Ann. 135; *Garner v. Anderson*, 27 La. Ann. 338; *Hodgdon v. Wight*, 36 Me. 326; *Adams v. Larrabee*, 46 Me. 516; *Buckley v. Osburn*, 8 Ohio 181. And see *Hale v. Branscum*, 10 Gratt. (Va.) 418; *Flanagan v. Grimmer*, 10 Gratt. (Va.) 421; *Usher v. Pride*, 15 Gratt. (Va.) 190; *Yokum v. Fickey*, 37 W. Va. 762; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211; *Smith v. Maryland*, 6 Cranch (U. S.) 286; *Owens v. Owens*, 25 S. Car. 155; *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Schenk v. Peay*, 1 Dill. (U. S.) 267. But see to the contrary, *Griffin v. Mixon*, 38 Miss. 424. And see *Baker v. Kelley*, 11 Minn. 480; *St. Anthony Falls Water Power Co. v. Greely*, 11 Minn. 326. Upon the ground that it is the taking of property without due process of law, the *Mississippi* case (*Griffin v. Nixon*, 38 Miss. 424) is referred to with disapproval in the later case of *Martin v. Dix*, 52 Miss. 59; 24 Am. Rep. 661.

4. *Harlan v. Seaton*, 18 B. Mon. (Ky.) 312; *Robinson v. Huff*, 3 Litt. (Ky.) 38; *Barbour v. Nelson*, 1 Litt. (Ky.) 60; *Marshall v. McDaniel*, 12 Bush (Ky.) 378. And see *Currier v. Fowler*, 5 J. J. Marsh. (Ky.) 145; *Hill v. Lund*, 13 Minn. 451. See *obiter* in *Kinney v. Beverly*, 2 Hen. & M. (Va.) 318.

5. *Blackwell on Tax Titles* (5th ed.), § 1037; *Cooley on Taxation* (2d ed.), p. 462. And see *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Barbour v. Nelson*, 1 Litt. (Ky.) 60; *Martin v. Snowden*, 18 Gratt. (Va.) 100; *Dickerson v. Acosta*, 15 Fla. 614.

delinquent lands to be vested in the state, has been held to fulfill the constitutional requirement of "due process of law."<sup>1</sup>

The statutes providing for the forfeiture of lands for non-payment of taxes are in derogation of common law and must be construed strictly. Doubtful words and phrases must be interpreted in favor of the owner. All statutory provisions must be strictly observed,<sup>2</sup> and all formalities necessary to complete the title of the purchaser from the state must be complied with.<sup>3</sup>

An action to test the validity of a forfeiture may be maintained

1. *Dentler v. State*, 4 Blackf. (Ind.) 259.

Where the legislature conferred jurisdiction on a court to order the sale of forfeited lands reported as forfeited by the commissioner, the authority of the court extends only to lands actually forfeited, and its decree of sale is not conclusive of the forfeiture; but the owner whose lands have been sold as forfeited, upon such decree may show that the land was not in fact so forfeited. *Twiggs v. Chevallie*, 4 W. Va. 463.

In order to constitute due process of law in proceedings for the collection of taxes, the machinery may be simple and the proceedings summary, but the taxpayer must have an opportunity to comply with the requirements of the law; and the state, not he, must be the actor. *Dingey v. Paxton*, 60 Miss. 1038.

2. *Biscoe v. Coulter*, 18 Ark. 423; *Davis v. Hare*, 32 Ark. 386; *Dickerson v. Acosta*, 15 Fla. 614; *Garrett v. Wiggins*, 2 Ill. 335; *Scott v. People*, 2 Ill. App. 642; *Smith v. People*, 3 Ill. App. 380; *Vetter v. People*, 3 Ill. App. 385; *Chicago, etc., R. Co. v. Boller*, 7 Ill. App. 625; *Williams v. State*, 6 Blackf. (Ind.) 36; *In re Baton Rouge Oil Works*, 34 La. Ann. 255; *State v. Labranche*, 34 La. Ann. 538; *Moulton v. Blaisdell*, 24 Me. 283; *Flint v. Sawyer*, 30 Me. 226; *Hill v. Mason*, 38 Me. 461; *Tolman v. Hobbs*, 68 Me. 316; *Stearns County v. Smith*, 25 Minn. 131; *West v. St. Paul, etc., R. Co.*, 40 Minn. 189; *Bonham v. Weymouth*, 39 Minn. 92; *Hopkins v. Sandidge*, 31 Miss. 676; *Mayson v. Banks*, 59 Miss. 447; *Adams v. Larrabee*, 46 Me. 516; *State v. Heman*, 70 Mo. 441; *Register v. Bryan*, 2 Hawks (N. Car.) 17; *Hannel v. Smith*, 15 Ohio 134; *Woodward v. Sloan*, 27 Ohio St. 592; *Magruder v. Esmay*, 35 Ohio St. 222; *State v. Thompson*, 18 S. Car. 538; *Owens v. Owens*, 25 S. Car. 155; *Kinney v. Beverley*, 2 Hen. & M. (Va.) 318; *Lohrs v. Miller*, 12 Gratt. (Va.) 452; *Kenna v.*

*Quarrier*, 3 W. Va. 210; *Twiggs v. Chevallie*, 4 W. Va. 463; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Cooley on Taxation* (2d ed.), p. 463.

Where it is required that delinquent lands shall be advertised, and the advertisement shall contain a notice that a motion will be made at the next term of court to vest the lands in the state, unless the taxes are paid before that time, a publication without such notice is not sufficient. *Dentler v. State*, 4 Blackf. (Ind.) 258.

Where lands have been forfeited to the state, as of a particular boundary, the commissioners, or the court under which the commissioners act, in a proceeding for the sale of the land, cannot alter the beginning corner called for by the deed. *Smith v. Chapman*, 10 Gratt. (Va.) 445.

Thus, where it was provided that a tax collector should return lists of delinquent lands before a certain date, it was held that a return of the lists before that date was an essential prerequisite to a valid forfeiture. *Hopkins v. Sandidge*, 31 Miss. 668.

Where the state acquires no title to forfeited lands, the forfeiture may be stricken from the books of the auditor of public accounts. *Cannon v. Barry*, 59 Miss. 289.

In *Illinois*, it is not important to enquire whether a judgment under which land is forfeited to a state is in every respect in conformity to law, if the land was in point of fact so forfeited. *Biggins v. People*, 106 Ill. 270.

An intention to deprive a citizen of his freehold will not be inferred from general or ambiguous language which will admit of a different construction. *Martin v. Snowden*, 18 Gratt. (Va.) 100.

3. See *Hannel v. Smith*, 15 Ohio 134; *Bender v. Dungan*, 99 Mo. 126; *Kinney v. Beverley*; 1 Hen. & M. (Va.) 531;

by any person interested therein against the county in which the lands are situated;<sup>1</sup> or, if they have been sold, against the purchaser.<sup>2</sup>

**3. Redemption.**—Usually a period of redemption is allowed the proprietor,<sup>3</sup> and special provision is sometimes made for infants,<sup>4</sup> lunatics,<sup>5</sup> and non-residents.<sup>6</sup> Sometimes a further period to redeem is given by subsequent statutes.<sup>7</sup>

**4. Waiver.**—The act on the part of the state which will be deemed a waiver must be such as, carried to its necessary end, would be inconsistent with the recognition of the forfeiture having been made,<sup>8</sup> as, for example, a legislative authorization of a

Mayson v. Banks, 59 Miss. 447; Worthen v. Badgett, 32 Ark. 497; Owens v. Owens, 25 S. Car. 155.

Where the deed from the state to the purchaser alleged forfeiture of the land for different taxes than those for which it was forfeited, it is void. Waddill v. Walton, 42 La. Ann. 763.

1. Willard v. Redwood County, 22 Minn. 61.

In an action to test the validity of a forfeiture, it is not necessary to allege that the forfeited land has not been purchased from the state. Willard v. Redwood County, 22 Minn. 61.

2. See Thevenin v. Slocum, 16 Ohio 532; Barbour v. Nelson, 1 Litt. (Ky.) 60; Robinson v. Huff, 3 Litt. (Ky.) 38; Mayson v. Banks, 59 Miss. 447; Chandler v. Wilson, 77 Me. 76; Tolman v. Hobbs, 68 Me. 316; Ketchum v. Mullinix (Mo. 1887), 4 S. W. Rep. 447.

**Jurisdiction of Federal Courts.**—The federal courts have jurisdiction of a suit between citizens of different states, to set aside sales of land forfeited to the state for illegality and irregularity, though such sales and deeds were made pursuant to an order of a state court of the county where the lands sold were situated. De Forest v. Thompson, 40 Fed. Rep. 375.

**Contest Without Tender of Tax.**—Where land is claimed by forfeiture for non-payment of the taxes, the validity of the assessment and subsequent proceedings may be contested without payment or tender of the tax. Williamsburg v. Lord, 51 Me. 599.

3. Blackwell on Tax Titles (5th ed.), § 1028. And see Hall v. Hall, 23 La. Ann. 135; Garner v. Anderson, 27 La. Ann. 338; Morrison v. Larkin, 26 La. Ann. 699. See also *infra*, this title, *Redemption from Tax Sale*.

As to what the owner must do to be entitled to redeem in *West Virginia*, see Yokum v. Fickey, 37 W. Va. 762.

**Constitutionality of Redemption Statute.**—The *West Virginia* statute of 1872, which permits lands forfeited to the state for non-payment of taxes to be redeemed within one year from the time of the sale, is constitutional. Braxton v. Rich, 47 Fed. Rep. 178; Wagoner v. Wolf, 28 W. Va. 820.

4. Infants are excepted from the *Kentucky* statute of Dec. 19, 1801. Marshall v. McDaniel, 12 Bush (Ky.) 378.

Where a forfeiture occurred in the owner's lifetime, but he died before the time for redemption had expired, and his heirs were infants, it was held that they were entitled to the period allowed infants for redemption. Reynolds v. Leiper, 7 Ohio 17.

5. Persons *non compos mentis* are excepted in *Kentucky* by the statute of Dec. 19, 1801. Marshall v. McDaniel, 12 Bush (Ky.) 378.

6. See Barbour v. Nelson, 1 Litt. (Ky.) 59; Hill v. Mason, 38 Me. 461.

7. A statute passed several years after a forfeiture has accrued, permitting the land to be redeemed within a limited period, is evidence to show that the state never intended to preclude the proprietor from redeeming. Hodgdon v. Wight, 36 Me. 326; Clarke v. Strickland, 2 Curt. (U. S.) 439.

Where lands have been forfeited from the state for the non-payment of a tax, and a subsequent act of the legislature has extended the time for the payment of such taxes, the title to such lands under a tax sale must be established under the later act. Hodgdon v. Burleigh, 4 Fed. Rep. 111.

8. See Hodgdon v. Burleigh, 4 Fed. Rep. 111; Clarke v. Strickland, 2 Curt. (U. S.) 439.

An act passed subsequently to the time at which the forfeiture had accrued, giving an additional time for redemption, does not release the for-

new levy of taxes on the land.<sup>1</sup> A county board, however, has no power to set aside a forfeiture when it has once accrued;<sup>2</sup> nor can the collector's receipt for unpaid taxes militate against the state's title,<sup>3</sup> though the failure upon the part of the state to comply with the conditions of a statute extending the time of redemption may be remedied by legislation.<sup>4</sup>

**XVII. REDEMPTION FROM TAX SALE**—1. Definition.—To redeem from a tax sale is to free the property sold from the rights of the purchaser under the sale. Unless the sale is valid, redemption is unnecessary.<sup>5</sup> If the sale is invalid, the land may be recovered without tender of the statutory penalty and costs, even though there are general provisions in the statutes requiring their payment in order to recover land sold for taxes,<sup>6</sup> provisions of this nature referring only to land held under valid sales.<sup>7</sup>

It is often difficult to distinguish a redemption from a purchase of the tax purchaser's interest. It is principally a question of intention. In general, a payment by the owner or by one acting in his interest, will be construed to be a redemption,—by a stranger, to be a sale.<sup>8</sup>

feiture, unless the owner or proprietor has availed himself of the privilege of redemption. *Staats v. Board*, 10 Gratt. (Va.) 400; *Smith v. Tharp*, 17 W. Va. 221; *McMillan v. Robbins*, 5 Ohio 28.

A state causing land to be listed for taxation to an occupier, does not waive its right to an *escheat*. *Crane v. Reeder*, 25 Mich. 303.

Additional time given the owner, in which to redeem, does not operate as a waiver of a forfeiture, unless he actually redeems within the time given. *Usher v. Pride*, 15 Gratt. (Va.) 199; *Staats v. Board*, 10 Gratt. (Va.) 400.

1. *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Hodgdon v. Wight*, 36 Me. 326; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111.

In *State v. Heman*, 70 Mo. 441, the circumstance that the forfeiture statute declared that the owner, when redeeming forfeited lands, should pay taxes levied in a special manner after the forfeiture was assumed to have accrued, was said to be an important element in deciding that the state intended merely to give a lien on the land, and not vest an absolute title in the state.

2. *Madison County v. Smith*, 95 Ill. 328.

3. *Smith v. Tharp*, 17 W. Va. 221.

**Entry on Commissioner's Book After Forfeiture.**—A tract of land omitted from the commissioner's book, and thus forfeited to the state under the *Virginia* Act of Feb. 27th, 1835, is not re-

lieved from forfeiture by its entry on the commissioner's book in the year 1866. *Yokum v. Fickey*, 37 W. Va. 762.

4. *Hodgdon v. Wight*, 36 Me. 326.

The state may by statute cure any irregularity for failure to comply with notices, or failure to comply with other provisions under which the sale of forfeited land is made. *Hodgdon v. Wight*, 36 Me. 326.

5. *Morris v. Sioux County*, 42 Iowa 416; *Gould v. Sullivan* (Wis. 1893), 20 L. R. A. 487.

6. *Covell v. Young*, 11 Neb. 510. A party seeking to set aside a tax sale for irregularities, in equity, must "do equity," but this only requires the tender of the amount paid at the tax sale with the legal rate of interest, not penalties and costs.

*Hickman v. Kempner*, 35 Ark. 505; *Roberts v. Merrill* 60 Iowa 166; *Wilder v. Cockshutt*, 25 Kan. 504; *Blançon v. Ludeling*, 30 La. Ann. 232; thus where the land is bought by the county clerk, the sale is irregular and the rate of interest will be the legal rate only. *Cole v. Moore*, 34 Ark. 582.

In ejectment, no tender or payment is necessary. *Coe v. Farwell*, 24 Kan. 566.

7. Thus, *California* Pol. Code, § 3803, which provides that land sold for taxes may be recovered on payment of the purchase price and fifty per. cent penalty, does not apply to a void tax sale. *Harper v. Rowe*, 53 Cal. 233.

8. *Faler v. McRae*, 56 Miss. 227; *Jenks v. Wright*, 61 Pa. St. 410. If one



**2. Origin of the Right.**—The right of redemption is recognized almost universally, but is unknown to the common law.<sup>1</sup> Sometimes it is secured by constitution.<sup>2</sup> To avail oneself of the right, the statute regulating it must be followed;<sup>3</sup> in the absence of this, equitable considerations will not avail.<sup>4</sup> The right may be implied as well as expressed;<sup>5</sup> but once given, expressly or by implication, must be exercised as pointed out by the statute.<sup>6</sup> The right of redemption is almost always restricted to real property.<sup>7</sup>

A right of redemption may be given by contract between

receives and records a deed of another given as security for debt, and enters into possession of the land, and he afterwards purchases at a tax sale, there is a redemption. *Miller v. Ziegler*, 31 Kan. 417. Whether the transaction is a purchase or a redemption, is a question of fact for the jury. *Coxe v. Wolcott*, 27 Pa. St. 154. Where a purchaser, upon a claim of right to redeem, conveys or assigns the legal title to the claimant, receiving the amount of the redemption, there is a redemption, and not a purchase. *Coxe v. Sartwell*, 21 Pa. St. 480.

Where an owner purchases a tax title which he knows to be bad, from the purchaser in possession, there is a redemption, not a purchase, and the owner cannot, under a statute allowing such a right, recover his money from the county on the ground that the tax was invalid. *Jones v. Miami County*, 30 Kan. 278.

But where the owner pays more than the amount required for redemption, and takes a regular assignment of the tax title, there is a purchase, not a redemption. *Arthurs v. King*, 95 Pa. St. 167.

If one buys a tax title, falsely representing that he is acting in the interest of the owner, there is a purchase, not a redemption, the one buying being under no agreement with the owner. *Culbertson v. Munson*, 104 Ind. 451.

The purchase of bids of the state at a tax sale by the owner constitutes a redemption. *Gould v. Day*, 94 U. S. 405.

Where one supposing himself to be an agent, paid his own money and took an assignment of the certificate of purchase, it was held that a ratification would be presumed, and that the transaction was a redemption, not a purchase. *Houston v. Buer*, 117 Ill. 324.

1. *Boyd v. Holt*, 62 Ala. 266; *Thompson v. Sherrill*, 51 Ark. 453; *Gage v. Scales*, 100 Ill. 218; *Pearson v. Robinson*, 44 Iowa 413.

2. As in *Illinois*, *Nebraska*, *Louisiana* and *Texas*. See *Weer v. Hahn*, 15 Ill. 298.

3. *Keely v. Sanders*, 99 U. S. 441.

4. *Moore v. Hamlin*, 38 Iowa 482; *Van Benthuyzen v. Sawyer*, 36 N. Y. 150.

Where the owner neglected to redeem, under the belief that the taxes had been paid, it was held that his mistake did not entitle him to relief. *Playter v. Cochran*, 37 Iowa 258.

Where a party by mistake redeemed the wrong tract, it was held that this was no defense in a suit of ejectment brought by the purchaser's vendee to recover the land. *Hollinger v. Derling*, 105 Pa. St. 417.

The fact that the owner is a resident of a state in rebellion, does not extend the time. *Finley v. Brown*, 22 Iowa 538.

One cannot have the time for redemption extended merely because he tried three times to find in his office the officer to whom payment should, under the law, be made; and having failed in this, left the money with his own agents, telling them that he would return to attend to the matter in person, which plan he was unable to carry out because of sickness. *Harrison v. Owens*, 57 Iowa 314.

But where sales for taxes of two different years were made on the same day, and the owner, through ignorance of this fact, redeemed from one of the sales only, it was held that he might redeem from the other after the expiration of the statutory period. *Shoemaker v. Lacey*, 38 Iowa 277.

5. *Bonds v. Greer*, 56 Miss. 710.

6. *Keely v. Sanders*, 99 U. S. 446; *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644; *Thompson v. Sherrill*, 51 Ark. 453. Redemption cannot be had by a bill in equity, the statute not so providing. *Mitchell v. Green*, 10 Met. (Mass.) 101.

7. *Hadley v. Musselman*, 104 Ind. 459.

the owner and the tax purchaser, independent of statute.<sup>1</sup>

**3. Construction of Redemption Statutes.**—It may be stated, as a general rule governing the construction of statutes, that statutes conferring the right of redemption are construed liberally in favor of him whose land has been sold for taxes.<sup>2</sup>

**4. The Law Governing the Right.**—The law which obtains is that in force at the time of the sale,—not that in force at the time of the assessment.<sup>3</sup> It has been held that changes in a law after the sale and before the expiration of the time allowed for redemption are invalid as affecting vested rights; but the rule may be said to be that the right is a special privilege which may be withdrawn or modified at the legislative will, and hence, that a law shortening the time for redemption is valid.<sup>4</sup> With the purchaser, however, a contract relation exists. Any attempted change which infringes his rights is unconstitutional as impairing the obligation of contracts. Hence, the time for redemption cannot be extended.<sup>5</sup> Statutory changes, however, which relate merely to the remedy, are valid.<sup>6</sup> Where land has been forfeited

1. But the owner must see to it that his contract is with the real holder of the tax title. A contract with the holder of record who is not the real party in interest, gives him no rights in the land. *Swan v. Whaley*, 75 Iowa 623.

2. *Dubois v. Hepburn*, 10 Pet. (U. S.) 1; *Schenck v. Peay*, 1 Dill. (U. S.) 267; *Corbett v. Nutt*, 18 Gratt. (Va.) 674; 10 Wall. (U. S.) 464; *Keely v. Sanders*, 99 U. S. 441; *Boyd v. Holt*, 62 Ala. 296; *Burton v. Hintrager*, 18 Iowa 348; *Penn v. Clemans*, 19 Iowa 372; *Rice v. Nelson*, 27 Iowa 148; *Fenton v. Way*, 40 Iowa 196; *Corning Town Co. v. Davis*, 44 Iowa 622; *Foster v. Bowman*, 55 Iowa 237; *Winchester v. Cain*, 1 Rob. (La.) 421; *Alter v. Shepherd*, 27 La. Ann. 207; *Bonds v. Greer*, 56 Miss. 710; *Merrill v. Dearing*, 32 Minn. 479; *State v. Woodbridge*, 47 N. J. L. 142; *Master-son v. Beasley*, 3 Ohio 301; *Rich v. Palmer*, 6 Oregon 339; *Patterson v. Brindle*, 9 Watts (Pa.) 98; *Gault's Appeal*, 33 Pa. St. 97; *Hale v. Penn*, 25 Gratt. (Va.) 261; *Jones v. Collins*, 16 Wis. 594; *Karr v. Washburn*, 56 Wis. 303.

3. *Thompson v. Sherrill*, 51 Ark. 953; *Negus v. Yancey*, 22 Iowa 57; *Merrill v. Dearing*, 32 Minn. 479.

In *Wolfe v. Henderson*, 28 Ark. 304, it was held that where an act superseded another act, but provided that the former should be in force as to the collection of taxes levied thereunder, it should also be in force as to the redemption.

The provisions of *California Pol. Code*, § 3785, as amended in the year 1885, requiring notice of an application for a tax deed, do not apply where the right to the deed had become absolute at the time of the enactment. *Rollins v. Wright*, 93 Cal. 395.

4. See *Negus v. Yancey*, 22 Iowa 57; *Moody v. Hoskins*, 64 Miss. 468; *Cargill v. Power*, 1 Mich. 369; *Robinson v. Howe*, 13 Wis. 341, 346; *Smith v. Packard*, 12 Wis. 371; *Butler v. Palmer*, 1 Hill (N. Y.) 324. See also *Black on Tax Titles*, § 175; *Cooley on Taxation* (2d ed.), p. 545.

5. *Cooley on Taxation* (2d ed.), p. 545; *Oullahan v. Sweeney*, 79 Cal. 537; *Merrill v. Dearing*, 32 Minn. 479; *Dikeman v. Dikeman*, 11 Page (N. Y.) 484; *Forqueran v. Donnally*, 7 W. Va. 141; *Robinson v. Howe*, 13 Wis. 341. See also *Goenen v. Schroeder*, 8 Minn. 387.

*Gault's Appeal*, 33 Pa. St. 94, construed a local statute extending the time for redemption from sales made for municipal claims. It was held that the statute should be construed liberally in favor of the right of redemption; that it applied to cases of sales made before its passage, where no deeds had been executed to the purchaser, and that, although thus retroactive, it did not violate in such case the obligations of the contract for that there was no contract with the purchaser under a municipal claim until the acknowledgment of the deed.

6. A statute requiring a notice to

to the state for the non-payment of a tax, the time for redemption may be extended by the legislature.<sup>1</sup>

**5. Nature of the Right.**—In some states the right to redeem is not an estate, but is a mere right to defeat a title;<sup>2</sup> in some, the purchaser has no title until the expiration of the time for redemption.<sup>3</sup> Rents and profits belong to the tax debtor;<sup>4</sup> he may assign his right of redemption.<sup>5</sup>

**6. Effect of Redemption.**—The exercise of the right of redemption creates no new title, but merely cuts off the purchaser's rights and makes the original title absolute.<sup>6</sup> After redemption, a tax deed to the purchaser effects nothing,<sup>7</sup> and if the sale is confirmed the confirmation will be set aside.<sup>8</sup> If the purchaser had another title than the tax title he may assert it, notwithstanding the exercise of the right of redemption.<sup>9</sup>

**7. Mode of Redemption.**—*a. THE ESSENTIAL ACT.*—Subject to exceptions created by statute, the act essential to redemption is the payment or tender of the proper amount to the proper person. This act cuts off the right of the purchaser and vests an absolute title in the former owner.<sup>10</sup> Once performed, it makes no differ-

redeem is constitutional, and may apply to sales made before its passage as well as after. *Gage v. Stewart*, 127 Ill. 207; 11 Am. St. Rep. 116; *Oullahan v. Sweeney*, 79 Cal. 537 (under the *California* Pol. Code, § 3785).

The law will be construed, however, if possible, as requiring the notice only in case of sales made after it was passed. *Robinson v. First Nat. Bank*, 48 Iowa 354; *First Nat. Bank v. Beeson*, 48 Iowa 711.

1. *Hodgdon v. Burleigh*, 4 Fed. Rep. 121.

2. *Craig v. Flanagan*, 21 Ark. 319; *Bender v. Bean*, 52 Ark. 132.

3. *Cooley on Taxation* (2d ed.), p. 542; *Douglass v. Dickson*, 31 Kan. 310 (*overruling Stebbins v. Guthrie*, 4 Kan. 353); *Spratt v. Price*, 18 Fla. 289.

4. *Mayo v. Woods*, 31 Cal. 269; *Jones v. Johnson*, 60 Ga. 260. The entry of the purchaser will be a trespass. *Shalemiller v. McCarthy*, 55 Pa. St. 186.

In *Kansas*, he will be liable to an action for waste if he commits acts injurious to the title of the owner before he gets his deed. *Douglass v. Dickson*, 31 Kan. 310.

5. *Stout v. Merrill*, 35 Iowa 47.

The right is not a purely personal one. If he conveys the land, it passes as an incident and may be enforced by his vendee. *Neil v. Rozier*, 49 Ark. 551.

In *Massachusetts*, it cannot be attached in an action at law. *Adams v. Mills*, 126 Mass. 278.

6. *Black on Tax Titles*, §§ 174, 179; *Blackwell on Tax Titles* (5th ed.), vol. 2, §§ 700, 701; *Gray v. Coan*, 30 Iowa 536; *Lake v. Grey*, 35 Iowa 44; *Phillips v. Zerbe Run, etc., Imp. Co.*, 25 Pa. St. 56; *Cuttle v. Brockway*, 32 Pa. St. 45. This is so, whether the redemption was within the allowed time, or made afterwards by consent of the purchaser. *Coxe v. Wolcott*, 27 Pa. St. 154.

7. *Hunt v. Seymour*, 76 Iowa 751; *Hartman v. Anderson*, 48 Iowa 309. If the grantee brings ejectment, the fact of the redemption constitutes a complete defense. *Cooper v. Shepardson*, 51 Cal. 298.

8. *Adair v. Scott*, 53 Ark. 480.

9. *Terrell v. Grimmell*, 20 Iowa 393. The lien of one tax sale is not removed by redeeming from a later one. *Gray v. Coan*, 40 Iowa 327.

The purchaser, if he holds both titles, may assert the later one after redemption from the former sale. But where the holder of two tax titles required the holders of a mortgage to redeem from the later tax sale, they having no notice of the earlier, it was held that he was estopped to assert the earlier title against them. *Chard v. Holt* (Supreme Ct.), 18 N. Y. Supp. 405; *Cooper v. Bushley*, 72 Pa. St. 252.

10. *Burns v. Ledbetter*, 54 Tex. 374. Where a mortgage creditor who has a right to redeem has tendered the redemption money, and it is refused, he

ence whether or not it is entered correctly on the record,<sup>1</sup> nor whether, in case payment is made to a public officer, the money ever reaches the tax purchaser, or even whether he has notice that the redemption has been effected.<sup>2</sup> No notice of an intention to redeem is necessary.<sup>3</sup> But there must be an actual tender or payment. A mere offer to redeem is insufficient.<sup>4</sup> The marking of the land by mistake, as "redeemed," avails nothing to the owner who has not paid or tendered the redemption money.<sup>5</sup>

*b. AS AFFECTED BY STATUTES.*—The statutes frequently prescribe minutely the steps incident to redemption.<sup>6</sup> The tendency of the courts is to construe such statutes strongly in favor of the former owner, and to regard them, so far as their details are concerned, as declaratory only.<sup>7</sup> These statutes provide often that application for redemption shall be made to some officer, and that payment shall be made to him, a redemption certificate issued, and a record made thereof.<sup>8</sup>

**8. Who May Redeem**—*a. THE RULE.*—The statutes sometimes provide specifically as to who may redeem. Often, on the other hand, mere general terms, such as "owner," or "party in interest,"<sup>9</sup> are made use of, while, in a third class of cases, the right is created, but nothing is said as to who may exercise it.<sup>10</sup> The terms "owner," "person in interest," and like expressions, have received a broad construction.<sup>11</sup>

may seize and sell the property to satisfy the debt. *Montgomery v. Burton*, 31 La. Ann. 330.

If payment or tender has been made, equity will set aside a tax deed executed thereafter. *Wyatt v. Simpson*, 8 W. Va. 394.

1. *Cooper v. Shepardson*, 51 Cal. 298; *Soutter v. Miller*, 15 Fla. 625; *Baker v. Crabb*, 73 Iowa 412; *Burke v. Cutler*, 78 Iowa 299; *Fenton v. Way*, 40 Iowa 196; *Chapin v. Curtenius*, 15 Ill. 427; 2 *Blackwell on Tax Titles* (5th ed.), § 708; *Wyatt v. Simpson*, 8 W. Va. 394. Failure to file a receipt in the office of the recorder does not prejudice redemptioner's title. *Cooper v. Shepardson*, 51 Cal. 298.

Payment was made to the auditor of the amount necessary to redeem from two sales. It was held that this redeemed from both sales, notwithstanding the auditor failed to issue a certificate showing a redemption from both. *Corbin v. Stewart*, 44 Iowa 543.

2. *Coxe v. Sartwell*, 21 Pa. St. 480.

3. *Rich v. Palmer*, 7 Oregon 133.

4. In *Shoemaker v. Porter*, 41 Iowa 197, it was held that such an offer would not relieve an owner who was afterwards successful in an action to redeem, from paying the costs of the suit.

5. *State v. Com'rs of School*, etc., *Lands*, 13 Wis. 409.

6. See the statutes of the various states.

7. *Cooper v. Shepardson*, 51 Cal. 298; *Byington v. Buckwalter*, 7 Iowa 512; 74 Am. Dec. 279. The provision of law that the recorder shall give to the owner a receipt and file a duplicate thereof in his office, is merely directory. *Wyatt v. Simpson*, 8 W. Va. 394.

8. See for example, the *Arkansas* statute. See *Ellsworth v. Green*, 59 Iowa 622.

Under the *Alabama* statute, requiring that the redemptioner must pay the tax for which the land was sold, and also the taxes paid by the purchaser since the sale, he must pay municipal as well as state and county taxes. *Turner v. White* (Ala. 1892), 12 So. Rep. 601.

9. See the statutes of *Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New York, Wisconsin*.

10. *Maine Rev. Stat.* 1883, § 198, p. 164.

11. In *Dubois v. Hepburn*, 10 Pet. (U. S.) 1, a statute was construed

The right of redemption may be perfect or inchoate,<sup>1</sup> in possession or in action;<sup>2</sup> legal or equitable;<sup>3</sup> the test is, will the interest in question be affected by the tax conveyance.<sup>4</sup> Where the right is given to the "owner," the original owner may exercise it, although there is an outstanding tax title.<sup>5</sup>

The right cannot be defeated by showing an outstanding paramount title.<sup>6</sup> It is immaterial to whom the lands were assessed.<sup>7</sup> The person redeeming must, however, have some title; a mere stranger cannot redeem.

Any payment by an agent or other person occupying a confidential relation to the owner will inure to the benefit of the owner, even though made with the agent's own money. The agent in that case will have a lien on the land for his money.<sup>8</sup>

b. INSTANCES.—One in possession under color of title may redeem.<sup>9</sup> An administrator or executor may redeem the land of the deceased;<sup>10</sup> either a trustee or his *cestui que trust* that of the trust estate;<sup>11</sup> and a guardian is entitled to redeem land of his

which gave the right of redemption to the owner or owners. It was said that "any right, which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession, or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem." This language was adopted in *Adams v. Beale*, 19 Iowa 61. See generally, OWNER, vol. 17, p. 299.

1. A person holding a deed for an unassigned right of dower in certain real estate, has such an interest as entitles him to redeem the same from a tax sale. *Rice v. Nelson*, 27 Iowa 48.

2. One may redeem who holds under a title bond of a donation claim. *Rich v. Palmer*, 7 Oregon 133.

3. *Cowdry v. Cuthbert*, 71 Iowa 733; *Campbell v. Packard*, 61 Wis. 88. The beneficiary of a deed of trust executed by way of collateral security may redeem. *Elliott v. Shaffer*, 30 W. Va. 347. Thus, a bankrupt, under act of Congress, may redeem land which belonged to him before going into bankruptcy, where the right is given to the "owner." *Hampton v. Rouse*, 22 Wall. (U. S.) 264.

4. *Cooley on Taxation* (2d ed.), p. 538.

5. *Lancaster v. County Auditor*, 2 Dill. (U. S.) 478.

6. *Jamison v. Thompson*, 65 Miss. 516 (under *Mississippi Code* II 531, giving the right to the "owner . . . or any person for him").

7. If the tax is assessed to "un-

known," the real owner may redeem. *Lyman v. Anderson*, 9 Neb. 367.

Redemption by Agent.—*Houston v. Buer*, 117 Ill. 324. As to the common-law rule, see *McBride v. Hoey*, 2 Watts (Pa.) 443; *Townshend v. Shaffer*, 30 W. Va. 176. An agent with power to take care of land, may redeem a tax sale after the death of his principal. *Patterson v. Brindle*, 9 Watts (Pa.) 98. The authority of one purporting to redeem as agent of another, is established by slight evidence. *Trego v. Huzzard*, 19 Pa. St. 44. It has been held that it will be presumed. *State v. Harper*, 26 Neb. 761. Where the agency is disputed, it should be left to the jury under instruction. *Rogers v. Johnson*, 70 Pa. St. 224. The declarations of the trustee of the title are admissible.

8. See IMPLIED TRUSTS, vol. 10, p. 73; UNDUE INFLUENCE.

9. *Foster v. Bowman*, 55 Iowa 237; *Brown v. Day*, 78 Pa. St. 129. It has been held that a redemption, in case there is a paramount title, will inure to the benefit of the true owner. *Levick v. Brotherline*, 74 Pa. St. 149.

10. *Bowers v. Williams*, 34 Miss. 324. Where a testator devised a part of a tract to certain persons, and the residue to the executor, charging him with the duty of selecting and setting aside the shares of the devisees, it was held that the executor could redeem. *White v. Smith*, 68 Iowa 313.

11. The trustee can redeem, if he acts with the consent of the *cestui que trust*, even if his appointment is invalid.

wards.<sup>1</sup> The holder of the equitable title,<sup>2</sup> such as one holding under title bond or agreement to convey, may redeem;<sup>3</sup> so may a judgment or other lien creditor,<sup>4</sup> a purchaser at a sheriff's sale,<sup>5</sup> or subsequent tax sale;<sup>6</sup> or one holding a power of attorney to sell the land.<sup>7</sup> The lessee, as well as the lessor, may redeem.<sup>8</sup> A husband may redeem his interest in land belonging to his wife,<sup>9</sup>

Corbett v. Nutt, 10 Wall. (U. S.) 464; 18 Gratt. (Va.) 624.

Where A verbally admitted that lands held by him by a title apparently absolute were in fact held in trust for B, and A conveyed them to C upon a parol trust in favor of B, it was held that B could redeem. Karr v. Washburn, 56 Wis. 303.

1. Witt v. Mewhirter, 57 Iowa 545. But the production from the possession of the guardian, of an unacknowledged deed of land sold after the tax sale, is not *prima facie* evidence of ownership in the minor, entitling him to redeem. Walker v. Sargent, 47 Iowa 448.

2. Plumb v. Robinson, 13 Ohio St. 304. See also McKee v. Spiro, 107 Mo. 452.

3. Woodward v. Campbell, 39 Ark. 580; Rogers v. Rutter, 11 Gray (Mass.) 410; Rich v. Palmer, 7 Oregon 133.

A vendor who has given a title bond may redeem to protect his interest. He will have a lien on the land for the money thus paid. Braley v. Langley, 28 Kan. 804.

4. Bacon v. Curtiss, 2 Root (Conn.) 39; Basso v. Benker, 33 La. Ann. 432. Having redeemed, he may recover the amount paid from his debtor. Ward v. Matthews, 80 Cal. 343. A lien creditor is "an owner of the land" within the statute stating who may redeem. Schenck v. Peay, 1 Dill. (U. S.) 267.

A judgment creditor cannot redeem by advancing the amount of his judgment upon a purchaser's bid at a tax sale. Russell v. Dodson, 6 Baxt. (Tenn.) 16.

Where land upon which several persons have liens is redeemed by one of them, the title to, and liens upon, the land, stand thereafter in the same condition as though no sale for taxes had taken place. Ellsworth v. Low, 62 Iowa 178.

Where the holder of a judgment procures a tax title to the land of the debtor, which he agrees shall be subject to redemption on paying the amount of his judgment, other claimants can redeem only on these terms. Jordan v. Brown, 56 Iowa 281.

In Louisiana, a creditor, even though not a mortgagee or lien creditor, may redeem. Basso v. Benker, 33 La. Ann. 432.

5. Byington v. Walsh, 11 Iowa 27. In this case it was held that it made no difference whether his purchase was before or after the tax sale.

Where property has been sold at a sheriff's sale and the purchaser put in possession, and the alleged debtor surrenders possession and pays rent, he cannot redeem the property. Whitaker v. Ashbey, 43 La. Ann. 117.

A purchaser at a sheriff's sale, of the right of one in possession, may redeem, though he shows no title in the former owner, who has been in possession for many years previous to the sale. Shearer v. Woodburn, 10 Pa. St. 511. If the sheriff's sale is afterwards set aside, the purchaser has a lien upon the land for money which he has paid to redeem it from tax sale. Harlan v. Jones, 104 Ind. 167.

6. A purchaser at a tax sale under the act of Congress for non-payment of a direct tax may redeem a prior sale by a state officer. McBride v. Hoey, 1 P. & W. (Pa.) 54.

7. McCord v. Burgantz, 7 Watts (Pa.) 487; Townshend v. Shaffer, 30 W. Va. 176.

8. The lessee of property sold for taxes is an owner within the meaning of section 505, Iowa Code (1851), and as such is entitled to redeem, though his interest is acquired after the sale, and the redemption is made without the knowledge or authority of the owner of the fee. Byington v. Rider, 9 Iowa 566.

9. Dubois v. Hepburn, 10 Pet. (U. S.) 1. The North Carolina statutes provide that when a person "seised, as tenant by curtesy or dower, as tenant for life, or in right of his wife," of land which is sold for taxes, shall fail to redeem the same within a year, the land shall be forfeited to the person "next in title in remainder or reversion," who may redeem within a year from such forfeiture. It is held that the homestead allotted to a widow "during widowhood" in lieu of dower,

and so, on the same principle, a wife may redeem her interest in her husband's land.<sup>1</sup>

The title of one redeeming need not be perfect; thus, a corporation, holding under irregular condemnation proceedings, may exercise the right.<sup>2</sup> The one to whom the land was assessed may redeem, and the purchaser cannot object on the ground that such redemptioner has no interest.<sup>3</sup>

c. MORTGAGEES.—A mortgagee's title is sufficient to enable him to redeem the mortgage premises.<sup>4</sup>

may be redeemed by the person next in title when the widow allows it to be sold for non-payment of taxes. *Tucker v. Tucker*, 108 N. Car. 235.

1. A wife may redeem her right in a homestead. *Adams v. Beale*, 19 Iowa 61; *Pfiffner v. Krapfel*, 28 Iowa 27. A doweress may redeem. *Rice v. Nelson*, 27 Iowa 148.

2. After land was sold for taxes, a railroad company condemned and took possession of a right of way over it. It was held that the railroad company had a right to redeem from the tax sale, and to personal service of notice to redeem; and this, although the condemnation proceedings were carried on without notice to the purchaser at the tax sale. *Garmo v. Sturgion*, 65 Iowa 147.

3. *Townshend v. Shaffer*, 30 W. Va. 176.

4. The mortgagee of record at the time of tender may redeem, though he did not hold the record title at the time of the tax sale. *Hawes v. Howland*, 136 Mass. 267.

The right of redemption exists in the mortgagee independent of statute. *Lloyd v. Bunce*, 41 Iowa 660; *Leitzback v. Jackman*, 28 Kan. 527; *Montgomery v. Burt*, 31 La. Ann. 330; *Shannon v. Lane*, 33 La. Ann. 489; *Rondez v. Buras*, 34 La. Ann. 1245; *Ellsworth v. Low*, 62 Iowa 178; *Griffith v. Utley*, 76 Iowa 292; *People v. Edwards*, 56 Hun (N. Y.) 377; *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163. A mortgagee is an "owner," within the meaning of the term as used in redemption statutes. *Alter v. Shepherd*, 27 La. Ann. 207.

The purchaser at a sale under a deed of trust given to secure a debt may redeem. *Giraldin v. Howard*, 103 Mo. 40. A mortgagee may redeem before condition broken. *Plumb v. Robinson*, 13 Ohio St. 304. One who lends his credit to enable another to redeem, gets no title, although the act

acknowledging the loan expressly subrogates him to the owner's rights. *Cambron v. Lapene*, 40 La. Ann. 557. See generally, MORTGAGES, vol. 15, p. 819.

The holder of a mortgage given to secure from liability as surety, who has received from the mortgagee money to apply on the amount needed to redeem, has sufficient interest to enable him to exercise the right of redemption. *Elliott v. Shaffer*, 30 W. Va. 347. The heir of a mortgagee may redeem. *Burton v. Hintrager*, 18 Iowa 348. Redemption by the mortgagee under the charter of Jersey City, inures to the benefit of both mortgagor and mortgagee. *Duncan v. Smith*, 31 N. J. L. 325. Where the assignee of a mortgage land acquired a tax title to protect his mortgage security, which tax title he assigned, it was held that the assignee was chargeable with notice of the equities of the mortgagor who was in possession of the land, and that the mortgagor was entitled to redeem. *Ragor v. Lomax*, 22 Ill. App. 628.

**Land Security for Amount Paid.**—If the mortgagee redeems, he can add the amount to the mortgage debt, both being equally secured by the land. *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Eagle F. Ins. Co. v. Pell*, 2 Edw. Ch. (N. Y.) 631; *Marshall v. Davies*, 78 N. Y. 414; *Sidenberg v. Ely*, 90 N. Y. 257.

**Effect of Tender by Mortgagee.**—If the mortgagee makes tender, but the purchaser refuses the money, the former may enforce the mortgage. *Montgomery v. Burton*, 31 La. Ann. 330.

**Mortgagee's Successors in Interest.**—If the mortgagee is dead, his administrator may redeem the land, *Ellsworth v. Low*, 62 Iowa 178; and so may his heir, *Burton v. Hintrager*, 18 Iowa 348. And where he assigns the mortgage, without having had notice of the sale, the assignee may redeem. *Faxon v. Wallace*, 98 Mass. 44.

**Guardian as Mortgagor.**—Where a

d. PAYMENT BY STRANGER.—A person having neither right nor interest in the land cannot redeem.<sup>1</sup> While there is a conflict in the decisions, the more generally accepted rule is that tender or payment by a stranger to a public official, does not inure to the benefit of the true owner, but that such payment or tender has no effect upon the title.<sup>2</sup>

If, however, the purchaser himself accepts the money, he cannot afterwards set up his title, but the redemption is complete and operative, and an assignment by the purchaser afterwards passes nothing.<sup>3</sup> In case a payment inures to the owner's benefit, the one making it cannot withdraw the money after the time for redemption has passed, and thus defeat the owner's right.<sup>4</sup>

e. PART OWNERS.—As redemption does not create a new title, but merely cuts off the right of the purchaser, it follows that any redemption operates in favor of all the former owners.<sup>5</sup>

The owner of a portion of the land sold may redeem, but he must redeem the whole, if it was properly included in one sale,

guardian holds a mortgage upon lands in trust for his ward, the ward has such an interest therein as will entitle him, or the guardian in his behalf, to redeem the land from the tax sale. *Wilt v. Newhirter*, 57 Iowa 545.

1. *Byington v. Buckwalter*, 7 Iowa 512; 74 Am. Dec. 279; *Penn v. Clemans*, 19 Iowa 372; *Lynn v. Morse*, 76 Iowa 665; *Wood v. Welpton*, 29 Fed. Rep. 405; *Rutledge v. Price County*, 66 Wis. 35. And see *Whitaker v. Ashley*, 43 La. Ann. 117; *Eaton v. North*, 25 Wis. 514; *Cousins v. Allen*, 28 Wis. 232. The words "or other person" in a statute enumerating those who may redeem, do not include those having no interest. *Rutledge v. Price County*, 66 Wis. 35. A person claiming under a tax sale, which is void, cannot redeem from a prior sale. *McBride v. Hoey*, 2 Watts (Pa.) 436; *Byington v. Buckwalter*, 7 Iowa 512; 74 Am. Dec. 279; *Penn v. Clemans*, 19 Iowa 372; *Staples v. Mayer*, 44 La. Ann. 628; *McBride v. Hoey*, 2 Watts (Pa.) 436; *Trego v. Huzzard*, 19 Pa. St. 441; *Huzzard v. Trego*, 35 Pa. St. 9.

By means of forgery, one procured an assignment of tax certificates to himself. It was held that he could not found a right of redemption on this. *Wood v. Welpton*, 29 Fed. Rep. 405.

2. A son-in-law of the owner of the land is not entitled to redeem for his own benefit, but a redemption by him will inure to the benefit of the owner. *Dixon v. Hockady*, 36 S. Car. 60.

If one not the owner redeems, the

redemption inures to the benefit of the owner, even though the redemptioner intended to act for himself upon an adverse claim of title. *Jamison v. Thompson*, 65 Miss. 516. See also *Greene v. Williams*, 58 Miss. 752.

3. 2 *Desty on Taxation*, p. 880; *Cooley on Taxation* (2d ed.), p. 540; *Burroughs on Taxation*, § 125; *Orr v. Cunningham*, 4 W. & S. (Pa.) 294.

The purchaser need not receive the money; if he does so, he is estopped from setting up his title. *Coxe v. Sartwell*, 21 Pa. St. 480.

Land was assessed as a whole tract, but before sale it was subdivided into lots. One of the lots was owned by one person in severalty before the assessment, but was not assessed separately to the owner. The owner of the remaining lots redeemed the whole. It was held that such redemption inured to the benefit of the owner of the single lot. *Alexander v. Ellis*, 123 Pa. St. 81.

4. *Levick v. Brotherline*, 74 Pa. St. 149.

5. *People v. McEwen*, 23 Cal. 54; *Busch v. Huston*, 75 Ill. 343; *Burnes v. Byrne*, 45 Iowa 285; *Ellsworth v. Low*, 62 Iowa 178; *Hurley v. Hurley*, 148 Mass. 444; *Maul v. Rider*, 51 Pa. St. 377.

Where the whole tract of unseated land is assessed in a body, and sold for taxes, the payment of the redemption money by one who owns a large share of the tract, divests the title of the purchaser to the whole. *Alexander v. Ellis*, 123 Pa. St. 81.

After a co-tenant has redeemed, a



and must pay the whole amount.<sup>1</sup> He may, however, collect from each of the other owners his proper proportion of the sum.<sup>2</sup> If the land of the one redeeming was improperly grouped and sold with other land of his own, or of others, he may exercise his right by tendering the proportionate amount due on the piece sought to be redeemed.<sup>3</sup> Similarly, holders of undivided interests may redeem the whole,<sup>4</sup> but not their individual interests.<sup>5</sup>

The rule in the case of redemption by minors, under statutes extending the time allowed them for redemption, is otherwise.<sup>6</sup>

Any attempted purchase on the part of a co-owner during the period of redemption will—except under unusual circumstances—operate as a redemption;<sup>7</sup> after that period has elapsed, how-

tender to the purchaser by another co-tenant of his proportion of the amount, is of no avail. *Watkins v. Eaton*, 30 Me. 529.

But see *Quinn v. Kenney*, 47 Cal. 147, which held that while a part owner must pay the whole amount in order to redeem, the payment has the effect of redeeming his own interest only.

1. *State v. Schaack*, 28 Minn. 358. A statute providing for the redemption of an undivided interest by itself does not allow a redemption of a part of the land. *State v. Schaack*, 28 Minn. 358.

2. See CONTRIBUTION, vol. 4, p. 9; JOINT TENANTS, vol. 11, p. 1109.

He has a lien on the land for the amount. *Bracken v. Cooper*, 80 Ill. 221.

A bill, however, cannot be sustained by a tenant in common to redeem the land from the lien of his co-tenant for money paid for taxes. *Chase v. Durfee*, 16 R. I. 248.

Another co-tenant cannot maintain a writ of entry against the one paying, without tender of his share of the amount. *Watkins v. Eaton*, 30 Me. 529; 50 Am. Dec. 637.

3. Where the land of one is unlawfully sold with that of others, and the informality is subsequently cured by a validating act, it can be redeemed on payment of the proportion of the tax fairly chargeable to the land, and the whole amount does not have to be tendered. *Dietrick v. Mason*, 57 Pa. St. 40.

So if land is improperly assessed in gross, to the several owners, and sold as such, one of the owners may redeem his part by paying his *pro rata* share, without reference to whether the redeemed part was taxed at more or less than its true relative value. *Penn v. Clemans*, 19 Iowa 372.

4. *Rich v. Palmer*, 6 Oregon 339.

One tenant in common may redeem for himself and his co-tenant. *Halsey v. Blood*, 29 Pa. St. 319.

5. *People v. McEwen*, 23 Cal. 54; *Quinn v. Kenney*, 47 Cal. 147; *Curl v. Watson*, 25 Iowa 35; 95 Am. Dec. 763; *Rice v. Nelson*, 27 Iowa 148; *Rich v. Palmer*, 6 Oregon 339.

One having a lien on an undivided two-thirds interest in land cannot redeem by paying two-thirds of the amount. *O'Reilly v. Holt*, 4 Woods (U. S.) 645. See also *Smith v. Thorp*, 17 W. Va. 221.

When an undivided interest in lands, the whole of which is subject to a tax sale, is sold in execution, the sheriff must pay the whole tax from the proceeds. *Dungan's Appeal*, 88 Pa. St. 414.

6. *Miller v. Porter*, 35 Iowa 166.

Where adults and infants are co-tenants of lands sold for taxes, and the limitation has expired as to the adults, the infants can redeem only their interests and not the whole tract. *Wilson v. Sykes*, 67 Miss. 617; *Jacobs v. Porter*, 34 Iowa 341; *Miller v. Porter*, 35 Iowa 166.

After the redemption, the infants who redeem will hold as tenants in common with the tax purchaser, or his successors in interest. *Stout v. Merrill*, 35 Iowa 59.

7. *Cooley on Taxation* (2d ed.), p. 843.

In *Arthurs v. King*, 95 Pa. St. 174, the court, speaking by Sterrett, J., said: "There is no valid reason why either the owner of land sold for taxes, or a stranger to the title, may not, within the time allowed for redemption, take from the purchaser at the treasurer's sale, a conveyance of his inceptive title, and hold the same until it ripens into a complete tax title. Where, as in this

ever, if there is no special confidential relation between the co-owners, any one of them may buy the land and get absolute title in himself.<sup>1</sup>

A right is frequently given by statute, however, to part-owners to redeem their own proper shares; when this is the case it may be enforced by *mandamus*.<sup>2</sup> Such a privilege does not take away the ordinary right of a co-tenant to redeem the whole interest in the land.<sup>3</sup>

**9. Period for Redemption—*a*. IN GENERAL.**—Statutes fix the time within which redemption may be made.<sup>4</sup> The rule generally adopted is that the time begins to run from the acceptance of the bid, which is the real time of sale,<sup>5</sup> unless provided otherwise in the statute.<sup>6</sup>

Where the law requires that the deed be filed in a public office, and remain there during the time allowed for redemption, the time does not run until the deed is so filed.<sup>7</sup> The bringing of a suit to quiet title does not affect the rights of the owner, who may tender the money after the suit is instituted.<sup>8</sup>

There can be no redemption after the expiration of the time

case, the consideration paid is more than would be required to redeem the land, and a regular assignment of the tax title is executed, it would be unreasonable to infer that the transaction is a redemption and not a purchase.<sup>9</sup>

1. *Keele v. Cunningham*, 2 Heisk. (Tenn.) 288.

2. *People v. Treasurer of Detroit*, 8 Mich. 14; 77 Am. Dec. 433.

3. *Loomis v. Pingree*, 43 Me. 312.

4. See generally, *Heard v. Walton*, 39 Miss. 388; *Winchester v. Cain*, 1 Rob. (La.) 421; *McCormack v. Russell*, 25 Pa. St. 185; *Gault's Appeal*, 33 Pa. St. 94; *State v. Woodbridge*, 47 N. J. L. 142; *Millen v. Howell*, 81 Ga. 653; *Eggleston v. Gage*, 33 Ill. App. 184; *Gage v. Parker*, 103 Ill. 528; *Tug River Coal Co. v. Brewer*, 91 Ky. 402; *Lander v. Bromley*, 79 Wis. 372; *McKee v. Spiro*, 107 Mo. 452.

5. *Stevens v. Cassaday*, 59 Iowa 113; *McCalmonet v. Rockland Coal, etc., Co.*, 72 Pa. St. 221. And not from the issuing of the treasurer's deed or certificate of sale, *Cromelien v. Brink*, 29 Pa. St. 522; nor from the recording of the sheriff's deed. *Boyd v. Wilson*, 86 Ga. 379. But see *Maina v. Elliott*, 51 Cal. 8, which held that in *California*, where the time allowed for redemption is six months from the sale, if the purchaser delays to take his certificate of purchase promptly, the landowner has six months to redeem in after the certificate has been taken out, but is

liable to lose his land if the right of a *bona fide* purchaser intervenes at any time after six months from the actual sale. See also *People v. Cady*, 105 N. Y. 299; *Coombs v. Steere*, 8 Ill. App. 147; *Doudna v. Harlan*, 45 Kan. 484.

As to the date of sale in *Alabama*, from which the time begins to run, see *Jones v. Randle*, 68 Ala. 259; *Lassitter v. Lee*, 68 Ala. 287; *Pugh v. Youngblood*, 69 Ala. 296.

Similar decisions on similar statutes were rendered in the following cases: *Eldridge v. Kuehl*, 27 Iowa 160; *Henderson v. Oliver*, 28 Iowa 20; *McCready v. Sexton*, 29 Iowa 356; 4 Am. Rep. 214; *Thomas v. Stickle*, 32 Iowa 71; *Robb v. Bowen*, 9 Pa. St. 71; *Johnston v. Jackson*, 70 Pa. St. 164.

6. If a city charter allows for redemption eighteen months after sale and deposit of the deed with the mayor, the time does not begin to run until a deed fully executed and properly acknowledged is so left. Leaving it in an incomplete shape has no effect. *Berthold v. Hoskins*, 38 Fed. Rep. 772. See, under the *Wisconsin* statute, *Lander v. Bromley*, 79 Wis. 372.

7. *West v. Duncan*, 42 Fed. Rep. 430.

8. *White v. Smith*, 68 Iowa 313.

But in order to redeem at this stage, the plaintiff is bound to pay the taxes and penalties provided by law, regardless of the Statute of Limitations. Long

limited by statute,<sup>1</sup> even though the deed has not been executed to the purchaser at the tax sale.<sup>2</sup> It has been held, however, that during the redemption period the record must disclose a valid sale for taxes, and that any irregularity appearing on the face of the record cannot be cured by amendments after the time has expired.<sup>3</sup>

A deed may not be issued before the expiration of the time allowed for redemption; if so issued, it is void.<sup>4</sup>

In the computation of the time, the day of the sale is excluded.<sup>5</sup>

*b. WAIVER OF REQUIREMENTS AS TO TIME.*—The purchaser, by express agreement,<sup>6</sup> or by the receipt of the money after the period allowed for redemption has expired, may waive a strict compliance with the requirements as to time. Payment thus accepted by him will constitute a perfect redemption.<sup>7</sup> A public officer, however, cannot waive the purchaser's right, and acceptance by him will not work a redemption.<sup>8</sup>

*c. PERSONS UNDER DISABILITY.*—The same strict rules apply to persons under disability as to others, unless the statutes other-

*v. Smith*, 67 Iowa 22. See also *Harber v. Sexton*, 66 Iowa 211.

1. *Pearson v. Robinson*, 44 Iowa 413; *Scofield v. McDowell*, 47 Iowa 129; *Meredith v. Phelps*, 65 Iowa 118; *Long v. Smith*, 62 Iowa 329; *Spenglin v. Forry*, 37 Iowa 242.

After that, nothing passes under an execution sale of the former owner's interest. *Church v. Riddle*, 6 W. & S. (Pa.) 509; *Smith v. Macon*, 20 Ark. 17; *Thweatt v. Black*, 30 Ark. 732.

2. *Pearson v. Robinson*, 44 Iowa 413; *Long v. Smith*, 62 Iowa 329; *Ellsworth v. Low*, 62 Iowa 178.

A county has the same time within which to redeem as has an individual. *Reeves v. Bremer County*, 73 Iowa 165.

3. *Judevine v. Jackson*, 18 Vt. 470; *Langdon v. Poor*, 20 Vt. 13.

4. *Swope v. Prior*, 58 Iowa 412; *Cummings v. Wilson*, 59 Iowa 14; *Reed v. Thompson*, 56 Iowa 455; *Bowman v. Wettig*, 39 Ill. 416.

5. *Richards v. Thompson*, 43 Kan. 209. Thus, if two years are given, a tender on the second anniversary of the sale is in time. *Hare v. Carnatt*, 39 Ark. 196.

A deed executed on the last day, is premature. *Cable v. Coates*, 36 Kan. 191. The general rules as to the computation of time are applicable here. See *DAY*, vol. 5, p. 81; *TIME, COMPUTATION OF*. See *Gladwin v. French*, 112 Mass. 186.

If the last day falls on Sunday, the right to redeem extends, generally,

through the next day. *Gage v. Davis*, 129 Ill. 236; 16 Am. St. Rep. 260; *Hill v. Timmermeyer*, 36 Kan. 252.

6. *Shoemaker v. Porter*, 41 Iowa 197. As by an agreement in writing by the purchaser to convey to the owner on being paid the amount of the bid with twenty-five per cent. additional. *Rogers v. Johnson*, 70 Pa. St. 224. A waiver may be conditional, in which case the condition must be strictly performed in order to entitle the owner to the benefit of it. *McCulloch v. Dodge*, 6 R. I. 346.

7. *Blackwell on Tax Titles* (5th ed.), vol. 2, § 716; *Thweatt v. Black*, 30 Ark. 732; *Coxe v. Wolcott*, 27 Pa. St. 154; *Philadelphia v. Miller*, 49 Pa. St. 440; *Byington v. Hampton*, 13 Iowa 23. See also, *Terrell v. Grimmer*, 20 Iowa 393.

8. His receipt for money paid after the time has expired is a nullity. *Thornton v. Smith*, 36 Ark. 508.

Land sold for taxes was purchased by the town in which it was situated. After the time within which redemption might have been made, had expired, the tax, interest, costs and charges were paid by the person succeeding to the rights of the original owner, to the county treasurer, who received the same in full payment, and marked the land redeemed upon his books. No claim of forfeiture was made at the time. It was held that the person making such payment was not entitled to a lease of the premises

wise provide.<sup>1</sup> Statutes, however, frequently provide for an extension of time in favor of minors, married women, idiots, insane persons, and others under disabilities.<sup>2</sup>

An infant, to bring himself within the statute, must have been the owner at the time of the tax sale.<sup>3</sup> So must a married woman.<sup>4</sup> One claiming under such a statute must show himself to be within its terms.<sup>5</sup>

The statutes giving an additional time to redeem, grant an additional privilege, and do not take away the right to redeem during the continuance of the disability,<sup>6</sup> nor suspend the right of the purchaser to take out his deed at the time allowed by statute. His title is at most subject to be defeated by redemption after the removal of disability.<sup>7</sup>

As the right to redeem after the usual period has expired rests upon statutes, only such interests as are included therein may be redeemed.<sup>8</sup> The right is not affected by mortgage foreclosure proceedings brought during the time allowed.<sup>9</sup> Statutes giving a person under disability a longer time to redeem merely extend

for the term for which they were sold. *People v. Hegeman* (Supreme Ct.), 14 N. Y. Supp. 567.

1. *Smith v. Macon*, 20 Ark. 17; *Thompson v. Sherrill*, 51 Ark. 453; *Little Rock Junction R. Co. v. Burke*, 53 Ark. 430; *Hood v. Mathers*, 2 A. K. Marsh. (Ky.) 558; *Levy v. Newman*, 130 N. Y. 11; *McCormack v. Russell*, 25 Pa. St. 185.

2. As to the *Arkansas* statute, see *Neil v. Rozier*, 49 Ark. 551; *Carroll v. Johnson*, 41 Ark. 59; *Little Rock Junction R. Co. v. Burke*, 53 Ark. 430; *Thompson v. Sherrill*, 51 Ark. 453; as to the *Iowa* statute, *Jacobs v. Porter*, 34 Iowa 341; *Stout v. Merrill*, 35 Iowa 47; *Myers v. Copeland*, 20 Iowa 22; *McGee v. Bailey* (Iowa, 1892), 53 N. W. Rep. 309; as to the *Mississippi* statute, *Price v. Ferguson*, 66 Miss. 404; as to the *Wisconsin* statute, *Karr v. Washburn*, 56 Wis. 303; *Tucker v. Whittlesey*, 74 Wis. 74; *Harding v. Vaughn*, 36 Fed. Rep. 742; *Dayton v. Relf*, 34 Wis. 86; as to redemption under the *Brooklyn* charter, *Levy v. Newman*, 50 Hun (N. Y.) 438.

3. Under *Iowa* Code, § 892; *Tallman v. Cook*, 39 Iowa 402; *Stevens v. Casady*, 59 Iowa 113; *Pearsons v. American Investment Co.*, 83 Iowa 358. The rule is the same under the *Kansas* statute. *Doudna v. Harlan*, 45 Kan. 484; *Culp v. Culp* (Kan. 1893), 32 Pac. Rep. 1118.

The death of the owner, subsequently to the sale, leaving minor heirs, does

not enlarge the time for redemption. *McCormack v. Russell*, 25 Pa. St. 185; *Burton v. Hintrayer*, 18 Iowa 348.

4. See *Finch v. Brown*, 8 Ill. 488, which holds that the *feme covert* must own the land sold at the time of sale. If it belonged to her husband at that time, her contingent right of dower does not entitle her to redeem.

5. *Harding v. Vaughn*, 36 Fed. Rep. 742. This case holds that a deed to the minor from his father and mother, dated before the tax sale, but which has an undated acknowledgement, and which was not recorded until after the tax deed was given, is not sufficient proof of title in the minor at the time of sale, without other evidence.

6. *Witt v. Mewhirter*, 57 Iowa 545; *Goodrich v. Florer*, 27 Minn. 97. Thus, a married woman, together with her husband, may institute proceedings to redeem during the continuance of the coverture. *Plumb v. Robinson*, 13 Ohio St. 298.

7. *Dayton v. Relf*, 34 Wis. 86.

8. If the statute allows the redemption of "the real property of a married woman," a homestead interest is included. *Adams v. Beale*, 19 Iowa 61.

Under the *West Virginia* statute, a wife's separate estate is not included. *Williamson v. Russell*, 18 W. Va. 612.

9. In *Iowa*, a minor, or his representative, may, at any time before he becomes of age, redeem from a tax sale of land devised to him. Where the purchaser had quit-claimed to another, taking a

the period; they do not otherwise affect the right of the former owner.<sup>1</sup>

**10. Payment and Tender**—*a.* IN GENERAL.—Payment and tender are alike effectual to revest title in the former owner.<sup>2</sup> Tender must be of the whole amount,<sup>3</sup> and must be continuous,<sup>4</sup> unconditional,<sup>5</sup> and made in good faith. If made collusively, upon an agreement that the money shall be refunded, it has no effect.<sup>6</sup> A mere offer to redeem without tender, is generally inoperative.<sup>7</sup> If, however, the offer is refused on the ground that there is no right to redeem, and no exception is taken to the omission to tender, it has been held to work a redemption.<sup>8</sup> An agreement to accept a redemption, although allowed by both parties to remain open, and never finally concluded, extinguishes the constructive possession of the holder of the tax title.<sup>9</sup> Tender relieves the owner from all liability for costs and subsequent charges.<sup>10</sup> A deed made after tender or payment is void.<sup>11</sup> Tender and payment may be

purchase-money mortgage from him, it was held that he could not, by foreclosure proceedings, get title in himself and cut out the interest of the minor. *Strong v. Burris*, 61 Iowa 375.

1. *Ethel v. Batchelder*, 90 Ind. 520.

2. *Cunningham v. Marklands*, 5 U. C. Q. B. 645; *Bender v. Bean*, 52 Ark. 132; *Corning Town Co. v. Davis*, 44 Iowa 622; *Heaton v. Knight*, 63 Iowa 686; *State v. Haughey*, 5 Kan. 625; *Mathews v. Buckingham*, 22 Kan. 166; *Olin v. Rohrbaugh*, 28 Kan. 412; *Brooks v. Hardwick*, 5 La. Ann. 675; *Basso v. Benker*, 33 La. Ann. 432; *Loomis v. Pingree*, 43 Me. 299; *State v. Woodbridge*, 47 N. J. L. 142; *Broughton v. Journeay*, 51 Pa. St. 31; *Burns v. Ledbetter*, 54 Tex. 374; *Sperry v. Gibson*, 3 W. Va. 522. So in *Connecticut* by statute. Gen. Stats. (1888), § 3893.

3. *Fitts v. Huff*, 63 Miss. 594.

A tender of the amount of purchase-money at a tax sale, without also tendering the premium allowed by law, will not accomplish redemption; and for the purchaser to name a larger amount than he was entitled to, while it would dispense with the actual production of the money tendered, will not dispense with full readiness to pay the proper amount at the time of offering to redeem. *Lamar v. Sheppard*, 84 Ga. 561.

4. *Hamlett v. Tallman*, 30 Ark. 505.

5. *Halsey v. Blood*, 29 Pa. St. 319.

A tender was not invalid because a receipt or certificate was demanded, when it was rejected by the treasurer solely upon the ground that he had no power to receive such money and give

such certificate. *People v. Edwards*, 56 Hun (N. Y.) 377.

Tender is not vitiated by a request to the purchaser, after it is made, to deliver possession. *Bacon v. Conn*, 1 Smed. & M. Ch. (Miss.) 348.

6. *Woodbury v. Shackelford*, 19 Wis. 55.

7. *Poindexter v. Doolittle*, 54 Iowa 52, which held that the owner of land, having made no tender of the amount required to redeem from the sale, would be chargeable with the costs of an action to set aside the deed, although he offered to redeem, and the offer was refused by the auditor.

But it has been held in *Louisiana*, that where lands have been sold to pay taxes, the owner has a right to redeem the same upon offering to pay to the purchaser the price, costs, improvements, and interest, and is not compelled to make a tender of the money, unless the purchaser has rendered an account of those items. *Brooks v. Hardwick*, 5 La. Ann. 675. See also *Binford v. Boardman*, 44 Iowa 53.

8. *Bender v. Bean*, 52 Ark. 132.

9. *Cornell University v. Mead*, 80 Wis. 387.

10. *Russell v. Hudson*, 28 Kan. 99; *Cole v. Moore*, 34 Ark. 582.

11. *Mathews v. Buckingham*, 22 Kan. 166; *Olin v. Rohrbaugh*, 28 Kan. 413; *Leitzback v. Jackman*, 28 Kan. 524.

Where a tax deed was made after the owner had paid to the clerk the amount necessary to redeem from the sale, it was held that the deed was unauthorized and void, and that the fail-

excused if the amount cannot be discovered,<sup>1</sup> or may be waived by the purchaser.<sup>2</sup>

*b. KIND OF MONEY REQUIRED.*—Sometimes statutes designate the kind of money required for tender or payment.<sup>3</sup> If the public officer whose duty it is to receive payment disregards the statutory requirement, he may be compelled to pay over lawful money to the holder of the tax title redeemed.<sup>4</sup> Payment by check may be good, if not objected to.<sup>5</sup>

*c. TO WHOM MADE.*—The statutes provide, frequently, that tender or payment must be made to the person possessing the tax title at the time of redemption;<sup>6</sup> for example, to the purchaser or his agent,<sup>7</sup> or to the purchaser's assignee.<sup>8</sup> An ineffectual assignment does not make it necessary to pay or tender to the assignee.<sup>9</sup>

Statutes provide, sometimes, for payment or tender to some specified public officer;<sup>10</sup> this being done, the redemption is effectual, even though such officer withholds the money.<sup>11</sup> These statutes generally do not deprive the redemptioner of the right to make payment to the purchaser.<sup>12</sup>

ure of the clerk to notify the treasurer of the payment would not defeat the redemption. *Fenton v. Way*, 40 Iowa 196. See also *Gage v. Bailey*, 115 Ill. 646.

1. *Miller v. Montagne*, 32 La. Ann. 1290; *Wederstrandt v. Freyhan*, 34 La. Ann. 705.

2. *Bright v. Boyd*, 1 Story (U. S.) 478.

3. In *Idaho*, "lawful money of the United States;" in *Illinois*, "legal money of the United States;" in *California* and *Oregon*, gold or silver. A county cannot redeem in its own warrants. *Reeves v. Bremer County*, 73 Iowa 165.

4. *Murphy v. Smith*, 49 Ark. 37.

5. *Townshend v. Shaffer*, 30 W. Va. 176.

6. *Thweatt v. Black*, 30 Ark. 732; *Banks v. Bingham*, 3 Yerg. (Tenn.) 312. See various state statutes.

7. A husband as general agent for the management of his wife's separate estate, purchased land at a tax sale in the name of his wife, and with money derived from her separate estate. It was held that he was a proper person to whom to tender the redemption money. *Dauser v. Johnsons*, 25 W. Va. 380.

8. *Thweatt v. Black*, 30 Ark. 732.

Where land of an infant has been forfeited to the state and sold by it for taxes before his time for redemption has expired, he may redeem from the

purchaser from the state, and the redemption money will belong to the purchaser and not to the state. *Keith v. Freeman*, 43 Ark. 296.

If the purchaser has accepted part of the money, the owner may redeem by tendering the rest to his grantee under a quit-claim deed. *Taylor v. Courtney*, 15 Neb. 190.

Tender to the purchaser may be good, notwithstanding a conveyance by him of which the redemptioner has no knowledge, the purchaser remaining in possession. *Faxon v. Wallace*, 101 Mass. 444.

The *Louisiana* statute provides that redemption may be effected by tendering the amount to the purchaser at the tax sale; therefore, it is immaterial that before the tender he has conveyed his title to another. *Wheelwright v. Lemore*, 56 Fed. Rep. 163.

9. *Faxon v. Wallace*, 98 Mass. 44; *Faxon v. Wallace*, 101 Mass. 444; *Rice v. Bates*, 68 Iowa 393.

10. See various statutes.

11. *Corbett v. Nutt*, 18 Gratt. (Va.) 624; 10 Wall. (U. S.) 464.

12. *State v. Woodbridge*, 47 N. J. L. 142, *overruling State v. Woodbridge*, 46 N. J. L. 109; *Broughton v. Journeay*, 51 Pa. St. 31. But in *Oregon*, the payment must be made to the sheriff, not the certificate holder. *Rich v. Palmer*, 7 Oregon 133.

An act allowing a minor to redeem within three years after attaining ma-

d. WHEN DISPENSED WITH—(1) *Mistake or Fraud of Officer*.—One seeking to redeem may rely on information given him as to time and amount by the proper officer in response to his inquiries.<sup>1</sup> Thus, if the amount named be too small, the redemption is valid if the sum given be actually paid or tendered,<sup>2</sup> although not otherwise.<sup>3</sup> If the owner be led by the officer to believe that there has been but one tax sale, and redemption is made from that, the owner may redeem from an undisclosed sale, on discovering the fact, even though the statutory time has elapsed.<sup>4</sup> The inquiry made of the officer must, however, be specific,<sup>5</sup> and refer to matters which it is his duty to disclose.<sup>6</sup> If the inquiry relates to taxes only, it will avail nothing to the owner that the

majority, by paying the redemption price to the one who paid the tax, does not take away the privilege given him by another statute of paying the amount to the collector within one year. *Holloway v. Clark*, 27 Ill. 483.

1. *Hintrager v. Mahoney*, 78 Iowa 537; *Gage v. Scales*, 100 Ill. 218; *Corning Town Co. v. Davis*, 44 Iowa 622; *Price v. Mott*, 52 Pa. St. 315; *Mather v. Hutchinson*, 25 Wis. 27. But see *McGahan v. Carr*, 6 Iowa 331; 71 Am. Dec. 421, which holds that the fact that the public officer informed an owner who has failed to redeem, that no taxes were assessed against the land, gives him no additional rights in the absence of collusion between the officer and the purchaser. See also *Harmon v. Steed*, 49 Fed. Rep. 779.

2. *Converse v. Rankin*, 115 Ill. 398; *Forrest v. Henry*, 33 Minn. 434; *People v. Registrar of Arrears*, 114 N. Y. 19; *Randall v. Dailey*, 66 Wis. 285. See also *Bubb v. Tompkins*, 47 Pa. St. 359; *Breisch v. Cox*, 81 Pa. St. 336, 348. Equity will grant relief to the owner in such a case. *Noble v. Bullis*, 23 Iowa 559; 92 Am. Dec. 442; *Corning Town Co. v. Davis*, 44 Iowa 622; *Iowa Falls, etc., R. Co. v. Storm Lake Bank*, 55 Iowa 696; *Gould v. Sullivan* (Wis. 1893), 20 L. R. A. 487; *Gage v. Scales*, 100 Ill. 218.

Where the officers named too small a sum, and the owner paid it, and on learning the mistake paid more than enough to cover the deficiency, it was held that there had been a redemption. *McDonald v. Geisendorff*, 128 Ind. 153. Title reverts on the tender of the amount as given by the officer, even though it be too small. It is immaterial that the officer subsequently discovered his mistake and told the owner, who neglected to pay the additional

amount. *Hintrager v. Mahoney*, 78 Iowa 537.

But where the officer to whom the redemption money should be paid, gives the wrong amount to the owner who pays, but on discovering his mistake, furnished a corrected statement, whereupon the owner sent an agent who demanded another statement, which was refused, it was held that there had been no misconduct sufficient to extend the time. *Van Benthuysen v. Sawyer*, 36 N. Y. 150.

Where a landowner was wrongly informed by the officer that no taxes were assessed against his land and thereupon it was sold at a tax sale, it was held that the tax deed passed nothing; that he could, on discovering the error, bring ejectment for the land; and that the three years' limitation for attacking tax titles applied only to a case where the deed was rightly issued and did not govern such a case as this. *Gould v. Sullivan* (Wis. 1893), 20 L. R. A. 487. See also *Darrow v. Union County* (Iowa, 1893), 54 N. W. Rep. 149.

3. *Ellsworth v. Cordrey*, 63 Iowa 675.

4. *Noble v. Bullis*, 23 Iowa, 558; 92 Am. Dec. 442.

5. *Lamb v. Irwin*, 69 Pa. St. 436. It has been held that a general offer to pay all taxes due is too indefinite, if no amount is specified, and no request made to redeem from particular sale. *Bolinger v. Henderson*, 23 Iowa 165. But see *Corning Town Co. v. Davis*, 44 Iowa 622.

6. Under the *Missouri* statutes, the owner has a right to redeem by paying the amount for which the property was sold on his procuring from the auditor "a statement setting forth the amount required to redeem." It was held that where a lot had been sold for the taxes of several years, the

officer said nothing of tax sales;<sup>1</sup> if to one sale only, it matters not that nothing was said of other sales.<sup>2</sup>

Likewise fraud or misconduct of the officer cannot prejudice the owner.<sup>3</sup> If the officer keeps his records in such a manner that the owner cannot learn of the sale, redemption may be made when the facts are discovered, even though the time has expired.<sup>4</sup>

(2) *Fraud of Purchaser*.—If the owner be prevented from redeeming within the time, by the fraud or deception of the purchaser, he may exercise his right thereafter, on discovering the facts.<sup>5</sup>

Where the purchaser, by promising to assign the certificate to the owner, induces him to let the time of redemption go by, the court will order a reconveyance.<sup>6</sup> Where he tells the owner that the land sold is not his, and thus leads him to fail to redeem, he will be perpetually enjoined from receiving his deed.<sup>7</sup>

*e. EQUITABLE REDEMPTION*.—Payment may be made otherwise than by the passing of money from the owner to the purchaser. If the latter is indebted to the former, the money due on the debt may be applied toward the redemption price, and if as great, such application may constitute an equitable redemption.<sup>8</sup>

11. *Amount*.—The amount required for redemption varies with the statutes. Repayment of the purchaser's bid with a specified interest by way of penalty, together with costs, and subsequent

auditor could not be required to give the statement of the amount necessary to redeem from the taxes of one year only. *State v. Tufts*, 108 Mo. 418.

1. *Moore v. Hamlin*, 38 Iowa 482.

2. *Lamb v. Irwin*, 69 Pa. St. 436.

3. An attempted redemption will avoid the deed where the owner could not find out the amount necessary to redeem because the sheriff failed to report the sale, and the purchaser did not file his certificate until within two days of the expiration of the time allowed for redemption, the owner having several times applied to the county clerk for information as to the amount. *Tug River Coal Co. v. Brown*, 13 Ky. L. Rep. 1.

If the tax be assessed in the name of another, the owner may still pay, and the refusal of the officer to accept, does not invalidate the redemption. *Kinsworthy v. Austin*, 23 Ark. 375.

4. If the officer wrongfully allowed a lot to stand upon the tax book against the former owner so that he did not know of the sale, his right is not lost, but he may redeem on discovering the facts. *Martin v. Barbour*, 34 Fed. Rep. 701.

5. *Converse v. Rankin*, 115 Ill. 398. In this case, one attempted to redeem

in good faith, but not knowing the amount, paid two dollars less than the proper sum, the purchaser agreeing to let him know the correct amount. When, instead of doing this, he took out a deed, it was held that equity would set it aside.

6. *Laing v. McKee*, 13 Mich. 124.

7. *Koon v. Snodgrass*, 18 W. Va. 320.

8. *Gaskins v. Blake*, 27 Miss. 675. But where the purchaser's grantee enters upon the land before the time of redemption has expired under a voidable deed, and makes use of it, and the value of his use exceeds the redemption amount, there is no equitable redemption. *Babcock v. Bonebrake*, 77 Iowa 710.

Where by statute, title does not vest until the deed is recorded, the entry and receipt of profits before recording, but after the expiration of the period of redemption, do not constitute an equitable redemption. *Spengin v. Ferry*, 37 Iowa 242.

In *Georgia*, the owner of land sold for taxes is entitled to occupy it free of rent for one year from the date of sale. But where rent is paid during that time, it cannot be treated as having been paid toward the redemption of the land where it was not then the



taxes paid by the purchaser, with interest, are usually required.<sup>1</sup> Sometimes the statute provides that the purchaser shall be reimbursed for improvements.<sup>2</sup> There is no distinction as to amount between an individual who redeems and the state or county.<sup>3</sup>

Statutes frequently fix the interest at a very high rate.<sup>4</sup> Interest runs from the time of sale, and not from the time of the actual payment.<sup>5</sup>

The whole amount must be paid in order to insure redemption, even though certain of the items may be barred by the Statute of Limitations.<sup>6</sup> If the sum actually paid at the sale was less than the amount of the taxes and other charges, this fact will not affect the amount to be tendered.<sup>7</sup> If the payment is to an assignee of the purchaser, it is immaterial what his rights may have cost him;<sup>8</sup> only the costs that have legally accrued need be paid.<sup>9</sup> So far as the question of amount is concerned, it is immaterial whether or not a suit to enforce the tax purchaser's claim is pending.<sup>10</sup> The full amount prescribed by statute must be paid in order that there may be a redemption.<sup>11</sup> In some cases, however, where the deficiency is small, the courts have relaxed the rule.<sup>12</sup>

intention of the parties, that it should be so applied, and no claim for such application was made until after the expiration of the period for redemption. *Lamar v. Sheppard*, 84 Ga. 561.

1. See various local statutes. See also *Comstock v. Cover*, 35 Ill. 470; *Swan v. Huse*, 15 Neb. 465; *Byington v. Rider*, 9 Iowa 566; *Tebbetts v. Charleston*, 33 W. Va. 705.

2. *Towle v. Holt*, 14 Neb. 221. See also *Lynch v. Brudie*, 63 Pa. St. 206; *Boatmen's Sav. Bank v. Grewe*, 101 Mo. 625; *Bender v. Bean*, 52 Ark. 132.

If improvements are allowed to a *bona fide* purchaser, one redeeming may be such, although the title which he brought was clearly bad to the eye of a lawyer. *House v. Stone*, 64 Tex. 677. See also *Indiana Rev. Stats.* (1881), § 6477.

3. *Briscoe v. Ellsworth County*, 23 Kan. 334; *State v. Haughey*, 5 Kan. 625. Where the state bids in property, and afterwards assigns it to a purchaser, the sum paid by such purchaser is "the amount sold for" to be inserted in the notice to redeem and to be paid on redemption. *Sperry v. Goodwin*, 14 Minn. 207.

4. See various state statutes. In *Estes v. Stebbins*, 25 Kan. 315, a rate of fifty per cent. was held to be within the power of the legislature to fix. See also *Milligan v. Hintrager*, 18 Iowa 171; *Augustin v. Jennings*, 42 Iowa 198. In *Kittle v. Shervin*, 11 Neb. 65, forty per cent. was upheld. In this state the con-

stitution prohibited the enactment of local or special laws regulating interest.

5. So in *New York*. *People v. Cady*, 105 N. Y. 299.

6. *Long v. Smith*, 67 Iowa 22.

7. Under the *Iowa* statutes, where land offered for sale for two years for delinquent taxes, was finally sold for less than the amount due under the provisions of a statute, it was held that the owner must pay the whole amount of the taxes and penalty in order to redeem. *Soper v. Espesêt*, 63 Iowa 326.

8. *Culbertson v. Munson*, 104 Ind. 451.

9. Thus, if it is provided that land struck off to a county remains unredeemed for five years, it may be sold, but the five full years must elapse before any steps can be taken towards the second sale, and if costs are made within the five years, they are illegal. *Heir v. Rullman*, 22 Kan. 606.

10. *Tebbetts v. Charleston*, 33 W. Va. 705.

11. *Chace v. Durfee*, 16 R. I. 248.

Tender of amount of purchase-money without the premium allowed by law avails nothing. *Lamar v. Sheppard*, 84 Ga. 561.

12. A payment of five dollars and ninety-nine cents instead of six dollars and four cents is sufficient, the deficiency being too trivial to invalidate the redemption. *Wyatt v. Simpson*, 8 W. Va. 394.

The failure to pay anything as

Where land was sold for taxes and under a judgment at the same time, it was held that the whole amount paid, and not that of the taxes only, must be tendered.<sup>1</sup> Taxes paid by the purchaser subsequent to redemption cannot be recovered,<sup>2</sup> nor can those paid subsequent to the sale but before the deed is made, unless so provided in the statute.<sup>3</sup> Neither can taxes levied and due prior to the sale.<sup>4</sup> Where lots are assessed and sold separately, redemption of any one lot must be made by tendering the whole amount due on it.<sup>5</sup>

**12. Notice to Redeem**—*a. GENERALLY.*—The statutes frequently require notice to be given to him whose land has been sold for taxes, of the expiration of the time allowed for redemption, and of the purchaser's intention to apply for a deed.<sup>6</sup> The form and contents of the notice vary with the language of varying statutes.<sup>7</sup> The notice must be addressed to the proper person.<sup>8</sup> It is presumed, in the absence of evidence to the contrary, that the land is assessed at the time of notice against the same person as at

printer's fees for publication of notice of the tax sale will not avoid the redemption where the treasurer had no notice of their amount. *State v. Harper*, 26 Neb. 761.

The notice of the amount required to redeem from a tax sale specified the date of the judgment instead of the date of the sale as the time from which interest was to run, but the consequent increase of the amount required to redeem was little more than one cent. It was held that the defect was not substantial. *Robert v. Western Land Assoc.*, 43 Minn. 3.

In an action to redeem land sold for taxes, the plaintiff tendered and brought into court the amount which he in good faith believed to be due, the exact amount depending upon the construction of a doubtful law. The court found a larger sum to be due, but held that a judgment in his favor should not be disturbed. *Kraus v. Montgomery*, 114 Ind. 103.

1. *Clower v. Fleming*, 81 Ga. 247.

2. *Byington v. Allen*, 11 Iowa 3; *Byington v. Walsh*, 11 Iowa 27; *Byington v. Wood*, 12 Iowa 479; *Byington v. Hampton*, 13 Iowa 23.

If the law provides for the payment of subsequent taxes, the payment of the purchase-money and premium, without such taxes, will not effect a redemption. *Harmon v. Steed*, 49 Fed. Rep. 779.

3. *Stephens v. Holmes*, 26 Ark. 48.

4. If the law prescribes that the one redeeming shall pay the amount for which the land sold, with interest

and costs and taxes paid for any subsequent years, he need not tender taxes of previous years. *Sheppard v. Clark*, 58 Iowa 371.

5. *People v. McEwen*, 23 Cal. 54.

Where lots have been assessed and sold separately, they must be redeemed separately. *Boatmen's Sav. Bank v. Grewe*, 101 Mo. 625.

6. See various local statutes. See also NOTICE, vol. 16, p. 787.

See *Emeric v. Alvarado*, 90 Cal. 444, as to the *California* statute.

7. See *Swan v. Whaley*, 75 Iowa 623; *Hinkel v. Krueger*, 47 Minn. 497.

In the absence of the required notice, the statutory limitation may not be set up in defense to a suit to redeem, but a notice which is merely defective, as for lack of a seal, for example, does not affect the bar. *Slyfield v. Healy*, 32 Fed. Rep. 2.

The *Massachusetts* statute provides for redemption by a mortgagee of record at any time within two years after he has actual notice of the sale. It was held in *Keith v. Wheeler* (Mass. 1893), 34 N. E. Rep. 174, that the fact that a release to him from the mortgagor declared that the release was "subject to any and all unpaid taxes," was not equivalent to actual notice of a sale for taxes.

8. *Hillyer v. Farneman*, 65 Iowa 227; *Slyfield v. Barnum*, 71 Iowa 245; *Lynn v. Morse*, 76 Iowa 665; *Wilson v. Russell*, 73 Iowa 395. An immaterial variance does not invalidate the notice, as where it is directed to "Corless," instead of "Corlis," the names being

the time of the sale.<sup>1</sup> The requirement of notice, where notice is required, is a condition precedent to the right of the purchaser to demand a deed.<sup>2</sup> A deed issued without the notice is bad.<sup>3</sup> So is a deed executed before the expiration of the time named in the notice.<sup>4</sup>

One who founds ejectment upon a tax title must prove that notice was given, where notice is necessary.<sup>5</sup> The surrender of the tax certificate in response to a bad notice does not make valid a deed prematurely issued.<sup>6</sup>

A strict compliance with the statutory requirements is essen-

*idem sonans*. *Nycum v. Raymond*, 73 Iowa 224. A notice not properly addressed is bad, even though served upon the right person. *Steele v. Murry*, 80 Iowa 336.

If a notice by publication is addressed to "unknown owners," where the land is taxed to one by name, it is insufficient. *Hartley v. Boynton*, 17 Fed. Rep. 873.

A notice directed to A and some fifteen other named persons, and unknown owners, and referring to the land in question and some fifteen other descriptions, is bad. *White v. Smith*, 68 Iowa 313; *Adams v. Burdick*, 68 Iowa 666.

**Waiver.**—An occupant cannot waive the notice to which the owner is entitled. *Jackson v. Esty*, 7 Wend. (N. Y.) 148.

1. See *Ellsworth v. Cordrey*, 65 Iowa 303.

2. *Caulkins v. Chamberlain*, 37 Hun (N. Y.) 113; *Ellsworth v. Van Ort*, 67 Iowa 222.

Proof of the service of notice establishes a *prima facie* case in favor of the tax deed. *Wilson v. Crafts*, 56 Iowa 450.

The statutory notice to redeem is indispensable when a tax deed is wanted, but it is not so where the holder of the tax certificate merely wants to foreclose the tax lien. *Lammers v. Comstock*, 20 Neb. 341. See also *Lockwood v. Gehlert*, 127 N. Y. 241; *Dentler v. State*, 4 Blackf. (Ind.) 258.

**Defective Notice.**—A notice defective in substance will not support a tax title. *Gage v. Bailey*, 100 Ill. 530; *Wisner v. Chamberlin*, 117 Ill. 568; *Gage v. Mayer*, 117 Ill. 632; *Long v. Smith*, 62 Iowa 329; *Adams v. Griffin*, 66 Iowa 125; *Long v. Wolf*, 25 Kan. 522; *Simonton v. Hays*, 32 Hun (N. Y.) 286.

In *People v. Cady*, 56 N. Y. Super. Ct. 180, it was held that if the notice to redeem is insufficient and invalid,

the case stands as if no notice had ever been given, but that the sale is not invalid.

3. *Long v. Smith*, 62 Iowa 329; *Wilson v. McKenna*, 52 Ill. 43; *Wisner v. Chamberlin*, 117 Ill. 568; *Dalton v. Lucas*, 63 Ill. 337; *Gage v. Bailey*, 100 Ill. 530; *Holbrook v. Fellows*, 38 Ill. 440; *Gavin v. Shuman*, 23 Ind. 32; *Long v. Wolf*, 25 Kan. 522; *Blackstone v. Sherwood*, 31 Kan. 35; *People v. Walsh*, 22 Hun (N. Y.) 139; *Merrill v. Dearing*, 32 Minn. 479; *Arthurs v. Smathers*, 38 Pa. St. 40; *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Gage v. Bani*, 141 U. S. 344; *Gage v. Lyons*, 138 Ill. 590. See also *Swope v. Prior*, 58 Iowa 412.

The doctrine that the claimant under a tax title must show that he gave the notice prescribed by the constitution, has reference to cases where a paramount title is claimed under such deed, and not to cases where such deed is merely color of title under the Statute of Limitations. *Morrison v. Norman*, 47 Ill. 477.

After deed has been made it will be presumed that the notice, if needed, was given. *Garmoe v. Sturgeon*, 65 Iowa 147.

4. See *Swope v. Prior*, 58 Iowa 412; *Barnard v. Hoyt*, 63 Ill. 341. See also *Bowers v. Hallock*, 71 Iowa 218; *Holbrook v. Fellows*, 38 Ill. 440; *Morrison v. Norman*, 47 Ill. 477.

5. *Holbrook v. Fellows*, 38 Ill. 440; *Sanborn v. Mueller*, 38 Minn. 27; *Nelson v. Central Land Co.*, 35 Minn. 408.

In *Illinois*, under the statute, the tax deed is void, if it does not allege that notice has been given. *Smith v. Prall*, 133 Ill. 308.

If the statute prescribes that the notice be recorded, the recording is a condition precedent to the issuing of the deed. *Reeds v. Morton*, 9 Mo. 878.

6. *Long v. Smith*, 62 Iowa 329.

tial.<sup>1</sup> A notice served too soon is bad.<sup>2</sup> It need not be served on the premises.<sup>3</sup>

b. TO WHOM GIVEN—(1) *In General*.—Notice need be given only to the persons named in the statute.<sup>4</sup> Where the constitution requires notice to "parties interested," and the statute notice to the owner merely, notice to the mortgagee is not necessary.<sup>5</sup> A corporation requires the same notice as does an individual.<sup>6</sup>

(2) *The Owner*.—Under a requirement of notice to the owner, one to whom land was assessed and in whom the record title was at the time of the sale, is *prima facie* the owner at the time of the giving of notice.<sup>7</sup> The death of the owner does not dispense with notice.<sup>8</sup>

1. *Blackstone v. Sherwood*, 31 Kan. 35; *Thompson v. Burhans*, 61 N. Y. 52; *Clifton Heights Land Co. v. Randall*, 82 Iowa 89.

The discovery by the owner, in the treasurer's office, of the sale of his land for taxes, is not the formal official notice required by law. *Broughton v. Journeay*, 51 Pa. St. 31.

That the land was unoccupied, does not preclude the necessity for notice. *Lucas v. McEterna*, 19 Hun (N. Y.) 14.

A requirement that notice shall be published at least six months before the expiration of the time for redemption, is not disregarded by a notice published sixteen months before such time. *Hoffman v. Clark County*, 61 Wis. 5.

2. *Griffin v. Tuttle*, 74 Iowa 219; *Smith v. Walker*, 56 N. Y. Super. Ct. 391; *Donahue v. O'Connor*, 45 N. Y. Super. Ct. 278; *Lockwood v. Gehlert*, 127 N. Y. 241; 53 Hun (N. Y.) 15; *Arthurs v. Smathers*, 38 Pa. St. 40.

3. *Gage v. Bailey*, 102 Ill. 11.

4. If notice is required to be served on the person in possession and also on the one in whose name the land is taxed, if a resident of the county where the land lies, none is needed where there is no one in possession and the land is not taxed in the name of any one. *Lawrence v. Hornick*, 81 Iowa 193; *Fuller v. Armstrong*, 53 Iowa 683; *Tuttle v. Griffin*, 64 Iowa 455; *Chambers v. Haddock*, 64 Iowa 556; *Parker v. Cochran*, 64 Iowa 757.

Where three years after the sale of land for taxes, it was both unoccupied and taxed to no one, the purchaser was held to be entitled to a deed therefor without giving any notice to the owner at the expiration of the time for redemption; and such deed will be good though made pursuant to a notice

published several years later when the land was both occupied by and taxed to the owner. *Meredith v. Phelps*, 65 Iowa 118.

Under the *Minnesota* statute, requiring that the notice be served on the person in whose name the land is assessed, service must be made on such person, even though he is the holder of the tax sale certificate. The statute makes no exception. *Mitchell v. McFarland*, 47 Minn. 535.

5. *Smyth v. Neff*, 123 Ill. 310. See *People v. Edwards*, 56 Hun (N. Y.) 377, as to notice to the mortgagee, under the *New York* statute.

6. *Garmoe v. Sturgeon*, 65 Iowa 147.

7. *Ellsworth v. Cordrey*, 65 Iowa 303. Under a statute requiring notice to be given to the owner personally or by publication, it was held that the owner must be designated by name. If the land was described as listed to "owners unknown," the notice was insufficient. *Hartley v. Boynton*, 17 Fed. Rep. 873; 5 McCrary (U.S.) 453.

Where the land is owned by a woman, it is not enough, under the *Illinois* statute, to leave a copy of the notice with her husband. *Cotes v. Rohrbeck*, 139 Ill. 532.

See, as to notice to the owner, *Hall v. Guthridge*, 52 Iowa 408; *Martin v. Stoddard* (Bklyn. City Ct.), 4 N. Y. Supp. 177; *Lyman v. Anderson*, 9 Neb. 367.

8. The fact that the original owner, J. T., is dead, does not make it proper to dispense with notice; it does not follow that there may not be another of the same name, the land remaining taxed to J. T. after the death of the original J. T. *Kessey v. Connell*, 68 Iowa 430.

If the owner dies, the notice must be given to his successor in interest. A

(3) *The Occupant*.—Notice must, by many statutes, be given to the "occupant" or the person "in possession."<sup>1</sup> The terms refer to actual occupancy or possession only,<sup>2</sup> and to occupancy and possession at the time of the giving of notice.<sup>3</sup> In the absence of proof, it is presumed that the owner is in possession.<sup>4</sup> Slight acts of ownership are sufficient to constitute occupancy, neither residence on the land nor systematic cultivation being essential.<sup>5</sup> A cultivation of a part of the tract sold entitles the one cultivating to notice. If it be not given, the title to the

notice addressed merely to his estate is insufficient. *McGee v. Fleming*, 82 Ala. 276. As to owners generally, see *OWNER*, vol. 18, p. 299.

1. Notice given to the adjoining owner by mistake does not invalidate the title if notice was also served on the proper person in possession. *Clifton Heights Land Co. v. Randell*, 82 Iowa 89. As to definitions, etc., see *OCCUPANT*, vol. 17, p. 29; *POSSESSION*, vol. 18, p. 840.

2. *Taylor v. Wright*, 121 Ill. 455. See, under the *Iowa* statute, *Parker v. Cochran*, 64 Iowa 757; *Cahalan v. Van Sant* (Iowa, 1893), 54 N. W. Rep. 433; *Snell v. Dubuque, etc., R. Co.* (Iowa, 1893), 55 N. W. Rep. 310.

3. *Hand v. Ballou*, 12 N. Y. 541; *Gonzalia v. Barblesman*, 143 Ill. 634.

Where personal notice must be given to one in occupation, the mere fact that five months before the expiration of the time for redemption the land was unoccupied does not authorize publication. *Gage v. Bailey*, 100 Ill. 530.

Such notice must be given, even though at the time of the assessment the land was unoccupied. *Comstock v. Beardsley*, 15 Wend. (N. Y.) 348.

4. *Hall v. Guthridge*, 52 Iowa 408; *Ellsworth v. Low*, 62 Iowa 178.

The owner of cultivated land let it on shares to another, to whom it was assessed. After possession was surrendered, although some of the lessee's property remained on the land with the lessor's consent, notice to redeem was served on the lessee. It was held that the service was insufficient, that it should have been upon the owner, although he did not reside on the land. *Whities v. Farsons*, 73 Iowa 137.

Service of notice on one in possession as agent of the purchaser, is not a compliance with the *Illinois* statute. *Burton v. Perry* (Ill. 1893), 34 N. E. Rep. 60.

5. *Comstock v. Beardsley*, 15 Wend. (N. Y.) 348, where the court, by Nel-

son, J., said: "An occupancy that would constitute a good adverse possession of the entire lot, and which might ripen into a title in twenty years, was not within the contemplation of the statute. It was not intended to regard the title of the land thus sold, but the object was to afford to any person who might happen to be an occupant at the date of the deed an opportunity to redeem, presuming that he might be the owner, or in some way legally interested in the land."

**Facts Constituting Possession.**—Removal of dirt and cutting down weeds from year to year are such acts of ownership as to put the purchaser on inquiry, and make it incumbent on him to give notice to one performing these acts. *Sapp v. Walker*, 66 Iowa 497. See also *Ellsworth v. Low*, 62 Iowa 178.

**Facts Insufficient to Constitute Possession.**—Where a person placed a few stacks of hay upon land actually occupied by another, and inclosed the stacks with boards to protect them from rain, and there was no agreement for the payment of rent, it was held that his possession was not of such nature as made it necessary for a purchaser of the land at a tax sale to serve notice to redeem upon him under a law requiring notice to "every person in actual possession or occupancy." *Drake v. Ogden*, 128 Ill. 603.

A joint owner of land, who resided upon it merely as a housekeeper for her brother, but who claimed no control over or interest in the property by reason of such residence, is not in such possession as to entitle her to notice under the *Iowa* code. *Rowland v. Brown*, 75 Iowa 679.

Under the *Iowa* code, one who herds cattle over a range of uninclosed land extending from one to two miles in area, including a particular quarter-section, is not in possession of such quarter-section. *Brown v. Pool*, 81 Iowa 455.

whole tract fails, not that of the part occupied only.<sup>1</sup> The occupancy must be intentional. Mere accidental encroachments do not constitute occupancy.<sup>2</sup>

The question whether or not land was occupied or in possession is for the jury.<sup>3</sup> The fact that the occupant is unknown to the purchaser will not dispense with notice,<sup>4</sup> nor will the fact that the one in possession had in fact no interest in the land.<sup>5</sup>

(4) *The Person in Whose Name Assessed*.—If the statute prescribes notice to the person in whose name the land was assessed, it must be given, even though such person has no interest in it.<sup>6</sup> The notice must be given to the person assessed at the time of notice.<sup>7</sup> Where the land is taxed in the name of the purchaser at the tax sale, notice has been held necessary.<sup>8</sup> So if assessed in the name of the purchaser's wife, it must be given.<sup>9</sup> Notice to one member of a firm, where land is assessed to the firm, is insufficient.<sup>10</sup>

c. GENERAL REQUISITES.—The notice must be precise and

1. *Comstock v. Beardsley*, 15 Wend. (N. Y.) 348; *Bush v. Davison*, 16 Wend. (N. Y.) 556; *Leland v. Bennett*, 5 Hill (N. Y.) 286.

2. *Smith v. Sanger*, 4 N. Y. 577.

3. *Smith v. Sanger*, 4 N. Y. 577; *Jones v. Chamberlain*, 109 N. Y. 100.

4. If notice is dispensed with if land be vacant, an affidavit stating that there was no person in actual possession or occupancy, "except as hereinafter stated," and then saying that the lands were fenced in and in the possession of persons unknown, does not bring it within the dispensation. *Combs v. Goff*, 127 Ill. 431.

5. *Clifton Heights Land Co. v. Randall*, 82 Iowa 89.

6. In *Illinois*, where by statute, notice must be served on the person assessed, the notice must be given, even though such person had no interest in the land and claims none. If this is not done the deed will be void, even though notice by publication is given. *Barnard v. Hoyt*, 63 Ill. 341. Under a law requiring notice to the person in whose name the land is assessed, a notice to the owner, if not that person, is inoperative. *Hillyer v. Farneman*, 65 Iowa 227.

See, as to notice under the *Iowa* statute, where the land is taxed to an unknown owner, *White v. Smith*, 68 Iowa 313; *Lawrence v. Hornick*, 81 Iowa 193.

7. *Heaton v. Knight*, 63 Iowa 686;

*Heaton v. Knight*, 65 Iowa 434; *Adams v. Snow*, 65 Iowa 435.

Where there has been lawful service of notice to redeem from a tax sale, the fact that when proof of service is made, the land is assessed to another, is immaterial. *Rice v. Bates*, 68 Iowa 393.

If notice must by statute be given to the person in whose name the property is assessed, it is not invalidated by the fact that it contains also the name of the person to whom it was assessed when tax was levied. *Sperry v. Goodwin*, 44 Minn. 207.

8. *Wakefield v. Day*, 41 Minn. 344. But see *Lamoreux v. Huntley*, 68 Wis. 24.

If the land is assessed to an unknown owner, but the holder of the tax certificate paid the taxes, and the treasurer entered his name as owner, no notice to himself need be given. *Knight v. Campbell*, 76 Iowa 730; *Irwin v. Dakin*, 79 Iowa 72; *Brown v. Pool*, 81 Iowa 457.

9. *Western Land Assoc. v. McComber*, 41 Minn. 20.

Under a statute providing that notice shall be served upon the person in whose name land is taxed, it was held that when land is taxed to an unknown owner and the name of the holder of the certificate is first entered on the tax list as owner, no notice is necessary. *Irwin v. Burdick*, 79 Iowa 69.

10. *Gage v. Reid*, 118 Ill. 35; *Hughes v. Carne*, 135 Ill. 519.

full.<sup>1</sup> It is better that it should be in writing, although it may be given orally, unless provided otherwise by law.<sup>2</sup> If it fails to state whether the land was sold for a tax or a special assessment it is defective.<sup>3</sup> The land must be described with sufficient fullness to identify it.<sup>4</sup> The name of the owner should be given, although its omission has been held not a fatal defect.<sup>5</sup> More than one tract of land may be included in the same notice.<sup>6</sup>

*d. CONTENTS OF NOTICE*—(1) *The Expiration of the Time to Redeem*.—The notice must state clearly and directly when the period allowed for redemption expires.<sup>7</sup>

1. *Broughton v. Journeay*, 51 Pa. St. 31; *Long v. Wolf*, 25 Kan. 522; *Blackstone v. Sherwood*, 31 Kan. 35; *Garrick v. Chamberlin*, 97 Ill. 620; *Gage v. Davis*, 129 Ill. 236; 16 Am. St. Rep. 260; *Griffith v. Utley*, 76 Iowa 292; *Robert v. Western Land Assoc.*, 43 Minn. 3; *Landregan v. Peppin*, 86 Cal. 122; *Poindexter v. Doolittle*, 54 Iowa 52.

For a notice sufficient to comply with the statute requiring that the notice specify a "day certain," on which to make the redemption, see *Hennesey v. Volkening*, 22 N. Y. Supp. 528.

A notice which fails to state for what year the land was taxed and to whom it was taxed, is insufficient as a foundation for a tax deed. *Taylor v. Wright*, 121 Ill. 455; *Brophy v. Harding*, 137 Ill. 621; *Smith v. Buhler*, 121 N. Y. 213. If the published list gives the year at the head, and the owner after each tract, it is sufficient. *Sperry v. Goodwin*, 44 Minn. 207.

2. In *Broughton v. Journeay*, 51 Pa. St. 31, it was held that although written notice might not be essential, the evidence of its service should be preserved in the archives of the treasurer's office as a muniment of title. And that where the witnesses differed as to the fact of notice and the treasurer could not fix the time within less than three months, the proof of notice was insufficient to go to the jury.

3. *Gage v. Waterman*, 121 Ill. 115; *Stillwell v. Brammell*, 124 Ill. 338; *Gage v. DuPuy*, 137 Ill. 652; *Gage v. Webb*, 141 Ill. 533.

4. If the number of the township in which the lands lie is wrongly given, the defect is fatal. *Thompson v. Burhans*, 61 N. Y. 53. If the description is the same as on the tax records and is by reference to a recorded plot of a city, town or subdivision, it is sufficient, even though the county and state are not given. *Sperry v. Goodwin*, 44 Minn. 207. An erroneous state-

ment of the quantity of land will be treated as surplusage, and will not invalidate the notice. *Rowland v. Brown*, 75 Iowa 679.

A description as "W. side, N.  $\frac{1}{2}$  S. E. N. W. 10 acres sec. 8 T. 23 R. 10," is sufficiently certain. *Taylor v. Wright*, 121 Ill. 455.

A description omitted to mention the state, county, or city. The land was described as "lot 8, block 4, of Penniman's Addition." The notice was issued by the auditor of H. county. The tract referred to was commonly known as Penniman's Addition, although platted as "Penniman's Addition to Minneapolis." It was held that the description was sufficient to make the notice good. *Reimer v. Newell*, 47 Minn. 237.

5. *Shoup v. Central Branch, etc., R. Co.*, 24 Kan. 547.

6. *Sperry v. Goodwin*, 44 Minn. 207; *Drake v. Ogden*, 128 Ill. 603.

7. *Wilson v. McKenna*, 52 Ill. 43; *Barnard v. Hoyt*, 63 Ill. 341; *Wisner v. Chamberlin*, 117 Ill. 569; *Gage v. Bailey*, 100 Ill. 530; *Gage v. Stewart*, 127 Ill. 207; 11 Am. St. Rep. 116; *Gage v. Davis*, 127 Ill. 236; 16 Am. St. Rep. 260; *English v. Williamson*, 34 Kan. 212; *Torrington v. Rickershauser*, 41 Kan. 486; *Landregan v. Peppin*, 36 Cal. 122; *Simonton v. Hays*, 32 Hun (N. Y.) 286; *Hill v. Timmermeyer*, 36 Kan. 252.

A mistake of one day in stating the time for redemption in a notice of purchase at a tax sale will invalidate the tax title. *Benefield v. Albert*, 132 Ill. 665. But see *Hicks v. Nelson*, 45 Kan. 51, which held that a notice is not invalidated by the fact that the officer gave by mistake a day too much for redemption.

*Notice Sufficient*.—Where a delinquent tax notice recited that the sale was made September 3d, 1878, and that the owner must redeem on or before

The owner has until the next day and the time should be so stated in the notice.<sup>1</sup>

(2) *Amount Due*.—Where the statute requires that the amount of the redemption money be stated in the notice, a disregard of this requirement, or a mistake in the amount, renders the notice bad.<sup>2</sup>

c. PUBLICATION.—Provision is sometimes made by statute for notice by publication.<sup>3</sup> If notice can be given personally, not-

September 3d, 1881, it was held that full three years were given for redemption by such notice. *Ireland v. George*, 41 Kan. 751; *Hicks v. Nelson*, 45 Kan. 47.

If the sale is made September 7th, 1880, a notice saying that the time will expire September 8th, 1883, is sufficient where three years are given in which to redeem. *Torrington v. Rickershauser*, 41 Kan. 486.

Under a statute requiring that the notice shall specify the expiration of the redemption period, a notice which stated "that the time for redemption from said sale will expire sixty days after service of this notice," was held sufficient. *Parker v. Branch*, 42 Minn. 155.

**Insufficient Notice.**—A notice stating that the land will be deeded "on and after September 5th, 1879, or within three years from the day of sale," is sufficient. *Blackstone v. Sherwood*, 31 Kan. 35.

A notice stating that the time will expire October 26th, when really November 6th is the correct date, is fatally defective. *Gage v. Bailey*, 100 Ill. 530.

Where city lots were sold at a tax sale on September 16th, 1875, for the taxes of 1874, and the notice stated that they were sold at a tax sale "commenced September 7th, and closed September 16th, 1875, and that unless such lots are redeemed before the days limited therefor, they will be conveyed to the purchaser," it was held that the notice was insufficient. *Jackson v. Challiss*, 41 Kan. 247.

A notice which stated the day on which the right of redemption would expire to be the same as that on which it is alleged the sale was made, was held void. *Wilson v. McKenna*, 52 Ill. 43.

1. *Gage v. Davis*, 129 Ill. 236; 16 Am. St. Rep. 260; *Hill v. Timmermeyer*, 36 Kan. 252.

2. A notice stating the amount slightly in excess (one dollar) of that in fact due, has been held, under the *California* statute, not to comply with the statute and therefore not to bar

the right to redeem. *Reed v. Lyon*, 96 Cal. 501.

In *Roberts v. Western Land Assoc.*, 43 Minn. 3, an error in computing interest, which made a difference of three cents only, was said to be too trifling to invalidate the notice.

In *Watkins v. Inge*, 24 Kan. 612, the notice stated the amount erroneously; but no redemption was attempted, no offer was made to redeem, and in the circumstances the notice misled no one and worked no injustice. It was held that the error was unimportant.

3. In *Frew v. Taylor*, 106 Ill. 159, notice by publication was held good, it appearing that there was no occupant within three months before the time of redemption, and that the person in whose name the tax was assessed, could not be found in the county.

An affidavit made more than five months before the expiration of the time for redemption, that no one was in possession of the premises, and that they were vacant and unoccupied at that time, is not sufficient to authorize notice to the owner by publication in a newspaper. *Gage v. Bailey*, 100 Ill. 530.

Under the *Illinois* statute, diligent inquiry must be made before publication. *Burton v. Perry* (Ill. 1893), 34 N. E. Rep. 60.

In *Minnesota*, proof of publication of notice of the expiration of the time for redemption is inadmissible without first proving that it is addressed to the party in whose name the land was assessed, and that it had been delivered to the sheriff for service, and that he had made return thereon to the county auditor. *Mueller v. Jackson*, 39 Minn. 431. See also, as to service by publication under the *Minnesota* statute, *Reimer v. Newall*, 47 Minn. 237.

The fact of non-residence must appear in some way, to authorize notice by publication. *Sweeley v. Van Steenburg*, 69 Iowa 696.



withstanding non-residence, such a notice is generally good, although notice by publication might be equally so.<sup>1</sup>

If the publication is to be in a newspaper printed in the county, one published there answers this description, although actually printed elsewhere.<sup>2</sup> If it is to be in the nearest newspaper to the county, the one published in the town nearest the county line is the proper one.<sup>3</sup> Such statutes generally require that the notice be published a certain number of times at stated intervals.<sup>4</sup> Unless their provisions are complied with, the conveyance to the purchaser at the tax sale is void.<sup>5</sup> Provisions sometimes exist requiring notice by posting, and similar results follow a failure to comply with them.<sup>6</sup>

*f. AFFIDAVIT OF SERVICE AND PUBLICATION.*—Statutes provide sometimes for an affidavit of service or publication, to be filed with the officer whose duty it is to execute the tax deed.<sup>7</sup>

1. *Baker v. Crabb*, 73 Iowa 416. In *Seymour v. Harrison* (Iowa, 1892), 52 N. W. Rep. 114, it was held that a personal service, though made in another state, superseded the necessity for publication.

2. *Nycum v. Raymond*, 73 Iowa 224.

3. *Weer v. Hahn*, 15 Ill. 299.

4. In *Wisconsin*, where the statute requires the publication "at least six months" before the expiration of the period allowed for redemption, it was held that a publication sixteen months before, was within the discretion of the clerk. *Hoffman v. Clark County*, 61 Wis. 5.

The requirements of the *Nebraska* statute for publication in a newspaper at least three times, the first publication not more than five months and the last not less than three before the end of the redemption period, are mandatory. *State v. Gayhart*, 34 Neb. 192.

Where the statute required that an advertisement be published at least six months before the expiration of two years from the sale, at least twice a week for six weeks successively, it was held that the six weeks must be completed six months before the expiration of the two years. *Doughty v. Hope*, 3 Den. (N. Y.) 594; 1 N. Y. 79.

To same effect is *Bennett v. New York*, 1 Sandf. (N. Y.) 485.

5. *Bunner v. Eastman*, 50 Barb. (N. Y.) 639; *Westbrook v. Willey*, 47 N. Y. 457.

But it has been held that the provision requiring land to be advertised six months before the expiration of the time of redemption is directory only, and that failure to comply does not

affect the purchaser's title. *Wright v. Sperry*, 21 Wis. 331.

6. As for example, in *Kansas*, *Stout v. Coates*, 35 Kan. 382.

Where the affidavit of the county treasurer attached to the redemption notices in his office, recites that the notices were posted at four different places in his county, one of which was in his office, it must be assumed in the absence of other testimony that the notices were posted in public places and that one of them was posted in a conspicuous place in his office. *Washington v. Hosp*, 43 Kan. 324; 19 Am. St. Rep. 141.

The notice by posting is complete when the notices are put upon the post. *Washington v. Hosp*, 43 Kan. 324; 19 Am. St. Rep. 141.

7. See the various statutes. The affidavit must be signed. *Lynn v. Morse*, 76 Iowa 665.

It is insufficient if signed by one merely as "agent," without stating for whom he acted. *Taylor v. Wright*, 121 Ill. 455.

The purchaser of land at a tax sale conveyed it by quit-claim deed without either assigning the certificate of purchase, or making proof of the service of notice of the expiration of the period for redemption. It was held that he might still make proof of the service of notice; because, if still the lawful holder of the certificate, he was authorized to make such proof by section 894, *Iowa Code*, and if not such holder, his grantee would be presumed to have authorized his act, which was for the grantee's benefit. *Babcock v. Bonebrake*, 77 Iowa 710.

Such affidavit is then a prerequisite to the validity of the tax deed.<sup>1</sup> Under these statutes the affidavit cannot be made by the proprietor or publisher of the newspaper.<sup>2</sup> If so made, however, the defect is cured by the lapse of the statutory period within which the action to set the deed aside may be brought.<sup>3</sup>

The affidavit must state everything essential.<sup>4</sup> Omissions in

Where the affidavit of service of notice recited that the affiant was agent of the holder of the tax certificate, and the owner of the land accepted service by him, it was held that there was sufficient proof of his authority. *Baker v. Crabb*, 73 Iowa 412.

The mere request of the purchaser at a tax sale made to the foreman of a newspaper in which notice of the expiration of the time for redemption is published, to make affidavit to the fact of such publication and return it to the treasurer, does not constitute such foreman an agent of the purchaser within the meaning of section 894 of the *Iowa Code*. *Chambers v. Haddock*, 64 Iowa 556.

If the affidavit must be recorded, this is done when it is left with the proper officer. His failure to spread it upon his books does not prejudice the purchaser's right. The original affidavit, or if lost, a copy duly proved, is admissible in evidence. *Baker v. Crabb*, 73 Iowa 412.

Under the *Iowa* statute, the affidavit need not recite all the facts required by the statute, nor have attached to it a copy of the notice. *Knudson v. Litchfield* (Iowa, 1893), 54 N. W. Rep. 199.

1. *American Missionary Assoc. v. Smith*, 59 Iowa 704; *Ellsworth v. Cordrey*, 63 Iowa 675; *Smith v. Heath*, 80 Iowa 231; *Wisner v. Chamberlin*, 117 Ill. 568; *Williams v. Underhill*, 58 Ill. 137; *Davis v. Gossnell*, 113 Ill. 121; *Gage v. Hervey*, 111 Ill. 305; *Gage v. Mayer*, 117 Ill. 632; *Lockwood v. Gehlert*, 53 Hun (N. Y.) 15. See also *Rowland v. Brown*, 75 Iowa 679.

The omission to file with the sheriff a sufficient affidavit, as required by statute, before taking a sheriff's deed for land sold for taxes, will not prevent such deed from being claim and color of title required in good faith under the *Illinois* Limitation Act of 1839. *Whitney v. Stevens*, 89 Ill. 53. But where no affidavit of notice can be found in the county clerk's office, a presumption is raised that the notice was not given, and it becomes the duty of a party claiming under a tax deed to prove

that the notice was actually given, in order to constitute himself a holder in good faith. *Dalton v. Lucas*, 63 Ill. 337.

2. *American Missionary Assoc. v. Smith*, 59 Iowa 704; *Adams v. Griffin*, 66 Iowa 125; *Sweeley v. Van Steenburg*, 69 Iowa 696. Compare *Stout v. Coates*, 35 Kan. 382.

And such defect is not cured by the additional affidavit of the holder of the certificate that publication was made for three consecutive weeks, without stating when the publication was made. Such proof of notice does not limit the time within which the owner may redeem. *Ellsworth v. Cordrey*, 63 Iowa 675.

It is sufficient if the affidavit of the holder of the certificate of purchase refers to the annexed affidavit of the publisher, that the printed notice pasted upon the latter was published as required by law. *Smith v. Heath*, 80 Iowa 231; *Stull v. Moore*, 70 Iowa 149.

In *Kansas*, where the printer, who published a tax list and notice, makes affidavit thereof as prescribed by the statute, and such affidavit is filed with the county clerk to be preserved by him, the failure or omission of the county treasurer to make another affidavit of the printing of the list and notice in accordance with the statute, is only an irregularity, and will not affect fatally the tax proceedings. *Stout v. Coates*, 35 Kan. 382.

An affidavit of service on one "as owner," does not comply with the *Illinois* statute which requires an affidavit of service of notice on "the owner." *Stillwell v. Brammell*, 124 Ill. 338.

3. *Trulock v. Bentley*, 67 Iowa 602.

4. *Rowland v. Brown*, 75 Iowa 679; *Davis v. Gossnell*, 113 Ill. 121; *Price v. England*, 109 Ill. 394; *Gage v. Hervey*, 111 Ill. 305; *Stillwell v. Brammell*, 124 Ill. 338; *Caulkins v. Chamberlain*, 37 Hun (N. Y.) 163; *Ellsworth v. Van Ort*, 67 Iowa 222. It must show service upon the proper person. *Brickey v. English*, 129 Ill. 626. It need not state where the service was made, this being immaterial.

the affidavit cannot be cured nor can defects be supplied by parol testimony.<sup>1</sup>

**13. Evidence.**—Tender and payment are matters *in pais*, which may always be shown by parol evidence in order to defeat a tax title.<sup>2</sup> The failure of the officer to file the affidavit of the facts on which the right of redemption is based, will not defeat the redemption; the facts may be proved by other evidence.<sup>3</sup>

Where the law provides that a certificate of redemption shall issue, such certificate is evidence of the fact of payment,<sup>4</sup> but not of the right to redeem, or the age of the redemptioner, or other facts;<sup>5</sup> neither is it a muniment of title in itself.<sup>6</sup> Likewise the books of redemptions are competent evidence,<sup>7</sup> and verified copies of their entries are admissible.<sup>8</sup> The receipt of the proper officer is *prima facie* evidence of redemption;<sup>9</sup> no proof of title need be deduced before the officer to whom redemption money is to be paid. It is enough to show some connection with the title, past or present, by deed, descent, contract, or possession.<sup>10</sup>

**14. Remedies.**—While it is true that redemption need not be sought and cannot be had in a court of equity, in the absence of a statute giving it jurisdiction,<sup>11</sup> it is nevertheless the case that the fact of redemption may be of importance as a matter of claim or defense in suits in equity. The statute sometimes grants power to the court to entertain jurisdiction of a bill to redeem.<sup>12</sup> If such a suit is allowed, it cannot be the means of determining

An affidavit which failed to state who was in possession when the notice was served, has been held to be fatally defective. *Wisner v. Chamberlin*, 117 Ill. 568.

An affidavit "that this affiant served, or caused to be served, written or printed, or partly written and partly printed, notices" is fatally defective. *Brickey v. English*, 129 Ill. 646.

1. *Gage v. Mayer*, 117 Ill. 632.

2. *Cooper v. Shepardson*, 51 Cal. 298. A sufficient foundation for the proof must be laid in the plea for redemption, which must set out facts sufficient to satisfy the statute prescribing the mode of redemption. *People v. Ryan*, 116 Ill. 73.

3. *Chapin v. Curtenius*, 15 Ill. 427.

4. *Henricksen v. Hodgen*, 67 Ill. 179; *Byington v. Rider*, 9 Iowa 569. See also *Rice v. Nelson*, 27 Iowa 148.

It is admissible, however, only when made as required by law. *Shelton v. Dunn*, 6 Kan. 128.

5. *Henricksen v. Hodgen*, 67 Ill. 179.

The county auditor's certificate that the period allowed for redemption has expired, is not of itself sufficient evidence that the notice has been duly given. *Jewell v. Truhn*, 38 Minn. 433.

6. *Boykin v. Smith*, 65 Ala. 294.

7. *Gage v. Parker*, 103 Ill. 528; *Huzard v. Trego*, 35 Pa. St. 9.

8. *Johns v. State*, 55 Md. 350.

9. *Taylor v. Steele*, 1 A. K. Marsh. (Ky.) 316.

The stub of the redemption certificate, kept in the auditor's office, is a "record." *Ellsworth v. Low*, 62 Iowa 178.

10. *Masterson v. Beasley*, 3 Ohio 301.

The officer should receive the money of any one seeking in apparent good faith to redeem, leaving the question of his right for further determination. *Cummings v. Wilson*, 59 Iowa 14.

As to the presumption of notice arising from possession of the deed, see *Fuller v. Armstrong*, 53 Iowa 683; *Chambers v. Haddock*, 64 Iowa 556; *Reed v. Thompson*, 56 Iowa 455; *Ellsworth v. Low*, 62 Iowa 178; *Baker v. Crabb*, 73 Iowa 412.

Where, in an action to redeem, both parties claim title from a common source, the plaintiff need not go behind such source. *McKee v. Spiro*, 107 Mo. 452.

11. *Mitchell v. Green*, 10 Met. (Mass.) 101.

12. *Craig v. Flanagan*, 21 Ark. 319; *Serrin v. Brush*, 74 Iowa 489; *Culver*

the validity of the tax title; that is assumed.<sup>1</sup> If it be brought by a part owner, it need not describe his interest.<sup>2</sup> Such a bill does not lie merely to redeem land from the lien of a tax paid by another part owner.<sup>3</sup> The petitioner must "do equity;" he must be ready to pay all past dues, whether outlawed or not.<sup>4</sup> The decree will be that the purchaser quit-claim to the owner.<sup>5</sup> If tender has been properly made and refused, an injunction will be granted to restrain the execution of the tax deed,<sup>6</sup> or the public officer can be compelled to accept the money and grant the redemption by *mandamus*.<sup>7</sup> If a void tax deed is issued, the claim of the purchaser may be removed as a cloud upon the owner's title,<sup>8</sup> or it may be treated as a nullity and the land recovered from the tax purchaser in an action of ejectment.<sup>9</sup> A law requiring payment of the purchase-money and interest, as a condition precedent to questioning the validity of a tax deed, is unconstitutional.<sup>10</sup> The statutes of many states provide that the right of redemption may be foreclosed.<sup>11</sup> Their provisions must be strictly followed.<sup>12</sup> Only those made parties to a bill to foreclose are bound by the decree.<sup>13</sup> An action to foreclose cannot be maintained after redemption, for the purpose of securing costs.<sup>14</sup> If a tax sale is void, the owner cannot be compelled to

*v. Watson*, 28 N. J. Eq. 548. Such a bill must be brought promptly. *Fuller v. Butler*, 72 Iowa 729.

Under the *Ohio* Act of March 3d, 1831, an action to redeem need name no defendant, and no service was necessary. It was essentially a proceeding *in rem*. *Plumb v. Robinson*, 13 Ohio St. 298.

1. *Chace v. Durfee*, 16 R. I. 248.

But an action to redeem under the *Minnesota* statute, is an action to test the validity of title to land within the statute providing compensation for improvements to occupying claimants in good faith. *Goodrich v. Florer*, 27 Minn. 97.

In *Massachusetts*, an action to redeem lies only after a valid sale. *Smith v. Smith*, 150 Mass. 73. Not so in *Iowa*. *Callanan v. Lewis*, 79 Iowa 452.

2. *Rich v. Palmer*, 6 Oregon 339.

3. *Chace v. Durfee*, 16 R. I. 248.

4. *Barke v. Early*, 72 Iowa 273.

A bill to redeem, setting up the respective interests of the parties and praying that the petitioner be allowed to redeem as provided by law, implies a tender, and where there is no objection to its terms, or to the fact that no tender was actually made, title is re-vested in the owner, and the estate of the purchaser terminated. The purchaser is thereafter liable for rents and profits. *Bender v. Bean*, 52 Ark. 132.

5. *Simonds v. Towne*, 4 Gray (Mass.) 603.

6. *Koon v. Snodgrass*, 18 W. Va. 320.

7. *State v. Haughey*, 5 Kan. 625; *People v. Treasurer of Detroit*, 8 Mich. 14; 77 Am. Dec. 433; *People v. Registrar of Arrears*, 114 N. Y. 19. See also *MANDAMUS*, vol. 14, p. 151.

8. *Smith v. Gage*, 11 Biss. (U. S.) 217; *Reed v. Tyler*, 56 Ill. 288; *Lynn v. Morse*, 76 Iowa 665; *Smith v. Smith*, 150 Mass. 73. For a form in such a suit under the codes of civil procedure, see *Maxwell on Code Pleading*, pp. 676, 677.

9. *Cooper v. Shepardson*, 51 Cal. 298.

10. *Reed v. Tyler*, 56 Ill. 288.

11. *Atkins v. Paige*, 50 Iowa 666.

12. *Peet v. O'Brien*, 5 Neb. 360; *Dayton v. Relf*, 34 Wis. 86; *Durbin v. Platto*, 47 Wis. 484; *Dentler v. State*, 4 Blackf. (Ind.) 258; *Gaylor v. Scarff*, 6 Iowa 179; *McGahan v. Carr*, 6 Iowa 330; 71 Am. Dec. 421; *Byington v. Buckwalter*, 7 Iowa 512; 74 Am. Dec. 279; *Abell v. Cross*, 17 Iowa 171; *Carter v. Hadley*, 59 Miss. 130; *McNish v. Perrine*, 14 Neb. 582.

13. *Coe v. Manseau*, 62 Wis. 81. Thus if a *cestui que trust* is not made a party he may afterwards redeem. *Corrigan v. Bell*, 73 Mo. 53.

14. *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210; 17 Am. St. Rep. 131.

pay redemption money, and, if he does so, he cannot recover the amount so paid.<sup>1</sup>

### XVIII. DISTRIBUTION AND DISPOSITION OF THE AVAILS OF TAXATION

—1. **Settlement Between State and County.**—The county officers must account to the state for the whole amount of the state taxes assessed and levied; if they fail to collect such taxes, the loss must fall upon the county and not upon the state, for the amount remaining uncollected cannot be deducted in the settlement.<sup>2</sup> In the event of delinquencies, suits pertaining thereto

1. *Morris v. Sioux County*, 42 Iowa 416; *Marsh v. St. Croix County*, 42 Wis. 355. The fact that the payment is under protest does not affect the rule. *Shane v. St. Paul*, 26 Minn. 543; *Jones v. Duras*, 14 Neb. 40. But see as stating a doctrine contrary to that of the text, *Clapp v. Pinegrove Tp.*, 138 Pa. St. 35.

Where one tract of land has been sold for taxes due upon another, the owner of the tract which has been sold has a lien upon the other tract for the redemption money. *Cockrum v. West*, 122 Ind. 372.

2. *New York v. Davenport*, 92 N. Y. 604; *State v. Kings County*, 125 N. Y. 312; *Winchester County v. Toyer*, 24 Wis. 312. The relation between the state and the county is that of debtor and creditor, and not that of principal and agent. *Com. v. Philadelphia County* (Pa. 1887), 10 Atl. Rep. 772; *Schuylkill County v. Com.*, 36 Pa. St. 524. But see *Wood v. Monroe County*, 50 Hun (N. Y.) 1; and *State v. Leavenworth*, 2 Kan. 61.

So long as the county is indebted to the state for state taxes, the latter may withhold the amount due the county on account of funds collected by the state for the several townships. *Ottawa County v. Auditor Gen'l*, 69 Mich. 1; 23 Am. & Eng. Corp. Cas. 606. But the county cannot, in an action against it by the auditor general, for state taxes levied and collected by it, set up by way of counter-claim, a demand of its own against the state. *Auditor Gen'l v. Van Tassel*, 73 Mich. 28.

*Mandamus* will lie, on relation of the state treasurer, to compel the treasurer of a county to pay over the state's proportion of taxes collected by him. *State v. Staley*, 38 Ohio St. 259; *People v. Jackson County*, 24 Mich. 237; and a sum of money lost to the state in consequence of the failure of a county treasurer to account for moneys received at a tax sale, may be compulsorily required to be spread on the tax rolls of the

county by the board of supervisors. *People v. St. Clair County*, 30 Mich. 388.

The mere fact of a tax being collected under an improper head and as for the county, will not entitle the county thereto and deprive the state thereof where the full limit of taxes for the county was also collected. *State v. Currituck County*, 107 N. Car. 110.

The board of revenue commissioners of *Pennsylvania* have ample power, under sections 2 and 3 of the act of 1876, to inquire into the corrections of any county's return of personal property subject to state taxation; hence, their decision thereon unappealed from, is conclusive upon both the county and the commonwealth; and the latter is estopped, upon appeal by the former, from an account settled by the auditor general and state treasurer, to set up the claim that the return was grossly below the actual assessment. *Com. v. Philadelphia County* (Pa. 1887), 10 Atl. Rep. 772.

A statute authorizing the state to sell lands which it bid in at a tax sale and held for five years, and to charge back to the proper county any deficiency in the amount bid at such re-sale below the amount bid by the state at the first sale, is invalid in so far as it authorizes losses on previous purchases to be charged back to the county. *Auditor Gen'l v. Ottawa County*, 76 Mich. 295. See also *Aplin v. Shiawassee County*, 74 Mich. 536; *People v. Monroe County*, 36 Mich. 70; *Stevens v. Saginaw County*, 62 Mich. 579. These cases are distinguished from *Aplin v. Van Tassel*, 73 Mich. 28, and *Aplin v. Grand Traverse County*, 73 Mich. 182, in that, in those cases the respondent sought to set off as a counter-claim the money paid to the state for losses upon the sale of state tax lands, and in these cases, such losses are made one of the items in relator's account.

On application for a writ of *mandamus* to compel the board of supervisors

must be prosecuted by the county, or for the benefit of the county.<sup>1</sup>

to assess and collect a sum which the county is alleged to be owing the state, the respondent's claim that an item of the alleged indebtedness is invalid, is not a counter-claim and may be considered. *Aplin v. Shiawassee County*, 74 Mich. 536. But under a constitutional provision that "no money shall be paid out of the treasury except on appropriations made by law, and on warrant drawn by the proper officer," a statute providing for the payment of bounties by a county treasurer for the destruction of certain wild animals or poisonous weeds, and for planting trees, the amount to be credited in his settlement with the state treasurer, is unconstitutional. *Institute for Education of Mute and Blind v. Henderson*, 18 Colo. 98.

Under the tax system of *Michigan*, all unpaid taxes which are returned as delinquent, belong to the state, and the counties have no further concern with, or control over them, except in case any tax is found to be illegal and is lawfully set aside by the proper state authority; and every dollar of taxes returned unpaid, in due course of law is a payment to that extent of the debts due from the county to the state, and the accounting between county and state is upon this basis; but the state is not authorized to charge back to the county because of injunctions, any taxes which have been returned as delinquent, until they have been rejected or held invalid by some competent authority; though if the injunctions were issued under circumstances which left authority in the auditor general to reject them for illegalities, and he actually rejected them for adequate causes, the fact that he did not wait for a decree, would not be important. *People v. Monroe County*, 36 Mich. 70.

Where the manner of dealing between the state and county, shows that no settlement was ever made between the two, and that there was never any express undertaking on the part of the county to pay or allow the accounts containing an item afterwards objected to, the most that can be claimed by the state is an "account stated" which would leave the dealings open to be impeached by the county for fraud or mistake. *White v. Campbell*, 25 Mich.

468; *Stevens v. Saginaw County*, 62 Mich. 579. And see *Aplin v. Midland County*, 84 Mich. 121.

A settlement which is unappealed from and unopened, made with a county by the auditor general and state treasurer, is conclusive, and a credit due the county thereon cannot be diminished by the transfer of a portion to a county subsequently erected out of the former, without that county's consent. *Com. v. Luzerne County* (Pa. 1888), 15 Atl. Rep. 548.

**How Payment to the State May Be Made.**—A statutory provision that payment of the state tax by a county treasurer "may also be made by depositing such money to the credit of the treasurer of the state" etc., does not limit such payment to the mode specified; any mode which brings the money to the official custody of the state treasurer, is lawful and proper. *Phelps v. People*, 72 N. Y. 334.

**Interest on Arrears of Taxes.**—In *New York*, by statute (Sess. 38, ch. 29, § 4) interest runs on arrears of taxes owing by a county, to be calculated after thirty days from the time when the account current is made up and rendered by the comptroller. *People v. New York County*, 5 Cow. (N. Y.) 331. And where it has been customary to charge interest on the annual balances due the state, and, when unpaid, to carry them forward into the account of the ensuing year, of which they form a partial balance, such balances are considered debts due the state, and such method of computing interest is not illegal as compounding it. *Auditor Gen'l v. Ottawa County*, 76 Mich. 295.

A county cannot object to interest charged on items charged back to it by the auditor general where such has been the custom for many years, and it has made no objection to such charges in the annual statements furnished it. *Aplin v. Shiawassee County*, 74 Mich. 536. And see *Mason v. Hazelton Tp.*, 82 Mich. 440.

A judgment against a defaulting tax collector should recite the date from which interest allowed is calculated on public money collected. *Timon v. San Patricio County*, 58 Tex. 263.

1. *Sexton v. Peck*, 48 Iowa 250; *Brown v. Painter*, 44 Iowa 368; *Bur-*

In controversies between the state and a county, growing out of tax proceedings, the state, while represented by the auditor general, is the real party in interest, and, in the legal positions taken, speaks through the attorney general, while the county speaks by its board of supervisors.<sup>1</sup>

County officials are not authorized to deduct fees or costs of collection in accounting with the state.<sup>2</sup> They must make settlement with the state at the time fixed by law, and the state auditor has no power to extend the time.<sup>3</sup> It is not a sufficient accounting for the collector to pay over the money in liquidation of a balance against him in the tax digest of a previous year,<sup>4</sup>

lington v. Burlington, etc., R. Co., 41 Iowa 134; State v. Henderson, 40 Iowa 242.

And where a plaintiff holds the right and claim of the county and state, his right must be determined by the same rule as though the action had been brought by the county. Callanan v. Madison County, 45 Iowa 561.

The county treasurer is the proper relator, in a suit on a share of official bond, to recover taxes collected for school purposes. Clifton v. Wynne, 80 N. Car. 145.

1. Stevens v. Saginaw County, 62 Mich. 579. See also People v. Regents, 4 Mich. 98; Water Com'rs v. Common Council, 33 Mich. 170; Ayers v. State Auditors, 42 Mich. 430; Wood v. Supervisors, 2 N. Y. Supp. 369.

2. When the state treasurer charges to each county the amount of revenue assessed to each for state purposes, the county and state stand in the relation of debtor and creditor, the revenue becomes a debt to be paid in full, and the county cannot burden it with any drawback or percentage for collecting it. Multnomah County v. State, 1 Oregon 358. And a constitutional provision that all taxes must be paid into the state treasury without deduction for commissions or other charges, is self-enforcing. Cunningham v. Moody, 2 Idaho 862. But see Biehn v. Bucks County, 132 Pa. St. 561, where by statute the county treasurer is allowed to retain his commission; and State v. Donnelly, 20 Nev. 214.

**The State Purchaser of Lands at Tax Sale — Liability for County Taxes, or Tax Collector's Fees.**—When the state becomes the purchaser of lands sold for taxes, the sum bid must include the county tax, with interest and penalties incurred; but the state is not liable to the county for this part of the

amount bid, nor is a tax collector entitled, on settlement of his accounts, to a credit for it. The state is never liable for costs or fees, unless expressly given against it by law; and the tax collector is not entitled to fees for levying on and selling the lands bought in by the state. State v. Brewer, 64 Ala. 287. See also State v. Kinne, 41 N. H. 238.

**Penalties.**—Money collected as a penalty, added to delinquent taxes, belongs to the county and state, respectively, in proportion to the amount of the state and county taxes. Hancock County v. State, 119 Ind. 473. See also State v. Jersey City, 50 N. J. L. 359; People v. Reis, 76 Cal. 269; Wood v. Monroe County, 50 Hun (N. Y.) 1.

3. When state tax collectors do not make settlement with the state at the time fixed by law, they are defaulters, and the auditor of the state has no power to extend the time of settlement. State v. Lanier, 31 La. Ann. 423.

**4. Collector's Funds Cannot Be Applied to a Pre-existing Debt.**—Taxes collected and paid into the treasury cannot lawfully be applied to a discharge of a pre-existing debt of the tax collector, on a former account. The collector cannot authorize it, nor can the comptroller apply it to the injury of the sureties of the collector, and the fact that the comptroller was ignorant of the source from which the funds had been received, which he had applied, without instructions from the collector, to his indebtedness for taxes for former years, will not deprive the sureties of the benefit of the payment of such funds into the treasury by their principal. State v. Middleton, 57 Tex. 185. See also U. S. v. Eckford, 1 How. (U. S.) 261; Jones v. U. S., 7 How. (U. S.) 688; U. S. v. January, 7 Cranch (U. S.) 575; Meyers v. U. S., 1 McLean (U. S.) 496; Pickering v.

nor can he escape liability for state taxes collected, because of the invalidity of orders under which they were collected,<sup>1</sup> or by the mistake of the state officials in the accounting.<sup>2</sup> But where a collector has paid over to the state a tax which he has failed to collect, he may recover the same from the person assessed, as money paid to his use.<sup>3</sup> On the general question of the responsibility of a county for the defaults of its treasurer, and what effect laches on the part of the state may have, as between the state and its municipal subdivisions, reference is made to the authorities cited in the notes.<sup>4</sup>

Day, 2 Del. Ch. 367; *Boring v. Williams*, 17 Ala. 525; *Porter v. Stanley*, 47 Me. 518; *Wilkinson v. Bennett*, 56 Ga. 290.

1. The tax, though part of it be illegal and avoidable by the taxpayer, when collected under process and by color of office, cannot be retained by the collector, but must be accounted for to the proper party. *Clifton v. Wynne*, 80 N. Car. 145. See also *Mississippi County v. Jackson*, 51 Mo. 23; *Wilkinson v. Bennett*, 56 Ga. 290; *Fort v. Clough*, 8 Me. 334; *Johnson v. Goodridge*, 15 Me. 29; *Orono v. Wedgewood*, 44 Me. 49; *Hewlett v. Nutt*, 79 N. Car. 263; *Wake County v. Magnin*, 78 N. Car. 181.

In *Sandwich v. Fish*, 2 Gray (Mass.) 298, the court, by Shaw, C. J., says: "Defects on the warrant or tax list might be a good excuse for not executing the warrant. But to say that a collector who has collected the money without objection by the taxpayers, is not liable to account therefor, would be contrary to the rules of law as to justice."

2. The failure of a state auditor, in settling with a tax collector, to include items with which he was justly chargeable, will not bar the state from an appropriate action against the officer; but the error must be shown, as in other cases of mistakes in accounting; it cannot be proved or shown *prima facie*, by a restatement by a succeeding auditor. *Hobson v. Com.*, 1 Duv. (Ky.) 172. See also *Richmond County v. Ellis*, 59 N. Y. 620; *Onondaga County v. Briggs*, 2 Den. (N. Y.) 26; *Arthur v. Adam*, 49 Miss. 404; *U. S. v. Jones*, 8 Pet. (U. S.) 375; *Porter v. School Directors*, 18 Pa. St. 144; *Middletown Tp. v. Miles*, 61 Pa. St. 290; *Burnett v. Portage County*, 12 Ohio 54; *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *Treasurer of Mobile v. Huggins*, 8 Ala. 440.

And the fact that state and county

taxes have been accidentally blended and confused on the tax list, does not exonerate the collector from the duty of paying each tax to the party entitled thereto. *Clifton v. Wynne*, 80 N. Car. 145.

3. *Ward v. Richardson*, 1 Abb. N. Cas. (N. Y.) 449. See also *McCracken v. Elder*, 34 Pa. St. 239. But compare *Wallace's Estate*, 59 Pa. St. 401, where taxes assessed on land under an act making taxes a lien prior to all other charges on the premises, had been paid over by the collector, but were unpaid by the owner. In 1859, the owner confessed judgment to the collector for their amount as collateral, and shortly afterwards died. The land was sold in 1864 by order of the Orphans' Court; there had always, up to the time of the sale, been sufficient personal property on the premises to satisfy the taxes, and the court held that the collector had no priority over liens which preceded his judgment.

**Reclamation of Fees Paid Over by Mistake.**—Under the *Indiana* fee and salary law (Acts 1875, Spec. Sess., p. 37) entitling a county treasurer to five *per centum* on delinquent taxes collected, a county treasurer, by mistake, retained only one *per centum*. *Held*, he was entitled under the assessment law of 1872, §§ 177 and 178, and under the Act of March 31st, 1879, § 5811, R. S. 1881, to an order from the county board for repayment. *Harrison County v. Benson*, 83 Ind. 470.

4. *People v. St. Clair County*, 30 Mich. 387; *Hart Tp. v. Oceana County*, 44 Mich. 417; *Detroit v. Weber*, 26 Mich. 284; *Potter County v. Oswayo Tp.*, 47 Pa. St. 162; *People v. Columbia County*, 10 Wend. (N. Y.) 363. And where a county treasurer reported to the auditor general that the county had used for certain purposes, money paid on sales of lands for state taxes, and the auditor general took his receipt for



**2. Accounting Between Subdivisions of the State.**—It is the duty of the county officials, after settlement with the state, to divide the revenue, collected for other than state purposes, between the county and city, and the various districts to which the taxes collected are to be appropriated, in the proportions provided for by statute.<sup>1</sup>

the same and charged the amount to the county, it was held, on the treasurer becoming a defaulter, that the county must bear the loss, although it had never used the money. *Aplin v. Shiawassee County*, 74 Mich. 536.

The state is not to be prejudiced by the laches of its agents; so where the bond, taken from the county treasurer for the faithful performance of his duties in behalf of the commonwealth, and approved by the judges of the court of quarter sessions, was insufficient, the county was not thereby released from liability to the state. *Schuylkill County v. Com.*, 36 Pa. St. 524; and statute providing that all losses sustained by the default of a county treasurer, in the discharge of the duties imposed upon him, shall be chargeable to the county, covers a default in the treasurer in not paying over the amount due the state on tax sales. *People v. St. Clair County*, 30 Mich. 388.

Where a county treasurer fails to pay over the proceeds, from a state tax, which have come into his hands, the board of supervisors is not required to levy a new tax for the sum retained, until all remedies against the county treasurer and the sureties on his official bond are exhausted, for the money cannot be said to be actually lost, pending such litigation. *People v. Livingston County*, 17 N. Y. 486.

1. A statutory enactment providing for a division of taxes collected and paid into the county treasury, between the county and city in a certain proportion, is not unconstitutional and may be enforced by law. *Logan County v. Lincoln*, 81 Ill. 156; *Springfield v. Power*, 25 Ill. 187.

A county is responsible to a township for township taxes collected by the county treasurer and not paid over by him. *Potter County v. Oswayo Tp.*, 47 Pa. St. 162. But see *Marquette County v. Dillon*, 49 Mich. 244. But not until such taxes have come into the county treasury in a legal way. *Guitard Tp. v. Marshall County*, 4 Kan. 388. And see *Honey Creek Tp. v. Floete County*, 59 Iowa 109. In *Pontiac v. Axford*, 49 Mich. 69, it was held that a city treas-

urer whose duty is to collect taxes and to make return to county treasurer, and who has power to collect unpaid taxes in the name of the city, may pay over the amount of the city tax to the county treasurer, even though the taxes of certain individuals have not been paid. An action may afterwards be maintained against them in the name of the city for the amount of their assessments.

Where the county authorities received and held money under a public law for the benefit of a city, the obligation of the county existed by law and it could not avail itself of the Statute of Limitations in a suit by the city to recover it. *Logan County v. Lincoln*, 81 Ill. 156.

Where a township collector has paid over to the county collector all county taxes levied in the township for a given year, he is not liable to the county for a portion thereof credited by order of the township committee to taxes due from the township for a previous year in which there was a deficit. *State v. Mathe*, 51 N. J. L. 216.

The duty imposed by statute on the county judge and on the mayor of a city, to divide the county revenue between the city and county, is merely ministerial, and on the neglect of those officers to perform the duty, the amount due the city may be ascertained in any other satisfactory manner. *Logan County v. Lincoln*, 81 Ill. 156.

Where a township issuing bonds in aid of a railway is entitled, by statute, to the county taxes collected from the railroad within the township and devoted to payment of the bonds, any diversion of such tax from the lawful object is an injury to the township which may be protected by an action in its behalf. *Bridges v. Sullivan County*, 92 N. Y. 570. And see *Wood v. Monroe County*, 50 Hun (N. Y.) 1.

**Preference of Town Over County.**—In *Winchester County Treasurer v. Tozer*, 24 Wis. 312, the court held that under *Wisconsin R. S.*, ch. 18, a town treasurer is justified in giving preference to the town over the county, where he was not able to collect sufficient taxes to pay both. See also

A treasurer failing to pay over the proper quota may be compelled to do so by *mandamus*,<sup>1</sup> and will be charged with interest thereon from the time it should have been paid.<sup>2</sup>

**3. Appropriations.**—It will be presumed, in the absence of proof to the contrary, that the revenues will be sufficient to meet all appropriations made against them;<sup>3</sup> but the money raised for general purposes by a municipal corporation must first be applied to the payment of current expenses.<sup>4</sup> Generally speaking, a tax raised professedly for one purpose may be applied to any other

*Wolff v. Stoddard*, 25 Wis. 503; *Stahl v. O'Malley*, 39 Wis. 328. But in *New Jersey*, under act 1886, § 83 (N. J. Rev. 1159), the county and state taxes must be paid out of the first moneys collected under the tax levy. *State v. Jersey City*, 50 N. J. L. 359; *State v. Bernards Tp.*, 42 N. J. L. 338.

**County Orders.**—County orders received by a town treasurer in payment of county taxes, belong to the county and not to the town, and the town treasurer cannot hold them for the use of the town, but must deliver them to the county treasurer in his settlement. *Webster v. Oconto County*, 47 Wis. 216. See also *Pelton v. Crawford County*, 10 Wis. 69.

**Where New County is Organized.**—Where a county is organized from territory detached from others, the equities between the new and old counties as to county taxes previously levied, should be adjusted under *Michigan Comp. L.*, ch. 9, p. 226. But township, school district, and road district taxes should be accounted for by the county to which returns were made, and with the respective townships and districts for which they were levied. *Clare County v. Auditor Gen'l*, 41 Mich. 182.

A county liable for a balance to a township set off from it, cannot relieve itself of any share of its liability by compromising with a defaulting treasurer. Such act cannot be treated as an act of agency on behalf of the township. *Roscommon Tp. v. Midland County*, 49 Mich. 454.

1. *Cass Tp. v. Dillon*, 16 Ohio St. 38; *State v. Bernards Tp.*, 42 N. J. L. 338; *State v. Jersey City*, 50 N. J. L. 359. And see *People v. Jackson County*, 24 Mich. 237.

2. *State v. Van Winkle*, 43 N. J. L. 125; *Sheridan v. Stevenson*, 44 N. J. L. 371. See also *People v. Gasherie*, 9 Johns. (N. Y.) 71; *Chenango County v. Birdsall*, 4 Wend. (N. Y.) 453; *Board*

of Justices *v. Fennimore*, 1 N. J. L. 242; *State v. Sooy*, 39 N. J. L. 539.

3. *State v. State Auditor*, 32 La. Ann. 89; *State v. Clinton*, 28 La. Ann. 400. And see *In re Appropriations*, 13 Colo. 316.

Where the whole amount of a city levy is not collected, the portion collected need not be pro-rated between the objects named in the general appropriation ordinance, in the relative proportion that each particular tax bears to the whole sum levied. *Fuller v. Heath*, 89 Ill. 296.

But in order to compel the state auditor by *mandamus* to issue his warrant for an appropriation, it must clearly appear, either that there were funds in the treasury at the date of the appropriation, not otherwise appropriated, or that the legislature provided for the levying of a sufficient tax to pay it within the proper fiscal year. *Henderson v. People*, 17 Colo. 587; *In re Appropriations*, 13 Colo. 316.

Taxes authorized for the current fiscal year and which will be paid within that year, are revenue from which the appropriations from that year may be paid, notwithstanding they cannot actually come into the state treasury until its expiration. *State v. Kenney*, 10 Mont. 488.

4. See *State v. Harvey*, 12 Neb. 31; *East St. Louis v. Board of Trustees*, 6 Ill. App. 130, which was a petition for a *mandamus* to compel the payment of a judgment. And see *Tucker v. Raleigh*, 75 N. Car. 267, in which it was held that when a city exercises its powers of taxation to the utmost, and the amount realized is sufficient to pay only necessary current expenses, no portion of such taxes can be diverted to the payment of antecedent debts.

A general appropriation act to defray the expenses of the executive, legislative, and judicial departments of the state government, must take precedence over an appropriation for the

legitimate purpose,<sup>1</sup> and the legislature may provide for the payment of deficiencies out of other sources of income than a deficiency tax specially levied;<sup>2</sup> but special taxes must go exclusively

Soldiers' and Sailors' Home; but although the appropriation for the Home provides that a part of such sum may be used during a particular year, this does not amount to an appropriation of such sum out of the revenue of that year. *Henderson v. People*, 17 Colo. 587. And see *In re Appropriations*, 13 Colo. 316.

Where, by the charter of a city, a fund raised by annual tax is authorized for the purpose of paying the necessary current expenses and administration, not including payments on account of certain city bonds, a court cannot require such fund to be appropriated to the payment of the bonds. See *St. Louis v. U. S.*, 110 U. S. 321.

1. "There may, perhaps, be an exception where a tax is levied by a special authority from the legislature, or upon the vote of the people, which would not otherwise be lawful. We speak only of a tax levied under the ordinary powers of the county commissioners." *Long v. Richmond County*, 76 N. Car. 273. And under the constitution of *South Dakota*, an act levying a tax for an extraordinary expense, must clearly state its object, and the tax so levied cannot be diverted to any other use. *In re Limitation of Taxation* (S. Dak. 1893), 54 N. W. Rep. 417. And where taxes collected on the assessed valuation of a railroad in a municipality which has issued bonds in aid of its construction, instead of being used by the county treasurer to purchase the bonds, or invested by him as required by the act authorizing their issue in aid of the road, have been applied to the payment of county obligations, the town has an equitable cause of action against the board of supervisors to compel the levying of a tax upon the county for the amount so misappropriated. *Kilbourne v. Sullivan County*, 137 N. Y. 170. And see *Collins v. Henderson*, 11 Bush (Ky.) 74; *Paxton v. Baum*, 59 Miss. 531; *Morgan v. Pueblo, etc.*, R. Co., 6 Colo. 458; *State v. Harvey*, 12 Neb. 31; *Merrill v. Marshall County*, 74 Iowa 24; *Vinton v. Cattaraugus County*, 2 N. Y. Supp. 367; 50 Hun (N. Y.) 600; *Brown v. Hertford County*, 100 N. Car. 92.

In *State v. St. Louis County Ct.*, 34 Mo. 546, it was held that money col-

lected by a county for specific purposes might, by act of the legislature, be diverted to another use. And see *State v. St. Louis, etc.*, R. Co., 9 Mo. App. 532; *St. Louis v. Shields*, 52 Mo. 351; *State v. Brewer*, 64 Ala. 287; *Blanding v. Burr*, 13 Cal. 343; *Graham v. Parham*, 32 Ark. 676.

But county commissioners have no power to appropriate a fund raised by taxation to defray county charges and expenses of the current year, to the erection of permanent county buildings. *State v. Marion County*, 21 Kan. 419. And see *National Bank v. Barber*, 24 Kan. 545; *State v. Haben*, 22 Wis. 660.

But it will not be presumed that a tax levied for parks and boulevards will be expended upon improvements in a town other than that in which it was collected, although it is payable to park commissioners who control boulevards not situated in such town. *Halsey v. People*, 84 Ill. 89.

If the funds raised for a particular purpose have been wrongfully diverted to other purposes, the only remedy of the municipality or government levying taxes, is against those guilty of the wrong-doing. The creditors for whose benefit the tax was levied are not to suffer thereby. *Pope County v. Sloan*, 92 Ill. 177.

2. See *State v. Cobb*, 8 S. Car. 123, where it was held that the legislature could constitutionally provide that the poll tax of any year should be applied to the payment of past due school claims against the county. And in *State v. State Auditor*, 32 La. Ann. 89, it was held that the legislature might provide for the payment of a just debt of the state, out of a surplus of the revenues of any particular year.

A balance of a claim for sheep killed by dogs, after applying all the taxes of the year applicable thereto, may be paid out of the tax of the following year, under *Pennsylvania Act*, May 15th, 1889, providing for the payment to the school fund, of any surplus of the fund amounting to \$100, as the statute does not forbid nor prohibit the carrying forward of the unpaid balance of a former claim. *Nevin v. Dreher School Dist.*, 2 Pa. Dist. Rep. 565; 12 Pa. Co. Ct. Rep. 449.

in the channel directed by the special act,<sup>1</sup> and county commissioners will be enjoined from diverting the sinking fund tax from the purpose for which it was raised, and transferring it to the general fund.<sup>2</sup> Where, by constitutional provision, the revenues of each year must be devoted to the expenses of the same year, an appropriation for the expenses of a joint committee of the preceding legislature, cannot be made from current revenues, by the legislature of the succeeding year.<sup>3</sup> Internal improvements, for which an appropriation is made, must be of a permanent nature and within the state.<sup>4</sup>

1. *Coy v. Lyons*, 17 Iowa 1; *Santee v. Allegheny City*, 10 Pitts. Leg. J. 241; *Louisville v. Murphy*, 86 Ky. 53; *Beck v. Allen*, 58 Miss. 143; *Galma v. Amy*, 5 Wall. (U. S.) 705; *Ranger v. New Orleans*, 2 Woods (U. S.) 128. And see *Clark v. Sheldon*, 106 N. Y. 104.

And when collected and set apart, according to the provisions of the act by which they are authorized, they constitute a trust fund, and the municipality or officer in whose charge they are placed may be enjoined from using them for any other than the designated purpose. *Maenhaut v. New Orleans*, 2 Woods (U. S.) 108; *Ranger v. New Orleans*, 2 Woods (U. S.) 128; *Aurora v. Chicago, etc.*, R. Co., 19 Ill. App. 360; *Bradford v. Chicago*, 25 Ill. 411. And the Statute of Limitations will not run against the party entitled to the fund. *Aurora v. Chicago, etc.*, R. Co., 19 Ill. App. 360.

A county or other municipality is a trustee, so far as it uses the funds or means gathered from its taxpayers, to the extent, at least, of the due collection and application of such funds to the purposes authorized by law. *Winston v. Tennessee, etc.*, R. Co., 1 Baxt. (Tenn.) 60.

Where a tax voted in aid of a railroad remains in the hands of a treasurer as a distinct fund, no judgment can be rendered against the county for its repayment, when forfeited by the railroad company. *Barnes v. Marshall County*, 56 Iowa 20. But where a tax voted in aid of a railway is collected and placed in the general funds of the county, and expended in paying ordinary county indebtedness, its identity is lost and the county is liable for the amount to the railway company or its assignee. *Merrill v. Marshall*, 74 Iowa 24.

2. *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254; *Clark v. Sheldon*, 134 N. Y. 333; 40 Am. & Eng. Corp. Cas. 695. See also, in addition to the

foregoing cases, *Morton v. Comptroller Gen'l*, 4 S. Car. 430; *People v. Cairo*, 50 Ill. 154; *Wood v. Monroe County*, 2 N. Y. Supp. 369; 50 Hun (N. Y.) 1.

Where a city is limited by its charter to the levying of a certain per cent., a designated portion of which is required to be applied to the payment of its bonded indebtedness, if the city levies a less amount than that limited, it must apply the same proportion of the amount levied to its bonded indebtedness as it would have applied had the whole amount been levied. *East St. Louis v. Underwood*, 105 Ill. 308.

3. See *Klein v. Johnson*, 33 La. Ann. 587. But the effect of an act which, after appropriating a certain sum for a certain legal purpose, payable in annual installments, provides that "out of all state taxes collected, one-half of one mill on every dollar shall be set apart of the general funds as a fund to meet" said sum, is merely to diminish the general fund tax by the amount it levies, and does not violate the constitutional provision. *Harris v. Dubuclet*, 30 La. Ann. 662. Such a provision does not repudiate the subsisting obligations of the state if the legislature fails to provide an annual revenue sufficient to pay them. The effect of such neglect would be that a subsequent legislature would, by taxation and appropriations, provide for their payment. *State v. Johnson*, 28 La. Ann. 511. And see *State v. New Orleans*, 29 La. Ann. 863; and *State v. State Auditor*, 32 La. Ann. 89.

In *California*, each year's income and revenue of a municipality must pay each year's indebtedness and liability, and no indebtedness or liability incurred in any one year can be paid out of the income or revenue of any future year. *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641.

4. Appropriations for transient objects, such as for personalty, or for the World's Fair, or to defray current ex-

**XIX. REMEDIES FOR ERRONEOUS AND ILLEGAL TAXATION—1. Remedies of the State—***a. REMEDIES BY LEGISLATIVE ACTION.*—Defects in a law authorizing a tax may be remedied by amendments, so as to affect any tax levied thereunder which has not yet been collected.<sup>1</sup>

Subject to the constitutional restrictions upon local and special legislation,<sup>2</sup> defective or irregular proceedings in the exercise of a valid authority to levy, assess, or collect taxes,<sup>3</sup> and even the lack of such authority,<sup>4</sup> may be cured retrospectively by an act of the

penses in carrying on state institutions, cannot be made from such fund. *In re Internal Improvements*, 18 Colo. 317. But an appropriation to exhibit the resources and progress of the state at the World's Fair, is for a public or governmental purpose. *Norman v. Kentucky Board of Managers*, etc. (Ky. 1892), 20 S. W. Rep. 901.

1. *Cowgill v. Long*, 15 Ill. 202; *Boardman v. Beckwith*, 18 Iowa 292.

2. See CONSTITUTIONAL LAW, vol. 3, pp. 670, 695; STATUTES, vol. 23, p. 140.

3. *Allen v. Archer*, 49 Me. 346; *Hart v. Henderson*, 17 Mich. 218; *People v. Ingham County*, 20 Mich. 95; *Butler v. Saginaw County*, 26 Mich. 22; *Vaughan v. Swayzie*, 56 Miss. 504; *State v. Love*, 47 N. J. L. 436; *Tift v. Buffalo* 82 N. Y. 204; *Russel v. Wernitz*, 24 Pa. St. 337.

Thus, the legislature may prescribe a mode of correcting and enforcing an informal assessment. *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *People v. McCreery*, 34 Cal. 432; *Muselman v. Logansport*, 29 Ind. 533. See remarks *obiter* in *People v. San Francisco Sav. Union*, 31 Cal. 132; or may simply ratify, confirm, and relevy the tax. *Newman v. Emporia*, 41 Kan. 583; *People v. Bleckwenn* (Supreme Ct.), 7 N. Y. Supp. 914; *Francklyn v. Long Island City*, 32 Hun (N. Y.) 451; *Van Deventer v. Long Island City*, 10 N. Y. Supp. 801; 57 Hun (N. Y.) 590. See *infra*, this title, *Reassessment*.

Failure of the assessors to make the required affidavit, or to subscribe to it, or to attach it to the rolls, can be validated. *In re Lamb*, 51 Hun (N. Y.) 633; *In re East Ave. Baptist Church* (Supreme Ct.), 11 N. Y. Supp. 113; *Smith v. Hard*, 61 Vt. 469.

The *Illinois* statute (Rev. Stats. 1891, ch. 20, § 191), which provides that no tax shall be vitiated by any error or informality not affecting the substantial justice of the tax itself, does not apply

to taxes levied before the law was passed. *Gage v. Nichols*, 135 Ill. 128.

Assessment of corporation property, as of a partnership of which those who organized the corporation were members, is an irregularity which may be cured under the *Michigan* statute. *Petrie Lumber Co. v. Collins*, 66 Mich. 64.

As to the unconstitutionality of an act which, in making the tax deed conclusive evidence of the regularity of all prior proceedings, deprives one of his property without due process of law so far as respects the essential prerequisites for the exercise of the taxing power, such as assessment, levy, sale, and the like, see *McCreedy v. Sexton*, 29 Iowa 356, wherein it is said also that, as to non-essentials or matters purely directory, the legislature may cure irregularities. In this case the subject is discussed at length by *Cole, J.*

The power of the legislature to validate a tax, extends also the interest which has accrued upon it. *Collins v. Long Island City*, 9 N. Y. Supp. 866; 56 Hun (N. Y.) 647.

4. Lack of authority can be cured if the authority could have been given in the first instance. *Kunkle v. Franklin*, 13 Minn. 127; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433; 98 Am. Dec. 237; *Hewitt's Appeal*, 88 Pa. St. 55; *Bellows v. Weeks*, 41 Vt. 590. But acts which could not have been authorized cannot be confirmed. *Commercial Nat. Bank v. Iola*, 9 Kan. 689. And see cases cited in last note.

If a tax authorized to be levied for a specified number of years, be levied after the expiration of that period, the levy can be validated by statute. *Louisville, etc., R. Co. v. Bullitt County* (Ky. 1891), 17 S. W. Rep. 632.

Lack of authority to levy a tax cannot, however, be validated by an act intended to cure irregularities in proceedings for the enforcement of taxes,

legislature, provided no injustice be inflicted thereby;<sup>1</sup> and a proceeding once so validated cannot be subsequently invalidated by a repeal of the validating act.<sup>2</sup> No void acts,<sup>3</sup> however, or unconstitutional exercises of power,<sup>4</sup> nor any omissions to perform acts essential to the validity of a tax can be cured by this means.<sup>5</sup> Thus, the want of an assessment,<sup>6</sup> or of a valuation,<sup>7</sup> cannot be cured, nor can a void assessment be validated.<sup>8</sup> The legislature has, moreover, no power to obviate jurisdictional defects in tax proceedings by establishing conclusive rules of evidence.<sup>9</sup>

as distinguished from their levy. *Bert-hold v. Hoskins*, 38 Fed. Rep. 772.

1. *Forster v. Forster*, 129 Mass. 559; *Mattingly v. District of Columbia*, 97 U. S. 687; *Albany City Nat. Bank v. Maher*, 20 Blatchf. (U. S.) 341.

2. *Lewis v. Eastford*, 44 Conn. 477.

3. The act of an officer or board who had no jurisdiction, is void, and cannot be validated. *People v. Goldtree*, 44 Cal. 323; *Hart v. Henderson*, 17 Mich. 218; *Dean v. Borchsenius*, 30 Wis. 236.

A district not legally constituted cannot authorize taxes, and hence the acts of assessors under claim of authority from such a district, are void, and cannot be validated. *Withington v. Eveleth*, 7 Pick. (Mass.) 106; *Dickinson v. Billings*, 4 Gray (Mass.) 42. So in the case of an assessment against a person not residing in the district. *Herriman v. Stowers*, 43 Me. 497; *Freeman v. Kenney*, 15 Pick. (Mass.) 44; *Baker v. Allen*, 21 Pick. (Mass.) 382. So of land outside the taxing district, even though the limits were subsequently enlarged so as to include the land. *Atchison, etc., R. Co. v. Maquilkinn*, 12 Kan. 301. So in the case of a single assessment of the lands of two persons. *Hamilton v. Fond du Lac*, 25 Wis. 495.

4. *Adams v. Lindell*, 5 Mo. App. 197; *People v. White*, 24 Wend. (N. Y.) 540; *Matter of Union College*, 129 N. Y. 308. An unconstitutional tax or one for an illegal purpose cannot be validated. *Cooley on Taxation* 303; *Commercial Nat. Bank v. Iola*, 9 Kan. 696; *Dean v. Borchsenius*, 30 Wis. 236; *Plumer v. Marathon County*, 46 Wis. 163.

5. Thus the assessment of land of a non-resident in the column for residents, the assessment in the name of a deceased owner's estate instead of the name of his devisee, and the signing and delivery of tax-warrants, by the board of supervisors, in blank, are jurisdictional defects, which the legis-

lature cannot cure. *Cromwell v. Wilson*, 5 N. Y. Supp. 474; 52 Hun (N. Y.) 614. See the two next notes.

6. *Schumacker v. Toberman*, 56 Cal. 508; *Stewart v. Shoenfelt*, 13 S. & R. (Pa.) 360; *Bratton v. Mitchell*, 1 W. & S. (Pa.) 310; *Miller v. Hale*, 26 Pa. St. 432; *McReynolds v. Longenberger*, 57 Pa. St. 13. But a failure of the assessor to sign his roll, may be validated. *Townsen v. Wilson*, 9 Pa. St. 270.

It has been held in *Illinois*, that the failure of an assessor to return his list within the prescribed time cannot be cured. *Marsh v. Chesnut*, 14 Ill. 223. But the contrary has been held in *Indiana*, *Musselman v. Logansport*, 29 Ind. 523; and *Mississippi*, *Fanning v. Funches*, 60 Miss. 541.

7. *People v. San Francisco Sav. Union*, 31 Cal. 132.

8. *People v. Holaday*, 25 Cal. 300; *Taylor v. Palmer*, 31 Cal. 240; *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677; *Schumacker v. Toberman*, 56 Cal. 510; *Mowry v. Blandin*, 64 N. H. 3; *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Cromwell v. Wilson*, 5 N. Y. Supp. 474; 52 Hun (N. Y.) 614.

9. *Cooley on Taxation* (2d ed.), p. 299. Thus, although a tax deed may be made *prima facie* evidence of the regularity of the proceedings which preceded and attended the sale, it cannot be made conclusive evidence. *White v. Flynn*, 23 Ind. 46; *Corbin v. Hill*, 21 Iowa 70; *McCready v. Sexton*, 29 Iowa 356; *Powers v. Fuller*, 30 Iowa 476; *Ware v. Little*, 35 Iowa 234; *Taylor v. Miles*, 5 Kan. 498; *Groesbeck v. Seeley*, 13 Mich. 329; *Abbott v. Lindenbower*, 42 Mo. 162; *Abbott v. Lindenbower*, 46 Mo. 291; *Wright v. Cradlebaugh*, 3 Nev. 341; *Newell v. Wheeler*, 48 N. Y. 486.

As to the manner in which the sale was conducted, a tax deed may be conclusive evidence. *Ware v. Little*, 35 Iowa 234; *Jeffrey v. Brokaw*, 35 Iowa 505; *Sibley v. Bullis*, 40 Iowa 429.

If the time within which certain acts must be done be extended by a curative act, they must be done within the extended period in order to be valid.<sup>1</sup>

*b. REASSESSMENT.*—It is generally provided by statute that when, in the course of proceedings to annul an assessment or to recover money paid for taxes, it is judicially decided that, although the tax itself is lawful,<sup>2</sup> the assessment is invalid as to a part<sup>3</sup> of the property listed, a reassessment shall be made,<sup>4</sup> and in some states, proceedings must be stayed until this is done,<sup>5</sup> but such reassessment cannot be made conclusive evidence of the amount justly due from the plaintiff.<sup>6</sup>

A reassessment may also be made directly by a curative act of the legislature, where the assessment was irregular,<sup>7</sup> or unauthorized,<sup>8</sup> or made under a defective law,<sup>9</sup> or even where it was inadequate.<sup>10</sup>

In some states, the assessor may reassess of his own motion,<sup>11</sup>

And all non-jurisdictional defects may be remedied by making tax deeds conclusive evidence that the sale and proceedings priorthereto were regular. *Ensign v. Barse*, 107 N. Y. 329.

1. *Osburn v. Hide*, 68 Miss. 45.

2. If the tax has been levied unconstitutionally or for illegal purposes, or upon exempt property, or has been already paid, no reassessment is possible. *Dean v. Charlton*, 23 Wis. 590; 99 Am. Dec. 205; *Dill v. Roberts*, 30 Wis. 178; *Dean v. Borchsenius*, 30 Wis. 238; *Plumer v. Marathon County*, 46 Wis. 163.

3. *Brevoort v. Detroit*, 24 Mich. 322; *Dean v. Charlton*, 27 Wis. 522.

4. *Dean v. Charlton*, 23 Wis. 590; 99 Am. Dec. 205; *Dill v. Roberts*, 30 Wis. 178; *Whittaker v. Janesville*, 33 Wis. 76; *Marsh v. Clark County*, 42 Wis. 502.

Local assessments may be reassessed, as well as general taxes. *Brevoort v. Detroit*, 24 Mich. 322.

A reassessment will be ordered where the original assessment is void for inequality. *Tallman v. Janesville*, 17 Wis. 71.

The fact that the property has changed hands since the original assessment was made, is no bar to a reassessment. *Tallman v. Janesville*, 17 Wis. 71; *Cross v. Milwaukee*, 19 Wis. 509.

It is within the power of the legislature to provide that when a just and valid reassessment has been made *pendente lite*, judgment for the taxpayer shall be conditioned upon payment of the tax as reassessed. *Warden v. Fond du Lac County*, 14 Wis. 618; *Kellogg*

*v. Oshkosh*, 14 Wis. 623; *Myrick v. La Crosse*, 17 Wis. 442; *Howes v. Racine*, 21 Wis. 514; *Plumer v. Marathon County*, 46 Wis. 184.

5. *Plumer v. Marathon County*, 46 Wis. 163; *Flanders v. Merrimack*, 48 Wis. 567; *Single v. Stettin*, 49 Wis. 645; *Kingsley v. Marathon County*, 49 Wis. 649; *Johnston v. Oshkosh*, 65 Wis. 473.

In such a case it is error to proceed to judgment without awarding a reassessment. *Monroe v. Fort Howard*, 50 Wis. 228.

6. *Plumer v. Marathon County*, 46 Wis. 163; *Newman v. Emporia*, 41 Kan. 583; *People v. Bleckwenn* (Supreme Ct.), 7 N. Y. Supp. 914; *Francklyn v. Long Island City*, 32 Hun (N. Y.) 451; *Van Deventer v. Long Island City*, 10 N. Y. Supp. 801; 57 Hun (N. Y.) 590.

7. *Mills v. Charlton*, 29 Wis. 400; *Dean v. Borchsenius*, 30 Wis. 236.

A constitutional provision for an assessment in every fifth year does not prevent a reassessment within the five years. *Ex p. Lynch*, 16 S. Car. 32.

8. *State v. Newark*, 34 N. J. L. 236. *Matter of Van Antwerp*, 56 N. Y. 261; *Mills v. Charlton*, 29 Wis. 400.

9. *Lang v. Kiendl*, 27 Hun (N. Y.) 66; *Spencer v. Merchant*, 100 N. Y. 585; 125 U. S. 345.

10. *Butler v. Toledo*, 5 Ohio St. 225.

11. *State v. Northern Belle Mill, etc., Co.*, 15 Nev. 385; *Himmelmänn v. Cofran*, 36 Cal. 411; *Bangor v. Lancey*, 21 Me. 472; *Pond v. Negus*, 3 Mass. 230; 3 Am. Dec. 131; *Libby v. Burnham*, 15 Mass. 144; *Tweed v. Metcalf*, 4 Mich. 579.

to correct an invalid assessment, or it may be requested by a person in interest,<sup>1</sup> or ordered by a superior authority.<sup>2</sup>

A reassessment must be made upon the same valuation as the original assessment,<sup>3</sup> and in strict accordance with statutory requirements,<sup>4</sup> and it is similarly subject to review both by the board of equalization and the courts.<sup>5</sup> The tax reassessed is due as from the time when it should have been first assessed.<sup>6</sup> Property not within the taxing district when the original assessment was made cannot be reached by a reassessment.<sup>7</sup>

The term reassessment is sometimes used for the assessment of property which has been omitted from the list in some previous year, when such assessment is made in a subsequent year for that when the omission occurred;<sup>8</sup> and also for a second local assessment upon delinquent property to cover the deficiency caused by such delinquency.<sup>9</sup>

**2. Remedies of the Taxpayer**—*a. GENERAL RIGHTS OF THE TAXPAYER AS TO REMEDIES.*—There is an important distinction between those provisions of a tax law which are intended for the protection of the taxpayer, and those which seek to promote the efficiency of the tax-collecting service. If the former be violated, the tax is illegal, but although infractions of the latter may be

The circumstance that in the assessment of a tax, some individuals are assessed who are not liable to the tax, does not vitiate the assessment as respects those who are liable; and a second assessment made for the purpose of rectifying the error is illegal and void. *Inglee v. Bosworth*, 5 Pick. (Mass.) 498.

1. If a reassessment be made for alleged errors, on the request of a person interested, he cannot afterwards question the authority of the assessors to make the reassessment. *Burr v. Wilcox*, 13 Allen (Mass.) 269.

2. In states under township organization, a township must pay the cost of a reassessment rendered necessary by errors, though such reassessment was ordered by the county board. *Crawford County v. Huls*, 12 Ill. App. 406.

The comptroller may order a relevy where the tax is invalid because the assessor's oath is defective or has been omitted, and no error has been alleged till after the "grievance days" had elapsed. *People v. Wemple*, 53 Hun (N. Y.) 197.

3. *Davis v. Boston*, 129 Mass. 377. See *Scheiber v. Kaehler*, 49 Wis. 291.

4. *People v. Goff*, 52 N. Y. 436.

5. *Cooley on Taxation* 311; *Plumer v. Marathon County*, 46 Wis. 163.

Where the taxpayer has paid part of the taxes already assessed, the same will be credited, with interest, to the payment of the taxes newly assessed. *Tallman v. Janesville*, 17 Wis. 71.

6. *Plumer v. Marathon County*, 46 Wis. 163. See *Hubbard v. Garfield*, 102 Mass. 72.

Hence the lien of a tax reassessed on real estate relates back to the time the original assessment should have been made. *Peters v. Myers*, 22 Wis. 602; *Simmons v. Aldrich*, 41 Wis. 241.

7. *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81.

8. *Allwood v. Cowen*, 111 Ill. 481; *State v. Louisiana Sav. Bank, etc., Co.*, 32 La. Ann. 1137; *Overing v. Foote*, 43 N. Y. 294; *People v. Board of Assessors*, 92 N. Y. 430; *Shelby County v. Mississippi, etc., R. Co.*, 16 Lea (Tenn.) 401.

In *Tennessee*, where the owner of property disputes such subsequent assessment, either as to the amount or as to his liability to taxation, he has ten days in which to have a reassessment before the judge or chairman of the county court. No continuance to a time beyond the ten days can be granted on application of the person assessed. *Warner Iron Co. v. Pace*, 89 Tenn. 707.

9. *Ayer v. Lake*, 11 Ill. App. 564.



punishable offenses, they do not prejudice the taxpayer.<sup>1</sup> Hence, no informality, irregularity, or error of any public officer or servant in regard to the assessment, levying, or collection of taxes, impairs the validity of the tax or its assessment, unless the justice of the tax itself be in any degree affected,<sup>2</sup> and

1. *Torrey v. Millbury*, 21 Pick. (Mass.) 64. See also *State Auditor v. Jackson County*, 65 Ala. 142, 152.

2. *Thatcher v. People*, 79 Ill. 597; *Law v. People*, 87 Ill. 385; *Union Trust Co. v. Weber*, 96 Ill. 351; *Bittinger v. Bell*, 65 Ind. 445; *Westhampton v. Searle*, 127 Mass. 502; *Bemis v. Caldwell*, 143 Mass. 299; *Stockle v. Silsbee*, 41 Mich. 615; *Brigins v. Chandler*, 60 Miss. 862; *Bradley v. Ward*, 58 N. Y. 401; *Scheiber v. Kaehler*, 49 Wis. 291.

Hence, merely formal objections to taxes levied will not be entertained. *Purrington v. People*, 79 Ill. 11; *State v. Jersey City*, 24 N. J. L. 108; *State v. Taylor*, 35 N. J. L. 184; *State v. Runyon*, 41 N. J. L. 98.

The Iowa statute, providing that where land has not been assessed by the proper officer, the owner shall have this done, and that no irregularity in the assessment shall affect the legality of the tax, renders it the owner's duty to see that the assessment is correct. *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153. See also *Patterson v. Baumer*, 43 Iowa 477. So, under the Maine statute, a mistake in the name of the party assessed is within the provision that no assessment shall be void for error in the making or because money is not raised for a legal object; but that the taxpayer may sue the town for damages caused by such an error. *Farnsworth Co. v. Rand*, 65 Me. 19. And under the Massachusetts statute, providing that in case of any error in the name of the person on the assessor's list, the tax may be collected of the person whom the tax was intended to cover, all cases of error in a name are embraced, in whatever list occurring, *Tyler v. Hardwick*, 6 Met. (Mass.) 470; and a party assessed can be identified by parol evidence. *Westhampton v. Searle*, 127 Mass. 502.

**Instances of Immaterial Errors.**—Where the councils of a city, through inadvertence, did not determine the amounts and levy the taxes, nor file nor correct the assessment roll, until a time beyond that fixed by the city charter, it was held that these irregu-

larities would not avoid the tax, even at law; still less would they entitle the plaintiff to relief in equity. *Mills v. Johnson*, 17 Wis. 598.

The fact that the city taxes were levied after the usual time, or later than they ought to have been, there being no act of limitations, is not ground for enjoining tax proceedings. *Hallo v. Helmer*, 12 Neb. 87.

Where in a levy of taxes, the several estimated objects of expenditure, and the rate for each, are set out in detail, instead of being, as contemplated by the statute, grouped together under the single head of "general fund," it is at most a mere irregularity, in no way invalidating the tax. *Burlington etc., R. Co. v. Lancaster County*, 12 Neb. 324.

Where the board of supervisors had ordered certain specified taxes spread upon the rolls, it was held that the fact that others were added would not invalidate the tax without an affirmative showing that they were not duly authorized. *Hunt v. Chapin*, 42 Mich. 24.

The omission to return a local levy does not affect the substantial justice of the tax. *St. Louis, etc., R. Co. v. Surrell*, 88 Ill. 535.

Accidental omissions from taxation of persons or property that should be taxed, arising from mistakes of fact or errors of judgment through the negligence or default of officers, will not vitiate the tax. *People v. McCreery*, 34 Cal. 432; *Schofield v. Watkins*, 22 Ill. 66; *Merritt v. Farris*, 22 Ill. 311; *Dunham v. Chicago*, 55 Ill. 361; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *Watson v. Princeton*, 4 Met. (Mass.) 602; *State v. Platt*, 24 N. J. L. 108; *State v. Randolph*, 25 N. J. L. 431; *People v. Brooklyn*, 16 Hun (N. Y.) 196; *Insurance Co. v. Yard*, 17 Pa. St. 331; *Speer v. Brain-tree*, 24 Vt. 414; *Weeks v. Milwaukee*, 10 Wis. 262; *Dean v. Gleason*, 16 Wis. 1; *Hersey v. Milwaukee County*, 16 Wis. 185; 82 Am. Dec. 713; *Bond v. Kenosha*, 17 Wis. 284; *Smith v. Smith*, 19 Wis. 615; 88 Am. Dec. 707; *Hale v. Kenosha*, 29 Wis. 599; *Marsh v. Clark*

County, 42 Wis. 510; *Muscatine v. Mississippi, etc.*, 1 Dill. (U. S.) 542.

Omissions made by the taxing officers will not invalidate the assessment. *Plumer v. Marathon County*, 46 Wis. 163.

Though a tax is vitiated by discrimination in the valuation of property made in intentional disregard of law, it is not necessarily vitiated by discrimination arising from mistake of fact or errors in computation or judgment. *Brauns v. Green Bay*, 55 Wis. 113.

If there be no evidence to show that the property assessed be not taxable in the taxing district, nor that the assessment was greater than the taxpayer could justly be called upon to pay, it is immaterial whether the assessment was made precisely as directed by the statute or not. *Pacific Hotel Co. v. Leib*, 83 Ill. 604. In such a case the assessment will not be set aside on *certiorari*, nor the collection restrained by injunction. *State v. Morris*, 48 N. J. L. 99; *Union Pac. R. R. Co. v. Lincoln County*, 2 Dill. (U. S.) 279.

A formal assessment, even if it does not in every respect conform precisely to the requirements of the statute, will, in an equitable proceeding, support a levy of taxes, otherwise legal. *Stephenson County v. Manny*, 56 Ill. 160; *Wood v. Helmer*, 10 Neb. 65; *South Patte Land Co. v. Crete*, 11 Neb. 344; *Hallo v. Helmer*, 12 Neb. 89.

The legality of a tax is not affected by a mere circumstantial error or defect in making up the list, or in consequence of any error of judgment in the listers, in determining any question which is within their legitimate discretion. *Henry v. Chester*, 15 Vt. 460; *Downing v. Roberts*, 21 Vt. 441.

That several distinct taxes are blended together in an assessment, and that the duplicate does not show directly the value per acre of the land assessed, are errors in form only, and do not warrant setting the assessment aside. *State v. Bishop*, 34 N. J. L. 45.

Where the statute directs that the roll shall have two columns for value, and it contains but one, this is a mere irregularity. *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Case v. Dean*, 16 Mich. 12; *Wall v. Trumbull*, 16 Mich. 228.

The requirement as to the form of assessment on the duplicate is directory,

and the taxes will not be set aside for variations or omissions. *State v. Manning*, 41 N. J. L. 275.

A bank tax for "money on hand, at interest or on deposit," will not be abated on appeal, for the assessors' omission of the statutory words, "surplus capital." *First Nat. Bank v. Concord*, 59 N. H. 75.

The form of statement adopted in the list is a matter resting altogether in the discretion of the listers, and they are only liable for errors purposely made, out of malice to the party injured. *Stearns v. Miller*, 25 Vt. 20.

In *Ohio*, a chose in action omitted from the list may be put in by the auditor. *Cameron v. Cappeller*, 41 Ohio St. 533.

The imperfect statement in the tax roll of the facts ascertained by the assessment, does not affect the liability to the tax. *George v. Dean*, 47 Tex. 73.

Error in stating the quantity of land will not vitiate the assessment. *Gilman v. Riopelle*, 18 Mich. 145; *Williston v. Colkett*, 9 Pa. St. 38; *Brown v. Hays*, 66 Pa. St. 229.

An assessment of an unseated tract by its proper number in the name of the original warrantee is sufficient, though the number of acres contained in it are misstated. *Williston v. Colkett*, 9 Pa. St. 38; *Brown v. Hays*, 66 Pa. St. 229; *Putnam v. Tyler*, 117 Pa. St. 570. See *Wells v. Austin*, 59 Vt. 157.

An assessment will not be vacated merely because one of the tenants in common was named as owner. *Fleischauer v. West Hoboken*, 40 N. J. L. 109.

Listing the name of a person other than the owner (*Stilz v. Indianapolis*, 81 Ind. 582), or making a mistake in the name of the owner, not calculated to mislead, will not invalidate the assessment. *Pierce v. Richardson*, 37 N. H. 306; *Carpenter v. Dalton*, 58 N. H. 615; *State v. Matthews*, 40 N. J. L. 269; *Van Voorhis v. Budd*, 39 Barb. (N. Y.) 479.

The omission of the official title of the assessor after his signature to the oath to his official return of the valuation of real estate, and the absence of the official seal of the county clerk on the jurats to the oath of the assessor attached to such return, and upon the affidavit of publication of the tax levy and tax sale, are mere irregularities, and will not invalidate the tax proceedings based upon them. *Shoup v.*

then only to the extent to which injustice may have been done.<sup>1</sup>

It may be stated as a general rule that a taxpayer cannot, ordinarily, dispute an assessment based upon a return which he has himself furnished;<sup>2</sup> nor if he has failed to comply with his obligation to make the return required of him,<sup>3</sup> or has made it

Central Branch U. P. R. Co., 24 Kan. 547.

An irregularity in issuing notice of the meeting of the county clerks, who are to act as a board of assessors, will not invalidate a tax. *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210.

The failure of a board of review to notify a taxpayer before increasing the assessor's valuation of his property is merely an irregularity, not available in equity to avoid the tax, without proof of substantial injustice. *Marsh v. Clark County*, 42 Wis. 502; *McIntyre v. White Creek*, 43 Wis. 620. As to sufficiency of notice left in the town clerk's office, see *Stearns v. Miller*, 25 Vt. 20.

A sale of property for taxes will not be enjoined on account of irregularities in the matter of notice of time and place of sale. *Finnegan v. Fernandez*, 15 Fla. 379.

An informality in the organization of the meeting of the electors or board may be ratified by a subsequent meeting so as not to affect the tax levied at such meeting. *Jordan v. School Dist.*, 38 Me. 164.

Mere clerical mistakes will not vitiate an assessment. *Atkins v. Hinman*, 7 Ill. 451.

A resident of one place, doing business in another, cannot enjoin the collection of a tax on personalty assessed in the former, unless he shows that it is in fact assessed in the latter place also. *Skeel v. Thompson*, 9 How. Pr. (N. Y.) 478.

It is held in *New Jersey*, that a taxpayer whose property is assessed at a higher rate than that of others should apply to have their assessments raised, and cannot have a *certiorari* to review the assessment in his own case. *State v. Randolph*, 25 N. J. L. 427; *State v. Taylor*, 35 N. J. L. 189; *State v. Koster*, 38 N. J. L. 308; *State v. Segoine*, 53 N. J. L. 339.

1. *Van Vorst v. Quaife*, 23 N. J. L. 89; *State v. McClung*, 27 N. J. L. 253; *State v. Bishop*, 34 N. J. L. 45.

*Massachusetts* Pub. Sts. 1882, ch. 11, § 84, provide that an excessive assessment is void only to the extent of the

illegal excess. But this does not affect the question of whether a tax on land should be regarded as integral or as a distinct tax on each parcel, and this question may affect the validity of the tax. *Schwarz v. Boston*, 151 Mass. 226.

Where more tax is assessed than was authorized, the assessment will be set aside, as to such excess, and a proportionate abatement made from the tax of each individual; but the assessment, as to the residue, will be affirmed. *State v. Randolph*, 25 N. J. L. 427.

If a part of the tax was valid and a part void, and the void part can be distinguished, the plaintiff is entitled to recover back only that part. *Torrey v. Millbury*, 21 Pick. (Mass.) 64.

However erroneous, in law or in fact, the assessment may be, the appeal being an equitable proceeding, and the appellant, seeking equity, being required to do equity, only so much of his tax is abated as in equity he ought not to pay. *Perry's Petition*, 16 N. H. 48; *Edes v. Boardman*, 58 N. H. 586.

2. See *supra*, this title, *The Assessment*, sub-title, *Listing*.

Prior payment of taxes on certain property, and the fact that the taxpayer's agent had once listed the property, have been held evidence of assent to the assessment, so as to estop the taxpayer from denying its validity a subsequent year. *Ives v. North Canaan*, 33 Conn. 402.

3. *State v. Leavell*, 3 Blackf. (Ind.) 117; *State v. Hamilton*, 5 Ind. 310; *Louisville R. Co. v. State*, 25 Ind. 177; *Donovan v. Firemen's Ins. Co.*, 30 Md. 155; *Peninsula Iron, etc., Co. v. Crystal Falls Tp.*, 60 Mich. 510; *State v. Welch*, 28 Mo. 600; *State v. Bell*, 1 Phil. (N. Car.) 76; *Weatherhead v. Guilford*, 62 Vt. 327; *State v. Washoe County*, 5 Nev. 317; *State v. Board of Equalization*, 7 Nev. 83; *State v. Central Pac. R. Co.*, 17 Nev. 260; *State v. Sadler*, 21 Nev. 13; *State v. Diamond Valley, etc., Co.*, 21 Nev. 86; *Lowell v. Middlesex County*, 3 Allen (Mass.) 546; *Otis Co. v. Ware*, 8 Gray (Mass.) 509; *State v. Parker*, 34 N. J. L. 49; *Oregon, etc., Sav. Bank v. Catlin*, 15 Oregon 342. And see *People v. Carter*, 119

informally,<sup>1</sup> can he dispute the valuation adopted, provided it has been made in good faith.<sup>2</sup> He must have availed himself of the ordinary remedies before he can resort to the more extraordinary ones,<sup>3</sup> and must, to secure any relief, have complied

N. Y. 654; *Louisiana Brewing Co. v. Board of Assessors*, 41 La. Ann. 565.

If a taxpayer has any property, however small in amount, he cannot complain of the assessment, however large, if he fails to return it. *Tripp v. Torrey*, 17 R. I. 359.

The rule is applicable to corporations. *Otis Co. v. Ware*, 8 Gray (Mass.) 509.

In *Freedom v. Waldo County*, 66 Me. 172, it was held that the fact that a sworn statement of a taxpayer's property has been accepted by two of the three town assessors, does not entitle him to adjudication by the board of equalization, if he afterwards refuses to make a more explicit statement.

The *Rhode Island* statute (Pub. Stats., ch. 43, §§ 6, 7), on this point applies to over assessments only, not to void taxes. *Mechanics' Sav. Bank v. Granger*, 17 R. I. 77.

1. See *Vaughan v. Street Com'rs*, 154 Mass. 143; *Porter v. Norfolk County*, 5 Gray (Mass.) 365; *In re Williamson's Estate*, 153 Pa. St. 508.

The taxpayer's return only controls the action of the assessors if sworn to. The fact that they wholly disregard an unsworn statement does not warrant a recovery of taxes paid. Other remedies should have been resorted to. *Lawrence v. Janesville*, 46 Wis. 364.

In order to authorize any abatement of a tax, the sworn list of estate liable to taxation, required to be furnished to the assessor, cannot be filed after an appeal from the assessors to the county commissioners. *Otis Co. v. Ware*, 8 Gray (Mass.) 509.

The omission by a taxpayer to bring to the assessors a list of his property, verified by oath, within the time required by statute, is not a ground for dismissing a petition for the abatement of a tax, if the assessors expressly assented to the delay, and a list verified by oath was brought in before the filing of the petition for abatement. *Lowell v. Middlesex County*, 3 Allen (Mass.) 546.

2. A taxpayer's failure to make a return does not warrant an exorbitant and unjust valuation, nor, if such a valuation be made, debar him from a defense against proceedings to collect

the tax. *State v. Central Pac. R. Co.*, 7 Nev. 99.

Under the *Rhode Island* statute, it is held that a taxpayer who makes no return, has no remedy whatever, even though the assessment be greatly in excess of the value of his taxable property. *Tripp v. Torrey*, 17 R. I. 359.

3. See *Dundee Mtg., etc., Invest. Co. v. Charlton*, 32 Fed. Rep. 192; *Stanley v. Albany County*, 121 U. S. 535; *State v. Matthews*, 40 N. J. L. 268; *Hall v. Snedeker*, 42 N. J. L. 76; *Appelget v. Pownell*, 49 N. J. L. 169; *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1; *Baird v. Williams*, 49 Ark. 518; *Small v. Lawrenceburgh*, 128 Ind. 231; *Monroe v. New Canaan*, 43 Conn. 309; *Lewis v. Eastford*, 44 Conn. 477; *State v. Louisiana Mut. Ins. Co.*, 19 La. Ann. 474; *Louisiana Brewing Co. v. Board of Assessors*, 41 La. Ann. 565; *New York, etc., Grain, etc., Exchange v. Gleason*, 121 Ill. 502; *Madison County v. Smith*, 95 Ill. 328; *Felsenthal v. Johnson*, 104 Ill. 21; *Butternuth v. St. Louis Bridge Co.*, 123 Ill. 535; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *San Jose Gas Co. v. January*, 57 Cal. 614; *Peninsula Iron, etc., Co. v. Crystal Falls Tp.*, 60 Mich. 510; *Gilpatrick v. Saco*, 57 Me. 277; *Hemingway v. Machias*, 33 Me. 445; *Red River, etc., Line v. Parker*, 41 La. Ann. 1046; *Yazoo Delta Invest. Co. v. Suddoth*, 70 Miss. 416; *People v. Tax Com'rs*, 99 N. Y. 254; *Johnson County v. Seamount Cattle Co.*, 3 Wyoming 777; *Wisconsin Cent. R. Co. v. Ashland County*, 81 Wis. 1; *Bratton v. Johnson Tp.*, 76 Wis. 430; *Boorman v. Juneau County*, 76 Wis. 550; *Lehman v. Robinson*, 59 Ala. 219; *Harris v. Fremont County*, 63 Iowa 639; *Missouri Valley, etc., R. Co. v. Harrison County*, 74 Iowa 283; *Bath v. Whitmore*, 79 Me. 182; *Northern Pac. R. Co. v. Patterson*, 10 Mont. 90; *Norcross v. Milford*, 150 Mass. 237; *Schwarz v. Boston*, 151 Mass. 226; *O'Neal v. Virginia, etc., Bridge Co.*, 18 Md. 1; 79 Am. Dec. 669; *Rhea v. Umatilla County*, 2 Oregon 298; *Shumway v. Baker County*, 3 Oregon 246; *Wharton v. Birmingham*, 37 Pa. St. 371; *Stewart v. Maple*, 70 Pa. St. 221; *Covington v. Rockingham*, 93 N. Car. 134; *Kittle v. Shervin*, 11 Neb. 65;

Mead *v.* Haines, 81 Mich. 261; Peninsula Iron, etc., Co. *v.* Crystal Falls Tp., 60 Mich. 510; Jamaica, etc., Road Co. *v.* Brooklyn, 123 N. Y. 375; *In re McLean* (Supreme Ct.), 6 N. Y. Supp. 230; Duck *v.* Peeler, 74 Tex. 268; International, etc., R. Co. *v.* Smith County, 54 Tex. 1; Boorman *v.* Juneau County, 76 Wis. 550; Lawrence *v.* Janesville, 46 Wis. 364; Sage *v.* Burlingame, 74 Mich. 120; Osborn *v.* Danvers, 6 Pick. (Mass.) 98; Howe *v.* Boston, 7 Cush. (Mass.) 273; Bourne *v.* Boston, 2 Gray (Mass.) 469; Bates *v.* Boston, 5 Cush. (Mass.) 93; Richardson *v.* Boston, 148 Mass. 508; Hughes *v.* Kline, 30 Pa. St. 227; Clinton School Dist.'s Appeal, 56 Pa. St. 315; Van Nort's Appeal, 121 Pa. St. 118; Moore *v.* Taylor, 147 Pa. St. 481; Caledonia *v.* Rose, 94 Mich. 216; Smith *v.* Marshalltown (Iowa, 1892), 53 N. W. Rep. 286; Norcross *v.* Milford, 150 Mass. 237; State *v.* Louisiana Mut. Ins. Co., 19 La. Ann. 474; State *v.* Wright, 4 Nev. 251. And see Red River, etc., Line *v.* Parker, 41 La. Ann. 1046; Stickney *v.* Bangor, 30 Me. 404; Holton *v.* Bangor, 23 Me. 269; Oregon, etc., Sav. Bank *v.* Jordan, 16 Oregon 113; Ramp *v.* Marion County (Oregon, 1893), 33 Pac. Rep. 681; Camp *v.* Simpson, 118 Ill. 224; New York, etc., Grain, etc., Exchange *v.* Gleason, 121 Ill. 505; Phoenix Grain, etc., Exchange *v.* Gleason, 121 Ill. 524; Beers *v.* People, 83 Ill. 488; Dickey *v.* Polk County, 58 Iowa 287; Ward *v.* Gallatin County, 12 Mont. 23; Williams *v.* Holden, 4 Wend. (N. Y.) 223. But see People *v.* Wilson, 119 N. Y. 515; Ingersoll *v.* Des Moines, 46 Iowa 553.

Though an appeal will not lie directly from the assessor to the court, complaint being required to be first made to the city council, yet one who is aggrieved need not complain more than once to the council. *Ingersoll v. Des Moines*, 46 Iowa 553.

The repeal of an act requiring objections to be first made to a board of review, does not affect questions then pending, or relieve the plaintiff therein from the necessity of complying with the requirement. *Bratton v. Johnson Tp.*, 76 Wis. 430; *Boorman v. Juneau County*, 76 Wis. 550.

An injunction is out of the question until a proper application to the board of equalization and review (or any other tribunal provided by law for the purpose) has been made, and has proved unsuccessful. *Boyd v. Selma* (Ala. 1892), 11 So. Rep. 393; *Breeze v.*

*Haley*, 10 Colo. 5; New York, etc., Grain, etc., Exchange *v.* Gleason, 121 Ill. 502; Phoenix Grain, etc., Exchange *v.* Gleason, 121 Ill. 524; Louisiana Brewing Co. *v.* Board of Assessors, 41 La. Ann. 565; Noxubee County *v.* Ames (Miss. 1887), 3 So. Rep. 37; Deane *v.* Todd, 22 Mo. 90; Meyer *v.* Rosenblatt, 78 Mo. 495; Baldwin *v.* Elizabeth, 42 N. J. Eq. 11; Mills *v.* Board of Equalization, 1 Cinc. Super. Ct. (Ohio) 556; Duck *v.* Peeler, 74 Tex. 268; Davis *v.* Burnett, 77 Tex. 3; Boorman *v.* Juneau County, 76 Wis. 550; Dundee Mtg., etc., Invest. Co. *v.* Charlton, 32 Fed. Rep. 192.

If relief has not been sought before the board of review, some valid excuse for not doing so must be given. *Johnson v. Roberts*, 102 Ill. 655; *Houston, etc., R. Co. v. Presidio County*, 53 Tex. 518.

Where it is clear that application to the proper officer will be futile, it is unnecessary to make it. *Hills v. Exchange Bank*, 105 U. S. 319.

Collection of a street assessment will not be enjoined, if the plaintiff never attempted to prevent the improvement from being made. *Weber v. San Francisco*, 1 Cal. 455; *Kellogg v. Ely*, 15 Ohio St. 64.

**A fortiori**, where the plaintiff requested that the work should be done. *Sleeper v. Bullen*, 6 Kan. 300; *Motz v. Detroit*, 18 Mich. 495.

There can be no injunction for any matter as to which the board's decision is final. *Alexandria Canal R., etc., Co. v. District of Columbia*, 1 Mackey (D. C.) 217; *Clayton v. Lafargue*, 23 Ark. 137.

In Iowa, if the tax be wholly unauthorized, application to the board of supervisors is not a prerequisite to an injunction. *Hubbard v. Johnson County*, 23 Iowa 130.

**Certiorari**.—Similarly, a writ of *certiorari* will not be granted where there has been a failure or neglect to appeal to the proper inferior tribunal. *Pulaski County Board of Equalization Cases*, 49 Ark. 518; *Menzies v. Board of Equalization*, 62 Cal. 179; *Pease v. Chicago*, 21 Ill. 500; *State v. Bentley*, 23 N. J. L. 532; *State v. Parker*, 34 N. J. L. 49; *State v. Snedeker*, 42 N. J. L. 76; *State v. Pownell*, 49 N. J. L. 169; *People v. Tax Com'rs*, 4 N. Y. Supp. 41; 51 Hun (N. Y.) 641; *People v. Dolan* (Supreme Ct.), 11 N. Y. Supp. 35; *People v. Tax Com'rs*, 99 N. Y. 254.

with all statutory requirements<sup>1</sup> (including in some states, the making of a sworn return),<sup>2</sup> and have done all other things that

But, by a recent statute in *New York*, the making of a return and an appearance before the assessors, is not a prerequisite to the obtaining of a *certiorari*, except in New York City. *People v. Cheetham*, 45 Hun (N. Y.) 6; *People v. Gray*, 45 Hun (N. Y.) 243; *People v. Adams*, 125 N. Y. 471; *People v. Assessors* (Supreme Ct.), 19 N. Y. Supp. 142.

In the *District of Columbia*, when, contrary to law, a tax is laid upon a corporate franchise, and the corporation applies to the court for relief, it cannot be objected that no appeal was taken to the board of equalization, that board having no power in the premises. *Alexandria Canal, etc., Co. v. District of Columbia*, 5 Mackey (D. C.) 376.

Where a party had no notice and no opportunity to be heard, he is entitled to a review by *certiorari* in *State v. Munn*, 39 N. J. L. 422.

So, in *Nebraska*, no action on a claim against a county on account of an erroneous sale of land for taxes can be maintained, except after presenting it to the county board for audit and allowance. *Richardson County v. Hull*, 28 Neb. 810.

In *Wisconsin*, the statute providing that the equalization of an assessment could not be questioned unless application were first made to the board of review, has been repealed. See *Boorman v. Juneau County*, 76 Wis. 550.

In *Louisiana*, a timely effort to have the board of assessors correct the alleged error while the matter was within their control, is essential to relief in the courts. *Shattuck v. New Orleans*, 39 La. Ann. 206; *Leeds v. Hardy*, 43 La. Ann. 810.

1. *Otis Co. v. Ware*, 8 Gray (Mass.) 509; *State v. McChesney*, 34 N. J. L. 63; *State v. Parker*, 34 N. J. L. 71.

2. The having made a sworn return is, in some states, essential to the right to apply for an abatement. *Lott v. Hubbard*, 44 Ala. 503; *Lincoln v. Worcester*, 8 Cush. (Mass.) 62; *Porter v. Norfolk County*, 5 Gray (Mass.) 365; *Otis Co. v. Ware*, 8 Gray (Mass.) 509; *State v. Apgar*, 31 N. J. L. 358; *Young v. Parker*, 33 N. J. L. 192; *State v. Board of Equalization*, 7 Nev. 83. Compare *State v. Washoe County*, 5 Nev. 317. Even though a sufficient excuse be shown. *Charlestown v. Middlesex County*, 101 Mass. 87.

In *Massachusetts*, a sworn list must have been brought to the assessors before the tax is assessed. *Porter v. Norfolk County*, 5 Gray (Mass.) 365; *Otis Co. v. Ware*, 8 Gray (Mass.) 509; *Charlestown v. Middlesex County*, 101 Mass. 87.

In *Maine*, the taxpayer, after due notice, must have made and brought in to the assessors a true and perfect list of his poll, real and personal estate liable to taxation, and, if required, have made oath to its truth. *Lambard v. Kennebec County*, 53 Me. 505; *Freedom v. Waldo County*, 66 Me. 176; unless he make it appear to the commissioners that he was unable so to do. *Lambard v. Kennebec County*, 53 Me. 505; *Fairfield v. County Com'rs*, 66 Me. 387; and his refusal to be sworn to a further statement, required by the commissioners, bars his right to have an adjudication by them. *Freedom v. Waldo County*, 66 Me. 176.

The owner must have personally exhibited the list, that the assessors might examine him on oath; sending it by another is not sufficient. *Winslow v. Kennebec County*, 37 Me. 561.

Where one excused himself from making a list, saying it was unnecessary, this was held to be a refusal. *State v. Parker*, 33 N. J. L. 192; *State v. Bishop*, 34 N. J. L. 45; *State v. Parker*, 34 N. J. L. 49; *State v. McChesney*, 34 N. J. L. 63.

Where a taxpayer, being furnished by the assessor with a blank to be filled up with the particulars of his property, under oath, told the assessor that he would see his attorney, and if it was right, etc., he would fill up the blank and return it to the assessor's office, it was held, that the assessor, hearing nothing further from the taxpayer, was justified in assessing his property at its highest estimated value. *State v. Parker*, 34 N. J. L. 49.

A taxpayer cannot justify his neglect to list, by showing that an article which he himself should have listed, another person had listed. *Olds v. Com.*, 3 A. K. Marsh. (Ky.) 465.

In *Georgia*, the making return of its property, is a condition precedent to the right of a railroad company to contest the validity of a tax by means of an affidavit of illegality. *Macon, etc., R. Co. v. Goldsmith*, 62 Ga. 463; *Gold-*

could legally be expected of him,<sup>1</sup> and have been guilty of no laches in respect of time.<sup>2</sup> Failure on the part of a taxpayer to

smith v. Augusta, etc., R. Co., 62 Ga. 468; Goldsmith v. Georgia R. Co., 62 Ga. 485; Goldsmith v. Southwestern R. Co., 62 Ga. 495; Goldsmith v. Central R. Co., 62 Ga. 509.

To entitle a person assessed to a reduction, he must deliver the statement required by section 20 of the act of 1866 to the assessor personally, or at his office, or at his dwelling, with a proper person. Nothing but unavoidable inability to effect such delivery will afford an excuse. State v. Horner, 38 N. J. L. 212. See Winslow v. Kennebec County, 37 Me. 561.

Where complainant had failed to make the return, and, after the time for appeal from the return made by the assessor, had applied to the commissioners for relief, alleging that he had misunderstood the notice, and the commissioners had offered to accept his return even then, but he had failed to make any, it was held that collection of the tax could not be enjoined. Van Nort's Appeal, 121 Pa. St. 118.

Where a person had rendered a true account to the selectmen, which was received by them, he need not furnish a second account on a public notice subsequently posted. Melvin v. Weare, 56 N. H. 436.

Where, in the absence of an individual, a member of the family gives in his invoice, on the application of the selectmen, and it is received without objection, they cannot doom, as in case of neglect to give in an invoice, without notice that the invoice given in is not satisfactory. Walker v. Cochran, 8 N. H. 166.

The same rule is applied where equitable relief is sought. Union Trust Co. v. Weber, 96 Ill. 346; Camp v. Simpson, 118 Ill. 224.

A sworn return is also, in some states, a condition precedent to the obtaining a *certiorari*. Orland v. Hancock County, 76 Me. 462; Otis Co. v. Ware, 8 Gray (Mass.) 509; State v. Massaker, 25 N. J. L. 531; State v. Grey, 29 N. J. L. 380; State v. Apgar, 31 N. J. L. 358; State v. Parker, 32 N. J. L. 341; State v. McChesney, 34 N. J. L. 71; People v. Tax Com'rs, 99 N. Y. 254.

In *New York*, the failure of a railroad company to make the written statement of its property required by

statute, will not prevent its obtaining a *certiorari* to review an assessment, the statute imposing no such penalty. People v. Cheetham, 45 Hun (N. Y.) 6.

1. Covington v. Rockingham, 93 N. Car. 134; Harrison v. Vines, 46 Tex. 15; Union Pac. R. Co. v. Ryan, 2 Wyoming 391.

A mortgagee who forecloses without making any township officer a party to the foreclosure proceedings, cannot, on *certiorari*, have a tax warrant issued for sale of the land for a tax assessed against the mortgagor subsequently to the mortgage, although the mortgagee's estate in the land is not affected by the mortgage. State v. Pidcock, 43 N. J. L. 165.

Persons affected by an illegal ordinance are not, however, required to attempt to have it set aside before an assessment has been made under it. State v. Hudson, 29 N. J. L. 475.

In order to avail himself of equitable remedies, the taxpayer must himself act equitably. Ewing v. Batzner, 24 Ind. 409.

Hence, where property has been converted into *United States* securities for the express purpose of avoiding taxation, the collection of a tax assessed against it will not be enjoined. Mitchell v. Leavenworth County, 91 U. S. 206; Ogden v. Walker, 59 Ind. 460.

2. Hubbard v. Hickman, 4 Bush (Ky.) 204; 96 Am. Dec. 297; Galveston County v. Gorham, 49 Tex. 279.

Failure to apply for abatement within the statutory time may be excused in cases of accident or misfortune. Trust, etc., Co. v. Portsmouth, 59 N. H. 33.

In *Wisconsin* (under Rev. Stats., § 2831), a court or judge (which term includes county judge and court commissioner) may allow objections to a reassessment to be made after the expiration of the time limited and even on an *ex parte* application. Woodruff v. Depere, 60 Wis. 128.

The *Tennessee* statute requiring applications for abatement to be made at a certain term of the county court "and never thereafter," is merely directory, and does not take away the general jurisdiction of the court in such cases. The court would incline to follow the statute unless there were a plain case for relief and good cause for the delay.

object to or to avail himself of irregularities at the proper time, is deemed a waiver of his rights in the matter.<sup>1</sup>

*b. ABATEMENT (APPEAL).*—Where the general power to assess exists, an application for an abatement, called an appeal in some states,<sup>2</sup> is the proper remedy for over-taxation and irregularities in the assessment.<sup>3</sup>

*c. CERTIORARI.*—(See also CERTIORARI, vol. 3, p. 60).—Agreeably to the principles characteristic of certiorari in general,<sup>4</sup> the office of the writ, in tax-proceedings, is merely to ascertain whether the inferior tribunal whose proceedings are sought to be reviewed had jurisdiction and lawfully exercised it.<sup>5</sup> Its use for these purposes cannot constitutionally be prohibited

Nashville Sav. Bank *v.* Nashville, 3 Tenn. Ch. 362.

1. *People v. Wall St. Bank*, 39 Hun (N. Y.) 525.

Thus where, under the *Ohio* statute authorizing process to compel the appearance of persons suspected of making false returns and requiring notice to be given of increased assessment, verbal notice was given to one who had appeared in response to a subpoena, and he did not object to the informality of the notice at the time, he cannot afterwards do so. *Sturges v. Caster*, 114 U. S. 511.

Under the *New York* statute requiring the petition for a *certiorari* to state the grounds of the illegality, failure of the assessors to make oath to the assessment rolls before the proper person, must appear in the petition or it cannot be taken advantage of. *People v. Tierney*, 57 Hun (N. Y.) 357.

A party who, though objecting to the legality of the meeting of a board of review on the ground that it is not held at the proper place or on proper notice, appears and submits voluntarily to the board, offering evidence and asking for a decision on the merits, waives the objections taken. *State v. Cooper*, 59 Wis. 666.

The fact that the officer who made the assessment was also a member of the board of review, does not remove the obligation to appear before the board and contest the assessment on account of irregularity. *Bratton v. Johnson Tp.*, 76 Wis. 430.

Where the owner's agent appears and objects to the valuation only, it is a waiver of objection to the mode of assessment. *Hilton v. Fonda*, 86 N. Y. 339.

A failure to appeal from the assessment has been held to conclude the per-

son assessed. *Yazoo Delta Invest. Co. v. Suddoth*, 70 Miss. 416.

A failure to allege in the petition to the board of equalization for the correction of errors in the assessment, that application has been made to the petitioner's court to correct the alleged irregularity and over-valuation, is ground for refusing an injunction. *Swenson v. McLaren* (Tex. 1893), 21 S. W. Rep. 300.

A failure to appear before the board of assessors on grievance day, has been held laches sufficient to deprive one of his remedy by *certiorari*. *People v. Duguid*, 68 Hun (N. Y.) 243.

A suit to recover back taxes is defeated by showing that objection to the over-assessment complained of was not made before the board of equalization. *Johnson County v. Searight Cattle Co.*, 3 Wyoming 777.

A taxpayer who fails to appear at the appointed time and place cannot afterwards assail the assessment. *Caledonia v. Rose*, 94 Mich. 216. Nor can he, where he has failed to appear before the city board of equalization authorized to correct assessments. *Smith v. Marshalltown* (Iowa, 1892), 53 N. W. Rep. 286.

2. This is the case in *Pennsylvania*. See *Hughes v. Kline*, 30 Pa. St. 227; *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Van Nort's Appeal*, 121 Pa. St. 118.

3. See *supra*, this title, *The Assessment*, sub-title, *Equalization and Review*.

4. See CERTIORARI, vol. 3, p. 60.

5. As the remedy by *certiorari* (to review the action of any inferior tribunal which is alleged to have exceeded its jurisdiction) is expressly provided in some states by statute, while in others, resort is had to the common-



by the legislature,<sup>1</sup> but this use is strictly confined to the review of judicial acts and errors in law; that is to say, to cases where injustice is alleged to have been done to any taxpayer or to the community for whose benefit a tax has been levied,<sup>2</sup> by illegal action or neglect or misperformance of official duty<sup>3</sup>

law writ; and as a broader scope is usually given to the statutory certiorari than characterizes the writ at common law (See CERTIORARI, vol. 3, p. 60), the character and extent of the relief to be obtained in tax proceedings from an employment of the writ, will depend, in each state, upon which of the writs (the common law or the statutory certiorari), with their distinguishing characteristics, the parties may be permitted under the law to invoke.

Under the constitution and laws of *New Jersey*, the county circuit courts have no jurisdiction by certiorari in matters of taxation. *State v. Decue*, 31 N. J. L. 302.

A proceeding by certiorari to review the action of the tax assessors in refusing to exempt certain property, must be under *New York* Act of 1880, ch. 269, and not under the general provisions of the Code of Civil Procedure. *People v. Assessors*, 106 N. Y. 671.

1. *Traphagen v. West Hoboken*, 39 N. J. L. 232. The contrary has, however, been held in *Tennessee*, on the ground that an adequate statutory remedy was provided in its place. *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 633.

2. *E. g.*, in cases of improper abatement of a tax, the inhabitants can have the matter reviewed on certiorari. *Winslow v. Kennebec County*, 37 Me. 561; *Fairfield v. Somerset County*, 66 Me. 385; *Levant v. Penobscot County*, 67 Me. 429. So, where an assessment is plainly much lower than the law requires. *State v. Howland*, 48 N. J. L. 425.

"If promptly urged, upon proper proofs presented to assessors in due season, this remedy is adequate for the correction of all the errors and injustice liable to be committed in the performance of their official duties." *Western R. Co. v. Nolan*, 48 N. Y. 514.

3. The fact that boards of assessors are officers of the state proposing to discharge their duties as such, does not affect the propriety of relief by certiorari or supersedeas, where they have disregarded the law regulating their

action. *Louisville, etc., R. Co. v. Bate*, 12 Lea (Tenn.) 573.

The object of a certiorari being to keep inferior tribunals within the bounds of their jurisdiction, it is no argument against its use to say that the tax was assessed or the application for abatement heard, by those who had no jurisdiction over the property assessed, and whose acts were therefore void. *State v. Dowling*, 50 Mo. 134; *State v. Thompson*, 2 N. H. 237. Hence, certiorari lies where the board of equalization adds to the assessment roll or tax list property not assessed, strikes therefrom property duly assessed, or changes the valuation of property, the board having no authority to do so. *Orr v. State Board of Equalization*, 2 Idaho 923; *Royce v. Jenney*, 50 Iowa 676. Or where it assesses the personal property, not within the state, of one who has ceased to reside therein. *Remy v. Board of Equalization*, 80 Iowa 470. Or where property not liable to taxation is assessed. *Worcester Agricultural Soc. v. Worcester*, 116 Mass. 193; *People v. Ogdensburgh*, 48 N. Y. 390. It lies to review an erroneous assessment of taxes by the comptroller upon the franchise or business of a corporation. *People v. Wemple*, 129 N. Y. 543, 664; *People v. Wemple*, 63 Hun (N. Y.) 444.

As the tax laws of the *District of Columbia* contemplate only the taxation of corporeal property, a tax directly upon the franchise of a corporation, as an independent and distinct subject matter, is invalid and void, and relief may be had either by certiorari or suit in equity. *Alexandria Canal, etc., Co. v. District of Columbia*, 5 Mackey (D. C.) 376.

If the jurisdiction of the assessing or reviewing body be in any way brought in question, certiorari will lie. *Patchin v. Brooklyn*, 13 Wend. (N. Y.) 664. But where a tax was illegally assessed for bounty money, and afterwards ratified and confirmed by a special law, the writ will be dismissed. *State v. Apgar*, 31 N. J. L. 358.

It has been held in *New York*, that where an assessment is illegal because in direct contravention of the express

on the part of any of the officers concerned in the assessment of taxes, or in reviewing such assessment, or by any judicial error in any decision rendered by them,<sup>1</sup> including cases where the tax

terms of the statute, certiorari is an inadequate remedy, and the assessors are personally liable. *National Bank v. Elmira*, 53 N. Y. 49.

Certiorari lies where the assessor has failed to note in the assessment book a change in an assessment, made by order of the township trustees. *Heck v. Keokuk County*, 37 Iowa 547.

Where the report of commissioners for a municipal improvement does not show compliance with the law, an assessment made thereunder will be set aside on certiorari, *State v. Newark*, 25 N. J. L. 399; *State v. Jersey City*, 26 N. J. L. 445; and a sale of land to collect the assessment will also be set aside. *State v. Montclair R. Co.*, 35 N. J. L. 331.

The validity of a distress warrant to collect taxes, and the legality of its issuance, may be tested by certiorari. *Saunders v. Russell*, 10 Lea (Tenn.) 293.

Certiorari does not ordinarily lie in cases of mere overvaluation. *State v. Powers*, 24 N. J. L. 406; *State v. Parker*, 34 N. J. L. 49; *Shelby County v. Mississippi*, etc., R. Co., 16 Lea (Tenn.) 401. Unless the overvaluation be itself the result of legal error. *State v. Randolph*, 25 N. J. L. 428; *State v. McClurg*, 27 N. J. L. 253. See *State v. Howland*, 48 N. J. L. 425.

It lies in *New Jersey*, by the act of 1884, in cases of both overvaluation and undervaluation of railroad and canal property. *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1. And in *Alabama*, for excessive occupation taxes. *Carroll v. Tuscaloosa*, 12 Ala. 173.

1. *Swift v. Poughkeepsie*, 37 N. Y. 511; *People v. Hillhouse*, 1 Lans. (N. Y.) 87; *People v. Westchester County*, 57 Barb. (N. Y.) 377; *Mutual Ben. L. Ins. Co. v. New York*, 32 How. Pr. (N. Y. Ct. App.) 359.

It lies as well before, as after, an appeal from the commissioners. *State v. Betts*, 24 N. J. L. 555. And to review the acts of a municipal corporation, whether they are judicial or legislative. *Camden v. Mulford*, 26 N. J. L. 49.

Certiorari will issue to correct the error of county commissioners in awarding costs upon an appeal from the refusal of assessors to abate a tax.

*Lowell v. Middlesex County*, 3 Allen (Mass.) 546; 6 Allen (Mass.) 131; *Charlestown v. Middlesex County*, 109 Mass. 270.

The decision of county commissioners, in adjudging the return of certain property to be conclusive upon the assessors as to the valuation placed upon it by the owner, and in rejecting evidence offered to sustain the valuation of the assessors, is erroneous and will be set aside on certiorari. *Newburyport v. Essex County*, 12 Met. (Mass.) 211.

A decision by county commissioners on a petition for the abatement of a tax assessed upon the property of a corporation, that the price for which the stock sold in the market was a conclusive test of the value of the company's real estate and machinery, for the purpose of taxation, the corporation owning no other property and owing no debts, is an error for which a writ of certiorari will issue. *Chicopee v. Hampden County*, 16 Gray (Mass.) 38.

Where assessors, having jurisdiction of a bank and of the subject-matter, the description, amount and value of its property liable to taxation, assess such bank at the full amount of its capital, they, in so doing, act within their jurisdiction, and if they err, the error is a judicial one which can be reviewed upon certiorari. *Genesee Valley Nat. Bank v. Livingston County*, 53 Barb. (N. Y.) 223.

Though the passing of an ordinance by a common council for the construction of a sewer, being a ministerial act, cannot be reviewed on certiorari, yet it is competent for the supreme court, in a proper case, to vacate the estimate and assessment of the common council in affirming the proceedings for the construction of the sewer, as the council then acts in a judicial capacity. *People v. New York*, 5 Barb. (N. Y.) 43.

A writ of review may be prescribed to review the orders made by the county board of equalization correcting the assessment of an individual taxpayer. *Rhea v. Umatilla County*, 2 Oregon 298; *Poppleton v. Yamhill County*, 8 Oregon 337.

The *New Jersey* Act of 1884 provides for a review on certiorari of the

is void,<sup>1</sup> or the record of the proceedings, authorizing the enforcement of the tax, is erroneous or defective.<sup>2</sup>

The writ lies, moreover, only in cases where there is no appeal from the extrajudicial action complained of, nor, in the judgment of the court, any plain, speedy, and adequate remedy.<sup>3</sup> It does not lie to review the discretionary action of the tribunal below, further than to ascertain whether such tribunal has kept within

action of the state board of assessors in valuing the property of railroads and canals. *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1.

Where an assessment of taxes has been made on erroneous principles, certiorari will lie; but the judgment of the commissioners of appeal is by statute final and conclusive on the mere valuation of property. *State v. Quaife*, 23 N. J. L. 89.

The judgments of the county court in the matter of hearing and determining appeals from assessments, are reviewable on certiorari. *State v. St. Louis County Ct.*, 47 Mo. 594.

By the *New York* statute of 1880, ch. 269, the power of the court to review and correct assessments by certiorari is confined to those cases in which it appears by the return of the writ, or the evidence taken thereunder, "that the assessment complained of is illegal, erroneous or unjust." It does not authorize a review where it appears that the assessment in question was made in accordance with the statutes then in force, and in the due performance of the duty then obligatory upon the assessors. *People v. Tax Com'rs*, 91 N. Y. 593; *People v. Greenburgh*, 43 Hun (N. Y.) 677; 106 N. Y. 671; *People v. Low*, 40 Hun (N. Y.) 176; *People v. Dolan* (Supreme Ct.), 11 N. Y. Supp. 35.

1. *Ex p. Buckner*, 9 Ark. 73; *Murphy v. Harbison*, 29 Ark. 340.

Certiorari is the proper remedy if the tax be void on its face, or if the fact that it is void would necessarily appear in the evidence of one claiming under a sale of real estate for non-payment of the tax. *Hatch v. Buffalo*, 38 N. Y. 276.

Where a tax or assessment is void because levied under an unconstitutional law, the delay of the prosecutor in making his complaint does not affect his right to the relief sought. *Bogert v. Elizabeth*, 27 N. J. Eq. 568; *State v. Newark*, 43 N. J. L. 576.

2. *State v. Newark*, 25 N. J. L. 399; *State v. Parker*, 32 N. J. L. 341.

3. *Carroll v. Tuskaloosa*, 12 Ala.

173; *Benton v. Taylor*, 46 Ala. 388; *Floyd v. Gilbreath*, 27 Ark. 675; *Central Pac. R. Co. v. Placer County*, 43 Cal. 365; *Orr v. State Board of Equalization*, 2 Idaho 923; *Smith v. Jones County*, 30 Iowa 531; *Polk County v. Des Moines*, 70 Iowa 351; *Newburyport v. Essex County*, 12 Met. (Mass.) 211; *Farmington River Water Co. v. Berkshire County*, 112 Mass. 206; *Fractional School Dist. v. Joint Board*, 27 Mich. 3; *State v. Apgar*, 31 N. J. L. 358; *People v. Ogdensburg*, 48 N. Y. 390; *People v. Betts*, 55 N. Y. 600; *People v. Queens County*, 1 Hill (N. Y.) 195; *Matter of Mt. Morris Square*, 2 Hill (N. Y.) 14; *Storm v. Odell*, 2 Wend. (N. Y.) 287; *Ex p. Albany*, 23 Wend. (N. Y.) 277; *Louisville, etc., R. Co. v. Bate*, 12 Lea (Tenn.) 573.

Where a revenue law provides a tribunal for the correction of errors, such *quasi* appellate jurisdiction, though exclusive *quoad hoc*, does not prevent a resort to the general remedy by certiorari to the special tribunal. *Macklot v. Davenport*, 17 Iowa 379.

A railroad company cannot appeal to the circuit court from an assessment of its property for taxation by a board of supervisors. The remedy, if any exists, would be by certiorari. *Ohio, etc., R. Co. v. Lawrence County*, 27 Ill. 50.

The proper remedy against an order of the county court refusing to correct a mistake in a settlement with an administrator, is by appeal to the circuit court, not by certiorari. But if no such appeal is provided, certiorari will lie. *O'Hare v. Hempstead*, 21 Iowa 33.

In an action of certiorari, it is peculiarly the duty of the court to scrutinize the petition and interfere only in a case properly made; and even then, the court may exercise a measure of discretion in granting or quashing the writ. *Woodworth v. Gibbs*, 61 Iowa 398.

The fact that an assessor had no jurisdiction, and that his assessment was void, while it would render the collector personally liable, will not

jurisdictional limits,<sup>1</sup> nor for errors, mere defects of form, or

prevent a review of his proceedings by certiorari. *State v. Dowling*, 50 Mo. 134.

Where parties dissatisfied with an assessment for a local improvement may petition for a jury, certiorari will not lie. *North Reading v. Middlesex County*, 7 Gray (Mass.) 109; *Jones v. Boston*, 104 Mass. 461; *Whiting v. Boston*, 106 Mass. 89.

A board of equalization made an order adding to the assessed value of petitioner's property. Held, that a writ of certiorari would not issue, the petitioner having another plain, speedy and adequate remedy, viz., a good defense *pro tanto* in any suit for the tax. *State v. Washoe County*, 14 Nev. 140.

In *Michigan*, certiorari will not bring tax proceedings before the supreme court for review, *Whitbeck v. Hudson*, 50 Mich. 86; but it is a common remedy to review proceedings in laying out drains and assessing the cost upon lands benefited, though nothing but jurisdictional questions will be reviewed. *Cooley on Taxation*, note p. 754, and cases cited there. See *Bennett v. Scully*, 56 Mich. 374.

In *New York*, a certiorari will not be allowed for the purpose of enabling a party, by procuring a reversal of proceedings, to recover back taxes paid. *People v. Tax Com'rs*, 43 Barb. (N. Y.) 494; *People v. Reddy*, 43 Barb. (N. Y.) 539.

But the contrary rule obtained in *New Jersey*. *State v. Clothier*, 30 N. J. L. 351. *Randle v. Williams*, 18 Ark. 380; *Jones v. Boston*, 104 Mass. 461; *State v. Kingsland*, 23 N. J. L. 85; *State v. Massaker*, 25 N. J. L. 531.

1. Erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, are not to be considered upon certiorari. *Central Pac. R. Co. v. Placer County*, 43 Cal. 365.

But disregard of evidence may be acting in excess of jurisdiction, and therefore reviewable. *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444.

The board of supervisors has power under its authority to alter or equalize the assessment of property, and its discretion in this respect in a particular case, though erroneous, cannot be reviewed on certiorari. *Smith v. Jones County*, 30 Iowa 531; *Harney v. Mitch-*

*ell County*, 44 Iowa 203; *Polk County v. Des Moines*, 70 Iowa 351.

Errors of judgment, either as to the facts or the law of the case, cannot be inquired into on certiorari. *Doolittle v. Galena, etc., R. Co.*, 14 Ill. 381.

The action of the county auditor, in charging back to a county certain taxes in his settlement with the county, being the exercise of an official discretion belonging to an executive department of a state government, is not subject to judicial review, and cannot be examined into upon certiorari. *Midland County v. Auditor Gen'l*, 27 Mich. 165.

Where the only questions to be decided by a board of supervisors were those of the facts of assessment and payment, its rejection of a just and legal claim for the refunding of certain prior taxes was held to be an error, reviewable on certiorari. *People v. Madison County*, 51 N. Y. 442.

In trying questions raised in cases of review, the court will not try questions of fact passed on by the inferior tribunal, unless such findings are manifestly wrong. *Poppleton v. Yamhill County*, 8 Oregon 337.

For errors or mistakes of law in the proceedings of county commissioners, certiorari will lie, but not for the review of mere questions of fact, *Gibbs v. Hampden County*, 19 Pick. (Mass.) 298; *Newburyport v. Essex County*, 12 Met. (Mass.) 211; *Lincoln v. Worcester*, 8 Cush. (Mass.) 61; *Chicopee v. Hampden County*, 16 Gray (Mass.) 38; *Lowell v. Middlesex County*, 6 Allen (Mass.) 131; unless the competency of the evidence be objected to, so as to raise a legal question. *Farmington River Water Co. v. Berkshire County*, 112 Mass. 213.

Certiorari lies to correct errors of law, and not to settle disputed facts. It is not the province of the court to inquire whether an assessment for street repairs was for a larger quantity of work than had actually been done, or whether the street had been graded according to contract. *State v. Hudson*, 32 N. J. L. 365; *State v. Davis*, 48 N. J. L. 112.

The writ issues only to bring up for review the record of the proceedings complained of, and is not a citation to appear and justify the action of the tribunal, as though a judgment were to

irregularities not affecting the substantial rights of the parties,<sup>1</sup> nor when public inconvenience or hardship would ensue.<sup>2</sup>

The writ must be applied for promptly,<sup>3</sup> and while the officer

be rendered against its members. The board of appeals cannot, therefore, be called upon to justify a levy. *State v. Dowling*, 50 Mo. 134.

In *New York*, while in ordinary cases the only question is as to whether the inferior tribunal kept within the sphere of jurisdiction allowed it (*People v. Com'rs*, 30 N. Y. 72; *People v. Assessors*, 39 N. Y. 81; *People v. Betts*, 55 N. Y. 602; *People v. Fredericks*, 48 Barb. (N. Y.) 173), yet if necessary to prevent a failure of justice, the whole evidence in the case, as well as the ground or principle of the decision rendered, will be reviewed. *Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *Baldwin v. Buffalo*, 35 N. Y. 380; *Swift v. Poughkeepsie*, 37 N. Y. 511; *People v. Supervisors*, 57 N. Y. 382; *People v. Van Alstyne*, 32 Barb. (N. Y.) 131.

This is especially the case since the passage of the act of 1880, providing for a review of illegal, erroneous and unjust assessments. The proceeding by certiorari under that act is essentially of an equitable character, untrammelled by strict common-law rules. See *People v. Keator*, 36 Hun (N. Y.) 592.

Under that statute, the petitioner must set forth either that the assessment is illegal, specifying the ground of the illegality, or is erroneous by reason of overvaluation, or is unequal in that the assessment has been made at a higher proportionate valuation than other real or personal property on the same roll, by the same officers, and that the petitioner is or will be injured by such alleged erroneous or unequal assessments. *People v. Dolan*, 57 Hun (N. Y.) 589.

Certiorari does not lie from a comptroller's refusal of a second application for a revision of an account settled by him with a corporation, he having once passed upon the matter on a first application and it being discretionary with him to grant or refuse a reconsideration. *People v. Campbell*, 19 N. Y. Supp. 652.

1. *Ex p. Keenan*, 21 Ala. 558; *Cushing v. Gay*, 23 Me. 9; *West Bath, Petitioners*, 36 Me. 74; *Winslow v. Kennebec County*, 37 Me. 561; *Furbush v. Cunningham*, 56 Me. 184; *Levant v. Penobscot County*, 67 Me. 433;

*Conover v. House*, 46 N. J. L. 347; *State v. Manitowoc County*, 59 Wis. 23.

An assessment will not be quashed on certiorari because of the failure of the assessor to take the oath of office. *Moore v. Turner*, 43 Ark. 243. Nor because all the assessors did not join in the valuation and the verification of the assessment roll. *People v. Parker*, 45 Hun (N. Y.) 432.

An assessment will not be set aside for including property not taxable with that which is, if the whole valuation is not excessive for that which is taxable. *State v. Haight*, 35 N. J. L. 178.

Where the return of the commissioners does not show that any substantial wrong or injustice has been done, the writ of certiorari should be quashed. *State v. Manitowoc County*, 59 Wis. 23.

If it appears from the record that the decision of the county commissioners was founded upon a consideration of adequate and uncontradicted evidence, and was substantially correct and worked no injustice, the proceedings will not be vacated, although the commissioners' view of the law as to the burden of proof was not expressed with technical accuracy. *Mendon v. Worcester County*, 5 Allen (Mass.) 13.

Any inaccuracy of statement or omission to state a fact in their record, not in any way injuring the petitioners, would be no ground for quashing the proceedings upon certiorari. *Jones v. Boston*, 104 Mass. 461.

It is not a sufficient reason for setting aside an assessment of taxes, that the year in which the town meeting was held, at which they were raised does not appear in the record, if it can be shown by parol proof. *State v. Bentley*, 23 N. J. L. 532.

2. *Fractional School Dist. v. Joint Board*, 27 Mich. 3; *State v. Kingsland*, 23 N. J. L. 85; *Matter of Mount Morris Square*, 2 Hill (N. Y.) 14; *People v. Allegany County*, 15 Wend. (N. Y.) 108.

3. *State v. Water Com'rs*, 30 N. J. L. 247; *State v. Street Com'rs, etc.*, 38 N. J. L. 320; *State v. Jersey City*, 41 N. J. L. 510; *State v. Love*, 42 N. J. L. 355; *State v. Street Com'rs, etc.*, 42 N. J. L. 510; *State v. Binnering*, 42 N. J. L. 528.

In the case of an assessment made

or tribunal whose proceedings it is sought to review retains control over the subject-matter.<sup>1</sup> If the petition, which may be filed by a fiduciary as well as by one interested in his own right,<sup>2</sup> and which must specify the illegality relied upon,<sup>3</sup> be filed by one or more individual taxpayers for themselves alone, it must show that they have some special interest in the proceedings, not common to all the taxpayers of the district.<sup>4</sup> If filed by more than one, verification by one is sufficient.<sup>5</sup> If all taxpayers have the same interest, the writ should be maintained in the name of the people.<sup>6</sup>

under an unconstitutional law, the legislature cannot limit the time within which a certiorari shall issue. *Traphagen v. West Hoboken*, 39 N. J. L. 232; *State v. Jersey City*, 42 N. J. L. 97; *State v. Newark*, 43 N. J. L. 576; *Bogert v. Elizabeth*, 27 N. J. Eq. 568.

The delay may be excused where it is due to the inaction of public officers, inducing a belief that the taxes will not be collected. *State v. Manning*, 41 N. J. L. 275.

A town where the property is claimed to have been assessed at too high a rate, cannot obtain a certiorari after nine months have passed and the greater part of the tax has been collected. *State v. Board of Assessors* (N. J. 1891), 21 Atl. Rep. 938.

In *New York*, a certiorari to review the comptroller's settlement of an account with a corporation, must be obtained within thirty days after notice of the settlement. This period cannot be extended by applying to him for a readjustment of the account. *People v. Campbell* (Supreme Ct.), 19 N. Y. Supp. 652.

Certiorari to review the action of a township drain commissioner in laying out a drain and levying a tax to pay for it, was sustained, where the plaintiff had seasonably sought the proper remedy at first, but had lost it without his fault, and where its allowance would not stay anything but the collection of his share of tax. *Burnett v. Scully*, 56 Mich. 374.

But where, in proceedings in a drain case, parties who, eleven months before, had appeared before the circuit court and opposed the confirmation of the report of the drain commissioners, afterwards sued out a certiorari, the writ was quashed for laches in the suing out of the writ. *In re Lantis*, 9 Mich. 324.

The owner of land over which a street is laid out by a city council, who objects, at the hearing before

them, to the regularity of the proceedings, and gives written notice to the city, before the commencement of the construction of the street, of his intention to take legal measures to protect his rights, is not guilty of laches in waiting six months, until the next term of court, before he petitions for a certiorari. *Dwight v. Springfield*, 4 Gray (Mass.) 107.

1. If a writ of certiorari be served on the assessors of a town after the assessment roll has been perfected and delivered to the supervisor, the writ should be quashed as to the assessors. *People v. Fredericks*, 48 Barb. (N. Y.) 173; *People v. Tompkins*, 40 Hun (N. Y.) 228; *People v. Board of Assessors*, 16 Hun (N. Y.) 407; *People v. Queens County*, 1 Hill (N. Y.) 195; *People v. Delaney*, 49 N. Y. 655; *People v. Dolan* (Supreme Ct.), 11 N. Y. Supp. 35; *People v. Allegany County*, 15 Wend. (N. Y.) 198; *People v. New York*, 2 Hill (N. Y.) 9; *People v. Reddy*, 43 Barb. (N. Y.) 539; *People v. Com'r of Taxes, etc.*, 43 Barb. (N. Y.) 494; *People v. Dunkirk*, 38 Hun (N. Y.) 7.

2. *State v. Holmdel Tp.*, 39 N. J. L. 79.

3. *People v. Tierney*, 57 Hun (N. Y.) 357, 589.

4. *Benton v. Taylor*, 46 Ala. 388; *Levant v. Penobscot County*, 67 Me. 434; *Libby v. West St. Paul*, 14 Minn. 288; *State v. Middletown*, 24 N. J. L. 124.

5. *People v. Cheetham*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 44; *People v. Coleman*, 41 Hun (N. Y.) 307.

6. The writ should not be allowed upon the relation of a town unless the petitioner was directed so to do, by the electors of the town. *State v. Manitowoc County*, 59 Wis. 15.

In *People v. Westchester County*, 57 Barb. (N. Y.) 377, the court, by Pratt, J., said: "The distinction between a taxpayer who acts as relator

Those whose interests are different cannot join in the petition.<sup>1</sup>

The writ should be directed to the person or body having the legal custody of the record<sup>2</sup> (and the person or body whose proceedings are sought to be reviewed must usually be notified of the granting of the writ),<sup>3</sup> and it should require a return only of the records affecting the property of the particular relator.<sup>4</sup> The return should show what the rulings and proceedings were,<sup>5</sup> and that they were as authorized by statute.<sup>6</sup> If insufficient, the

in a legal proceeding, in which all the inhabitants of a political division of the state have a common interest, and a suit by a private individual to redress a wrong personal to himself, is clear. . . . The public has the same interest that a tax shall be proper as to a town or aggregation of individuals, as it has that it shall be right as to one person." That was the case of an appeal from an order superseding a common-law certiorari to review and correct certain items alleged to have been illegally included in the tax levy and warrant to be issued against a town. The relator was simply a resident and taxpayer of the town.

1. The judgment of the court of county commissioners, increasing the valuation of property as assessed for taxation, is a separate and distinct judgment as to each taxpayer, in which the other taxpayers have no individual interest, and certiorari will not be awarded to bring up for review jointly, judgments involving different rights. *Carter v. Cullman County*, 80 Ala. 394.

Where several townships separately voted taxes to aid in the construction of a railroad, and in the proceedings in each township a defect was alleged to exist which avoided the taxes, it was held that the taxpayers in the several townships could not unite as plaintiffs in certiorari to test the validity of the taxes. *Woodworth v. Gibbs*, 61 Iowa 398.

2. *People v. Queens County*, 1 Hill (N. Y.) 199; *People v. Fredericks*, 48 Barb. (N. Y.) 173; *People v. Delaney*, 49 N. Y. 655.

If the writ be directed to one who has not the legal custody of the record (e. g., to the commissioners of appeal after they have rendered their decision and returned the duplicate to the collector with their certificate), it will be dismissed. *State v. Howell*, 24 N. J. L. 519.

If directed to the proper party, and

also to an improper party, the writ will be quashed as to the former only. *State v. Street Com'rs, etc.*, 42 N. J. L. 510.

Certiorari to bring up the proceedings of the town board of review should be directed to the town clerk. *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444.

Certiorari to correct a local assessment in New York City, must be directed to the board having the matter in charge, not to the city. *People v. New York*, 20 Hun (N. Y.) 73.

In *New York*, the writ may be directed to village trustees, although the rolls are with the collector. The statute does not require the original rolls to be returned. *People v. Adams*, 125 N. Y. 471.

3. *Levant v. Penobscot County*, 67 Me. 434.

In *New York*, under the statute providing for the review of illegal assessments, notice of the granting of the certiorari may be dispensed with. *People v. Smith*, 24 Hun (N. Y.) 66.

4. Facts affecting other property, relevant as showing a disproportionate valuation, should be left to be shown by the evidence. *People v. Com'rs of Taxes*, 10 Abb. N. Cas. (N. Y.) 35.

5. *Farmington River Water Co. v. Berkshire County*, 112 Mass. 206; *Lowell v. Middlesex County*, 146 Mass. 403.

The findings are conclusive as to facts, and if they report evidence, the proceedings will not be set aside if the evidence supports the findings. *Great Barrington v. Berkshire County*, 112 Mass. 218.

6. To certiorari to reduce an assessment made under a statute regulating the valuation, the assessors should certify in the return that they followed the statute, not merely that they fairly assessed the property. *People v. Weaver*, 67 How. Pr. (N. Y. Supreme Ct.) 477.

return may be supplemented by amendment.<sup>1</sup> The common-law effect of the writ when served (as a *supersedeas*, staying all proceedings of the officers to whom it is addressed),<sup>2</sup> has, in some states, been changed by statute in tax cases.<sup>3</sup> Upon the petition for a certiorari, the whole case will be heard,<sup>4</sup> but when the case is before the court on the writ, no evidence extrinsic to the record is allowed<sup>5</sup> (except where this rule has been changed by statute),<sup>6</sup> nor will the validity of the title of the assessors to their offices, or of other persons whose action is reviewed, be inquired into.<sup>7</sup>

The judgment of the court is, in most states, either to dismiss the writ (but this is not conclusive as to the validity of the assess-

1. *Levant v. Penobscot County*, 67 Me. 434; *Orland v. Hancock County*, 76 Me. 462.

Upon certiorari, omissions or errors going to the formality and regularity of the proceedings and record of county commissioners, may be cured by amendment, or the whole proceedings may be quashed, if the errors are such as demand it. *Rutland v. Worcester County*, 20 Pick. (Mass.) 71; *Brimmer v. Boston*, 102 Mass. 91, and cases cited; *Blake v. Norfolk County*, 114 Mass. 583; *Taber v. New Bedford*, 135 Mass. 162; *Gilkey v. Watertown*, 141 Mass. 317.

The plaintiff cannot rely upon the affidavit for the certiorari to supply the deficiencies of the return. *Whitbeck v. Hudson*, 50 Mich. 86.

2. See CERTIORARI, vol. 3, pp. 60, 66.

3. The right to recover back the taxes, if paid, is considered to render a stay of proceedings unnecessary. *State v. State Board of Assessors*, 54 N. J. L. 90; *Bank of Com. v. New York*, 43 N. Y. 185; *People v. Coleman*, 48 Hun (N. Y.) 602.

In *Wisconsin*, the writ operates as a stay where the invalidity of the tax appears by an admission upon the record. *Griggs v. St. Croix County*, 20 Fed. Rep. 341.

4. *Vance v. Little Rock*, 30 Ark. 435; *Levant v. Penobscot County*, 67 Me. 429.

5. *Floyd v. Gilbreath*, 27 Ark. 675; *Com'rs v. Carthage*, 27 Ill. 140; *Smith v. Jones County*, 30 Iowa 531; *Levant v. Penobscot County*, 67 Me. 434; *Mendon v. Worcester County*, 5 Allen (Mass.) 13; *Charlestown v. Middlesex County*, 109 Mass. 270; *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1; *State v. Manitowoc County*, 59 Wis. 15.

If the return set up matters *dehors*

the record, it should be objected to by motion to strike out, not by demurrer. *Vance v. Little Rock*, 30 Ark. 435.

In *Arkansas*, however, the acts of executive officers or boards are only *prima facie* evidence of their regularity. *Vance v. Little Rock*, 30 Ark. 435.

6. In *New York*, when the return traverses material allegations in the petition or introduces new matter, the court may, under the statute, order testimony to be taken by a referee, if it be deemed necessary. *People v. Cheetham*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 44.

Refusal of the assessor to hear testimony offered by the person assessed, is a sufficient reason for such a reference. *People v. Zoeller* (Supreme Ct.), 15 N. Y. Supp. 684.

Where a taxpayer, supposing himself to be legally a non-resident, gave the commissioners no evidence as to the value of his taxable property, testimony will be taken, and the court may reduce the assessment. *People v. Tax Com'rs* (Supreme Ct.), 16 N. Y. Supp. 834.

Where testimony of unequal valuation is introduced, the taxpayer must show that he is required to pay more than his just proportion. *People v. Carter*, 109 N. Y. 576; *modifying* 46 Hun (N. Y.) 444.

An order of reference, under this statute, and an order refusing to set such order aside, are not reviewable, as they are not final and do not affect substantial rights. *People v. Smith*, 85 N. Y. 528.

The common-law rule as to evidence does not apply to cases involving assessments levied under the charter of Chicago. *Rue v. Chicago*, 66 Ill. 256.

7. *State v. Holmdel Tp.*, 39 N. J. L. 75; *People v. Walter*, 68 N. Y.



ment),<sup>1</sup> or to vacate the assessment, though in some states the statute allows the court to reduce it.<sup>2</sup> The assessment may be vacated either in its entirety,<sup>3</sup> or as to the prosecutors only, in which case the officer having custody of the roll is ordered to strike the assessment from it.<sup>4</sup> Costs are not allowed the petitioner, except where the officers have acted negligently or in bad faith, or have unreasonably persisted in their defense.<sup>5</sup> If the tax be affirmed, payment of costs as well as of the tax may be enforced by attachment.<sup>6</sup>

*d. PROHIBITION*—(See also PROHIBITION, vol. 19, p. 274).—Generally the writ of prohibition is not available as a preventive remedy for an illegal collection.<sup>7</sup>

*e. INJUNCTION*—(See INJUNCTIONS, vol. 10, p. 857).—The law applicable to the writ of injunction in connection with taxation is set forth elsewhere.<sup>8</sup>

*f. REFUNDING AND RECOVERY OF TAXES PAID*.—It is provided by statute in some states that taxes illegally collected shall be refunded on application to the board of supervisors, county commissioners, or other like body.<sup>9</sup> Apart from such a provision

403; *People v. Parker*, 45 Hun (N. Y.) 432.

1. *People v. Kingston*, 101 N. Y. 82.

2. *People v. Zoeller* (Supreme Ct.), 15 N. Y. Supp. 684; *People v. Tax Com'rs* (Supreme Ct.), 16 N. Y. Supp. 834.

3. *Bergen v. State*, 32 N. J. L. 490; *State v. Bergen*, 34 N. J. L. 438.

4. *Bergen v. State*, 32 N. J. L. 490; *People v. Reddy*, 43 Barb. (N. Y.) 545; *People v. McLean*, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 137.

The whole assessment will not be set aside, if proper relief can be given the prosecutor without this. *State v. Kingsland*, 23 N. J. L. 85.

5. *Lowell v. Middlesex County*, 3 Allen (Mass.) 546; *State v. Newark*, 44 N. J. L. 323; *People v. Keator*, 67 How. Pr. (N. Y. Supreme Ct.) 277; *People v. McComber* (Supreme Ct.), 7 N. Y. Supp. 71; *People v. Zoeller* (Supreme Ct.), 15 N. Y. Supp. 684.

6. *Smith v. State*, 31 N. J. L. 216.

7. See the law stated and cases cited in PROHIBITION, vol. 19, p. 274.

8. See INJUNCTIONS, vol. 10, p. 857.

9. The *Illinois* statute provides for the *pro rata* refunding by order of the county board, of state, county, city, town and village taxes, in case of double assessment. The board's order creates no claim on the county except for county taxes, or other taxes collected by the county and not yet distributed. If they have been distributed, a certified copy of the refunding order

should accompany an application to each of the various bodies who have received a share of the tax. *Barber v. Jackson County*, 40 Ill. App. 42.

In *Indiana*, it is provided that the common council of a city may at any time order the amount erroneously assessed against and collected from any taxpayer, to be refunded to him. This provision is mandatory, and applies to the assessment of property outside the city limits. *Indianapolis v. McAvoy*, 86 Ind. 587.

Where the assessor and the city treasurer have refused to deduct a taxpayer's indebtedness from his assessment list, the excess paid on that account may be recovered, whether voluntarily paid or not, and previous application to the board of equalization is unnecessary. *Indianapolis v. Vajen*, 111 Ind. 240.

By the *Indiana* statute, county taxes "wrongfully assessed" must similarly be refunded by the county commissioners. The word "wrongfully" means that the taxes should not have been assessed at all, not merely that they were irregular or unauthorized. *Howard County v. Armstrong*, 91 Ind. 528; *Durham v. Montgomery County*, 95 Ind. 182; *Carroll County v. Graham*, 98 Ind. 279; *Henry County v. Murphy*, 100 Ind. 570.

This statute applies to illegal increase of valuations by the state board of equalization, the legislature having ordered the money to be refunded to the

counties. *Newsom v. Bartholomew County*, 92 Ind. 229. Also to illegal increase of valuation by a county auditor. *Pulaski County v. Senn*, 117 Ind. 410.

As to the repeal of the act for the refunding of illegal taxes on school lands, see *St. Joseph County v. Buckman*, 57 Ind. 96; *Henderson v. State*, 58 Ind. 244.

The *Iowa* statute provides that the county board of supervisors shall direct the county treasurer to refund to the taxpayer any tax, "illegally exacted or paid." This applies to all cases where, on account of errors or illegal proceedings, the taxpayer was not bound to pay, and if the board of supervisors refuse so to direct, an action will lie. *Lauman v. Des Moines County*, 29 Iowa 310; *Isbell v. Crawford County*, 40 Iowa 102; *Richards v. Wapello County*, 48 Iowa 507; *Dickey v. Polk County*, 58 Iowa 287; *Winzer v. Burlington*, 68 Iowa 279; *Thomas v. Burlington*, 69 Iowa 140. But it does not apply to the case of taxes paid under a misapprehension as to ownership of the taxed property, the taxpayer knowing all the facts upon which his claim of title was based. *Dubuque, etc., R. Co. v. Webster County*, 40 Iowa 16.

In the case of a city, the fact that its indebtedness exceeds the constitutional limit does not affect the right to recover a tax illegally exacted. *Thomas v. Burlington*, 69 Iowa 140.

The *Iowa* statute does not require protest. *Richards v. Wapello County*, 48 Iowa 507. It applies to local assessments, as well as to taxes. *Robinson v. Burlington*, 50 Iowa 240.

Where lands are sold for more than the legal tax due, the excess may be recovered under this section. *Harper v. Sexton*, 22 Iowa 442; *Rhodes v. Sexton*, 33 Iowa 540.

The taxpayer's failure to pursue other remedies to defeat the collection of a tax does not affect his right to recover under this section. *Dickey v. Polk County*, 58 Iowa 287.

This section does not authorize the refunding of redemption money paid after a void sale for taxes, such redemption being unnecessary. *Morris v. Sioux County*, 42 Iowa 416.

A city may, by ordinance, be subjected to the liability to refund, imposed by this ordinance. *Tallant v. Burlington*, 39 Iowa 543.

If the board of supervisors or the treasurer refuse to act, they may be compelled by *mandamus*, but no action

will lie against the county. *Eyerly v. Jasper County*, 72 Iowa 149.

An order of the board of supervisors, authorizing the repayment, is essential in the case of an ordinary county tax (*Crosby v. Floete*, 65 Iowa 370), but not in other cases, *e. g.*, in that of a railroad aid tax. *Barnes v. Marshall County*, 56 Iowa 20.

The *New York* statute (3 Rev. Stats. 1890, p. 287, § 55), authorizes the boards of supervisors, either on application by a taxpayer or on order of the county court, to refund taxes "illegally or improperly" assessed. This means illegality in the tax, and not merely in the assessment. *Harris v. Niagara County*, 33 Hun (N. Y.) 279.

It is not essential to such refunding that the taxpayer should have made a return, nor that he should have paid under duress. *People v. Madison County*, 51 N. Y. 442.

The county court may order the supervisors to refund, although the assessment has not been first adjudged illegal by any tribunal. *Matter of New York Catholic Protectory*, 77 N. Y. 342.

The assessor's affidavit, attached to the roll, that the latter contains a true statement of property "at the full and true value thereof," is no evidence that the proper deductions were not made, so as to warrant proceedings to compel refunding. *Matter of Farmers' Nat. Bank, i. Thomp. & C. (N. Y.)* 383.

The *New York* statute authorizing the comptroller to review and adjust accounts already settled by him with any corporation and to "charge or credit" it with any balance due, does not authorize the refunding of any excess amount paid for taxes. The money remains in the treasury to be applied to future taxes. *People v. Wemple*, 133 N. Y. 617.

Under the *New York* statute authorizing a refunding by a two-thirds vote of the county supervisors under certain circumstances, the two-thirds vote is essential. *Van Antwerp v. Kelly*, 50 Hun (N. Y.) 513.

Under the *North Carolina* statute, in the case of illegal state taxes paid under protest, the commissioners certify the amount to the state auditor, who draws his warrant upon the treasurer for the amount due the taxpayer. *North Carolina R. Co. v. Alamance*, 77 N. Car. 4.

In an action to recover taxes charged to have been collected unlawfully, the

as this, the general doctrine of law as to the recovery of money paid<sup>1</sup> applies in the case of payment for illegal taxes, so that, in the absence of fraud<sup>2</sup> or mistake of fact,<sup>3</sup> taxes paid without legal duress cannot be recovered back,<sup>4</sup> nor their application

action of the board of review and equalization having power to change or set aside assessments, cannot be reviewed, the action of the board having consisted in reducing the assessments on real estate fifty per cent. and leaving those on personal property unchanged. *Biggs v. Lake County* (Ind. App. 1893), 34 N. E. Rep. 500.

A proceeding in the nature of an action to recover back taxes paid, is not available where a corporation has voluntarily reported for taxation and paid the taxes assessed on property exempt. *People v. Wemple*, 69 Hun (N. Y.) 367. See generally *Wiesmann v. Brighton*, 83 Wis. 550; *Ratterman v. American Express Co.*, 49 Ohio St. 608; *Simonson v. West Harrison*, 5 Ind. App. 459.

1. See *PAYMENTS*, vol. 12, pp. 220, 222.

2. Where a property owner was liable for only half the cost of laying certain pipes, but, not knowing the actual cost, paid the whole in reliance upon fraudulent misrepresentations by the city officers, such payment was held not to be voluntary. *Harrison v. Milwaukee*, 49 Wis. 247.

3. Taxes paid through mistake of fact as to the ownership of real estate, may be recovered from the real owner. *Fenton v. Way*, 40 Iowa 196; *Union R. Co. v. Skinner*, 9 Mo. App. 189. But not from the county. *Scott v. Chickasaw County*, 53 Iowa 47.

Some courts have held a mistake as to the legality of a tax, as being in the nature of a mistake of fact, in so far as to warrant a recovery of the money paid. *Louisville v. Anderson*, 79 Ky. 334; *Newport v. Ringo*, 87 Ky. 635; *Torbitt v. Louisville* (Ky. 1887), 4 S. W. Rep. 345; *Delano v. New York*, 32 Hun (N. Y.) 144; *Wooley v. Staley*, 39 Ohio St. 354.

But the contrary has been held in *Lester v. Baltimore*, 29 Md. 415; *Bradley v. Laconia* (N. H. 1890), 20 Atl. Rep. 331; *Custin v. Viroqua*, 67 Wis. 314.

In *Hubbard v. Hickman*, 4 Bush (Ky.) 204, and *Galveston County v. Gorham*, 49 Tex. 279, the fact that the mistake was one of law was held a defense where the taxes had been paid

for several years and repayment would derange the finances of the local government. To the same effect, *Manistee Lumber Co. v. Springfield Tp.*, 92 Mich. 277.

In *Jackson v. Atlanta*, 61 Ga. 228, a mistake of the city engineer, whereby property outside the city was assessed for municipal taxation, was held to be no ground for requiring repayment of the taxes.

Where the property taxed was situated in a district which, after the assessment, but before the taxes were due, became part of another county, taxes paid to the treasurer of the old county were held recoverable as a payment to a public officer, under color of his office, after his authority had ceased. *Fremont, etc., R. Co. v. Holt County*, 28 Neb. 742.

4. *Santa Rosa Bank v. Chalfant*, 52 Cal. 170; *Mills v. Austin*, 53 Cal. 379; *Merrill v. Austin*, 53 Cal. 379; *De Fremery v. Austin*, 53 Cal. 380; *Younger v. Santa Cruz County*, 68 Cal. 241; *Grimley v. Santa Clara County*, 68 Cal. 575; *Tatum v. Trenton*, 85 Ga. 468; *St. Joseph County v. Ruckman*, 57 Ind. 96 (a case not within the statute); *Dickinson County v. National Land Co.*, 23 Kan. 196; *Louisville, etc., R. Co. v. Hopkins County*, 87 Ky. 608; *Walker v. St. Louis*, 15 Mo. 563; *Wilcox v. New York*, 53 N. Y. Super. Ct. 436; *People v. Brinckerhoff*, 40 Hun (N. Y.) 381; *Meylert v. Sullivan County*, 19 Pa. St. 181; *McCrickart v. Pittsburgh*, 88 Pa. St. 133; *Babcock v. Fond du Lac*, 58 Wis. 230; *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. (U. S.) 296; *Little v. Bowers*, 134 U. S. 547. And if taxes are voluntarily paid by a claimant of real estate whose title is subsequently adjudged invalid, he cannot recover them from the successful claimant. *Garrigan v. Knight*, 47 Iowa 525.

Where a non-resident holder of certain city bonds was illegally assessed for them, and the banks where the interest was payable deducted the tax from their remittance to him, he not objecting for several years, this was held equivalent to a voluntary payment on his part. *Baltimore v. Hussey*, 67 Md. 112.

If the duress be removed by a promise

restrained,<sup>1</sup> even protest being immaterial,<sup>2</sup> except in those states where, by the statute, payment under protest is made sufficient to entitle the taxpayer to recover.<sup>3</sup> In the other states actual

to pay, subsequent payment will be voluntary. *Gachet v. McCall*, 50 Ala. 307; *Savannah v. Feeley*, 66 Ga. 31.

That the levy or assessment was in violation of the statute does not alter the case. *McGehee v. Columbus*, 69 Ga. 581; *People v. Miner*, 46 Ill. 374.

In *Galveston v. Sydnor*, 39 Tex. 236, however, it was held that it would be "contrary to good conscience" for a city to retain money collected as taxes under an ordinance not authorized by its charter, and that therefore an action would lie to recover money so collected, whether paid under duress or not. This case seems to be clearly at variance with the usual doctrine.

That the law under which the tax was collected was afterwards declared unconstitutional in some other case, does not make the payment less voluntary. *Taylor v. Board of Health*, 31 Pa. St. 73; *San Francisco, etc., R. Co. v. Dinwiddie*, 8 Sawyer (U. S.) 312.

But where the taxpayer himself subsequently succeeds in having the assessment set aside by a judicial decision, this has been held to do away with the voluntary character of his payment, he having "pushed his claim to a successful result." *Jersey v. Riker*, 38 N. J. L. 225.

#### Voluntary Payment by Receiver.—

Where the receiver of a railroad company, pending a foreclosure sale, paid taxes, the amount of which were allowed to him by the court without objection, the purchasers of the railroad, who had been parties to the suit, were not allowed to recover. *Norfolk, etc., R. Co. v. Smyth County*, 87 Ga. 521.

1. One who cannot recover back the money paid as a tax will also be unable to restrain its application to the object for which the tax was levied. *Babcock v. Fond du Lac*, 58 Wis. 230.

2. *Raisler v. Athens*, 66 Ala. 191; *First Nat. Bank of Americus v. Americus*, 68 Ga. 119; *People v. Miner*, 46 Ill. 374; *Conkling v. Springfield*, 132 Ill. 420; *Whitbeck v. Minch*, 48 Ohio St. 210; *Georgetown College v. District of Columbia*, 4 MacArthur (D. C.) 43.

Even where the payment under protest is made in pursuance of an agreement that the taxpayers' rights and their assertion in the courts shall not be prejudiced by such payment, it can-

not be recovered back. *Galveston City Co. v. Galveston*, 56 Tex. 486.

3. The *Massachusetts* statute requires the protest to be in writing. An oral protest is insufficient, even though the treasurer has instructed the clerk to make a note of all protests, written or oral. *Knowles v. Boston*, 129 Mass. 551. But if the taxpayer writes the protest across the face of his tax bill, and presents that to the collector, but does not leave it with him, it is sufficient. *Borland v. Boston*, 132 Mass. 89.

The taxpayer need not resist the collector, nor resort to any other remedies. *McGee v. Salem*, 149 Mass. 238.

If he be taxed by two municipalities, the taxpayer cannot file a bill in equity to determine in which one he is properly taxable; he should pay under protest and sue. *Macy v. Nantucket*, 121 Mass. 351.

The statute does not apply to cases of overvaluation or overtaxation, if the taxpayer was properly taxable at all. The remedy in such a case is by application for abatement, as it was before the statute was passed. *Bourne v. Boston*, 2 Gray (Mass.) 494; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Salmond v. Hanover*, 13 Allen (Mass.) 119; *Hicks v. Westport*, 130 Mass. 478; *Boston Mfg. Co. v. Com.*, 144 Mass. 598; *Richardson v. Boston*, 148 Mass. 508; *Norcross v. Milford*, 150 Mass. 237.

Hence, where one partner paid under protest the amount of a tax assessed against his firm after its dissolution, it was held that he could not recover it back, unless, at the date of the assessment, the firm's affairs had been wound up or it had no taxable property remaining undisposed of. *Oliver v. Lynn*, 130 Mass. 143.

And the question of the invalidity of a sewer assessment, on account of the omission therefrom of persons benefited by the sewer, cannot be tried in an action to recover the money paid. *Kelso v. Boston*, 120 Mass. 297.

The *Michigan* statute allows recovery from a township within thirty days after protest, if the tax be illegal for the reasons specified in the protest.

The protest is a mere notice, and a copy may be evidence if service be proved. *Michigan Land, etc., Co. v. Republic*, 65 Mich. 628.

duress is essential,<sup>1</sup> and if the tax or assessment be demanded by an officer who has in his possession at the time a warrant in the nature of an execution against the taxpayer's property, so that he can only protect himself by paying, this is held to constitute

The illegality gives the right of action; the protest merely determines the time from which the amount may be recovered. *White v. Millbrook*, 60 Mich. 532.

The statute applies to excessive taxation. See *Solomon v. Oscoda*, 77 Mich. 365.

A protest in the form "Paid under protest to protect property from being sold, and on account of taxes being illegal" is sufficiently specific where the claim is that the taxes are wholly illegal, and not merely so in some special point. *Whitney v. Port Huron*, 88 Mich. 268.

The *Nebraska* statute requires that, before suit can be brought against a county treasurer, demand must be made of all the treasurers, state, county, district, etc., to whom the money was to be distributed. *Burlington, etc., R. Co. v. Buffalo County*, 14 Neb. 51.

The statute covers the case of local occupation taxes. *Caldwell v. Lincoln*, 19 Neb. 569.

The *Tennessee* statute providing for action, within thirty days of the time of payment, to recover "illegal" taxes, has been held not to apply to an unconstitutional tax, such a tax being void. *U. S. Express Co. v. Allen*, 39 Fed. Rep. 712. A judgment for a tax under this statute has precedence over other claims upon the county treasury. *Sheldon v. Platt*, 139 U. S. 591.

The *Wisconsin* statute applies to school-district taxes, though not expressly mentioned therein. *Matteson v. Rosendale*, 37 Wis. 255.

1. On the question of what constitutes such duress as will give a taxpayer, who pays under protest, the right to recover, the courts of the different states are not altogether in harmony. In general it may be said that a payment made to avoid an actual levy and sale of the taxpayer's property, is made under duress. *Howard v. Augusta*, 74 Me. 79; *Lyon v. Guthard*, 52 Mich. 71; *Bruecher v. Port Chester*, 31 Hun (N. Y.) 550; *Dutchess County Mut. Ins. Co. v. Poughkeepsie* (Supreme Ct.), 4 N. Y. Supp. 93; *Grim v. Weissenberg*, 57 Pa. St. 433; *Galveston Gas Co. v. Galveston County*, 54 Tex. 287; *Allen v. Bur-*

*lington*, 45 Vt. 202; *Parcher v. Marathon County*, 52 Wis. 388.

But it has been held that if that which is not distrainable be distrained and advertised for sale, payment of the tax to avoid sale is voluntary. *Sowles v. Soule*, 59 Vt. 131. And payment to avoid an action or prosecution, where the invalidity of the law would be a defense, is not under duress. *Maxwell v. San Luis Obispo County*, 79 Cal. 466.

Payment of a tax to avoid an impending sale, after an unsuccessful application for an injunction against the sheriff, is not voluntary. *Shaw v. Allegheny*, 115 Pa. St. 46.

Payment before legal proceedings are begun, though after they have been authorized, is voluntary. *Barrett v. Cambridge*, 10 Allen (Mass.) 48; *Wilson v. Pelton*, 40 Ohio St. 306. And so of payment prior to a demand, which was an essential prerequisite to a seizure. *Conkling v. Springfield*, 19 Ill. App. 167.

Threats of sale, of legal proceedings, or of adding costs, do not constitute duress. *Buchnall v. Story*, 46 Cal. 595; *De Baker v. Carillo*, 52 Cal. 473; *De Fremery v. Austin*, 53 Cal. 379; *Vanderbeck v. Rochester*, 46 Hun (N. Y.) 87; *Taylor v. Board of Health*, 31 Pa. St. 73. *A fortiori*, payment of a tax is voluntary, although under protest, when made before such threats have been made. *Woodland Bank v. Webber*, 52 Cal. 73.

Threats either before or after sale, to execute a tax deed, which, being void upon its face, would not cloud the title, do not constitute duress. *De Fremery v. Austin*, 53 Cal. 379; *Shane v. St. Paul*, 26 Minn. 543. A mere assertion by city officials that they have power to require payment, is not duress. *Holder v. Galena*, 19 Ill. App. 409. But under certain circumstances threats may amount to compulsion. *Magnolia v. Sherman*, 46 Ark. 358; *Cade v. Perlin*, 14 S. Car. 1. *E. g.*, where the collector, having repeatedly demanded the tax, threatens to shut up the taxpayer's shop. *Vicksburg v. Butler*, 56 Miss. 72.

A demand for the tax, accompanied by a threat of immediate and effectual enforcement, is held to be duress in

duress.<sup>1</sup> Payment of the tax is not considered voluntary when necessary to clear the title to real estate.<sup>2</sup>

To warrant a recovery, the tax must be itself illegal, or at least illegally assessed, and not merely irregularly so,<sup>3</sup> and no right of

*Michigan*. First Nat. Bank v. Watkins, 21 Mich. 483.

1. Williams v. Corcoran, 46 Cal. 556; Smith v. Farrelly, 52 Cal. 77; Atwater v. Woodbridge, 6 Conn. 223; Adam v. Litchfield, 10 Conn. 127; Mills v. Hopkinsville (Ky. 1889), 11 S. W. Rep. 776; Amesbury Woollen, etc., Mfg. Co. v. Amesbury, 17 Mass. 461; Sumner v. Dorchester, 4 Pick. (Mass.) 361; Preston v. Boston, 12 Pick. (Mass.) 7; Perry v. Dover, 12 Pick. (Mass.) 206.

But in Union Pac. R. Co. v. Dodge County, 98 U. S. 541, it was held that where warrants were issued to the county treasurer, directing him to seize and sell personal property, upon default in the payment of taxes upon certain lands, but he made no special effort to do so, payment was voluntary.

In Boston, etc., Glass Co. v. Boston, 4 Met. (Mass.) 181, it was held that where the collector has a tax bill and warrant in the form prescribed by law, payment is compulsory, and that protest is only essential to the recovery of interest.

In Chicago v. Fidelity Sav. Bank, 11 Ill. App. 165, and Dunnell Mfg. Co. v. Newell, 15 R. I. 233, it is stated that the mere fact that the collector has a warrant does not make the payment compulsory, as he may not execute it, but proceed at law; but in the opinion in the latter case it was stated that if payment be made under protest, it may be recovered back. The opinion is not very clear.

The mere fact that the taxes are included in the delinquent list does not make payment compulsory, especially when the taxpayer has no land on which they would be a lien. Dear v. Varum, 80 Cal. 86.

It has been held in *Pennsylvania*, though by a divided court, that the advertisement of land for sale for the taxes is not duress. Union Ins. Co. v. Allegheny, 101 Pa. St. 250.

In Bailey v. Buell, 50 N. Y. 662, reversing 59 Barb. (N. Y.) 158, it was held that the order of a county judge that a tax should be paid, was in the nature of a judgment, and nugatory without further action, so that payment in compliance therewith was voluntary;

and this was followed in Drake v. Shurtliff, 24 Hun (N. Y.) 422, even though the taxpayer had been enjoined from disposing of his property till payment was made. It had previously been held (Bank of the Commonwealth v. New York, 43 N. Y. 184), that the assessment itself was in the nature of a judgment which the taxpayer was legally bound to pay, and had no lawful means of resisting; and hence that payment on demand of the proper authority was not voluntary. This view was followed in Union Bank v. New York, 51 N. Y. 638, reversing 51 Barb. (N. Y.) 159, where the plaintiffs had paid on being notified by the officer in charge of the collection that in the event of non-payment, a warrant would be issued to collect the same, but no warrant had issued. It seems difficult to harmonize these cases.

Where it became the immediate duty of the county treasurer, however, if the tax were not paid, to issue a warrant to the sheriff to levy upon and sell the taxpayer's personal property, payment was held to be under duress. Kansas Pac. R. Co. v. Wyandotte County, 16 Kan. 589. To the same effect, Preston v. Boston, 12 Pick. (Mass.) 7.

2. State v. Nelson, 41 Minn. 25; Vaughn v. Port Chester, 43 Hun (N. Y.) 427; Stephan v. Daniels, 27 Ohio St. 527.

3. Stephenson County v. Manny, 56 Ill. 160; Chicago v. Fidelity Sav. Bank, 11 Ill. App. 165. See *Indiana* cases under statute cited in note *supra*; Williams v. School Dist., 21 Pick. (Mass.) 75; Rogers v. Greenbush, 58 Me. 390; Hanson v. Haverhill, 60 N. H. 218; Matter of New York Catholic Protector, 8 Hun (N. Y.) 91.

Where a tax payable in labor was assessed as a money tax, without the statutory notice and demand, the remedy was held to be against the assessor for damages sustained. Hayford v. Belfast, 69 Me. 63.

Where a county auditor increased the assessment of certain property as listed, this was held to be a revaluation, not an assessment, of omitted property, and as the auditor could not revalue, a recovery was had. Douch v. Lake County, 4 Ind. App. 374.

action arises from the fact that the proper officers have agreed to refund a tax voluntarily paid, and not of itself illegal and void.<sup>1</sup> If the amount of an illegal tax be actually collected by distress and sale of personal property, it can of course be recovered back, as the question of duress does not arise,<sup>2</sup> and if the owner of land sold for illegal taxes redeems it, it has been held that he can recover the redemption money,<sup>3</sup> though in some cases the redemption has been regarded as a voluntary payment.<sup>4</sup>

In *Minnesota*, it has been held that the taxation of property properly taxable elsewhere, was erroneous, but not void, so that the taxpayer should have sought to have the error corrected, and could not recover the money paid. *Clarke v. Stearns County*, 47 Minn. 552.

In *Swift v. Poughkeepsie*, 37 N. Y. 511, it was held that where both the person and the property taxed were within the jurisdiction of the taxing authority, the fact that some of the property taxed was exempt, did authorize an action against the county or municipality for erroneous tax after it was paid—that the remedy was by *certiorari*, writ of error, or application to the legislature. In *Newman v. Livingston County*, 45 N. Y. 676, it was attempted to extend this limitation of municipal responsibility to a compulsory payment of a tax due from a former occupant of the taxpayer's premises, a tax void as to the latter; but the Court of Appeals, reversing 1 Lans. (N. Y.) 476, declared that in such a case a recovery could be had against the county or municipality that had received the money.

In *Bank of Com. v. New York*, 43 N. Y. 184, it was held that money paid for a tax erroneously assessed could be recovered back where the assessment was, after the payment, annulled on *certiorari*.

A tax collected without any assessment whatever may be recovered back. *Shewalter v. Brown*, 35 Miss. 423.

1. *Lyons v. Cook*, 9 Ill. App. 543.

2. *Hennel v. Vanderburgh County*, 132 Ind. 32; *Sumner v. Dorchester*, 4 Pick. (Mass.) 361; *Inglee v. Bosworth*, 5 Pick. (Mass.) 498; *Dow v. First Parish*, 5 Met. (Mass.) 73.

But if the payment be in satisfaction of a judgment for taxes, it cannot be recovered until the judgment is set aside. *First Presbyterian Church v. New Orleans*, 30 La. Ann. 259.

3. In *Brownlee v. Marion County*, 53 Iowa 487, and *Parker v. Cochran*, 64

Iowa 757, such redemption was held to bring the case within the *Iowa* statute (Rev. Code, 1888, § 870), but in *Sears v. Marshall County*, 59 Iowa 603, where the land was sold for taxes which had already been paid, it was held that the owner should have proceeded against the holder of the certificate or tax deed, to have these instruments canceled.

In *Pennsylvania*, redemption money paid for land illegally sold for a tax levied a second time, may be recovered. *Clapp v. Pinegrove*, 138 Pa. St. 35.

Purchase, from the county's assignee, of the outstanding certificates and the taking of quit-claim deeds for lands conveyed to him by tax deed, have been held in *Wisconsin* not to constitute a voluntary redemption, and hence in such case the owner can recover under the statute. *Marsh v. St. Croix County*, 42 Wis. 355.

Payment, after sale of land for an assessment for an improvement afterwards abandoned, has been held not voluntary, even when made after the abandonment. *Valentine v. St. Paul*, 34 Minn. 446.

4. *Sears v. Marshall County*, 59 Iowa 603. See last note.

In *Shane v. St. Paul*, 26 Minn. 543, where the sale was under a void tax judgment and the owner had full knowledge of the character of the sale and the facts affecting its validity, he could not recover the money paid.

In *Phillips v. Jefferson County*, 5 Kan. 412, certain Indian lands, not legally taxable, were assessed and sold for taxes. One who had title to the land, paid the taxes, though denying their legality, in order to prevent tax deeds from being issued. This payment was held to be voluntary, the court saying, "The money was not paid on compulsion or extorted as a condition. A tax deed had been due for nearly two years. Had the plaintiff desired to litigate the question, he could have done so without paying the money; even had

If a tax be partly illegal, and the illegal portion can be separated, it may be recovered if paid under duress, provided the legal tax be first tendered and refused.<sup>1</sup> No recovery will be permitted in cases of overvaluation, where the taxpayer neglected to pursue his ordinary remedies before payment;<sup>2</sup> but in the case of illegal taxation, no proceeding to set aside the assessment is necessary.<sup>3</sup>

The protest made should be sufficiently definite to notify the tax collector of the illegality which the taxpayer claims to exist;<sup>4</sup> but it need not state facts of which he has notice.<sup>5</sup> Prior demand for repayment is required by statute in some states,<sup>6</sup> but this is exceptional.<sup>7</sup>

The action, which under common-law pleading is one of *assumpsit*,<sup>8</sup> may be maintained against the county, town, city,

a deed been made out on the tax certificate, it would have been set aside by appropriate proceedings. There was no legal ground for apprehending any danger on the part of the plaintiff."

In *Wabaunsee County v. Walker*, 8 Kan. 431, it was held in a similar case, that not even illegal interest paid on the taxes could be recovered back.

In *Lamborn v. Dickinson County*, 97 U. S. 181, the owner had full knowledge of the facts, but was misled by an erroneous decision of the state supreme court (afterwards reversed by the U. S. Supreme Court), and in consequence redeemed the property. The redemption was held to be voluntary, as there was no absolute necessity for it.

1. *Bank of Mendocino v. Chalfant*, 51 Cal. 471.

In *Michigan*, this may be done in the case of a tax properly levied but excessive. *Lake Superior Ship Canal Co. v. Thompson*, 56 Mich. 493.

2. *Hemingway v. Machias*, 33 Me. 445; *Waite v. Princeton*, 66 Me. 225; *Huggins v. Hinson*, Phill. G. (N. Car.) 126; *Wharton v. Birmingham*, 37 Pa. St. 371; *Cloud v. Norwich*, 57 Vt. 448; *Stanley v. Albany County*, 121 U. S. 535; *Williams v. Albany County*, 122 U. S. 154; *Balfour v. Portland*, 28 Fed. Rep. 738.

As to recovery after unsuccessful application to board of review, see *James v. New Orleans*, 19 La. Ann. 109.

But where a tax was assessed against a former owner of a building (assessed separately from the land), the fact that he never petitioned for abatement, was held not to affect the subsequent owners' right to recover the tax paid them under protest, there being no personal

obligation on them, nor any lien on the building. *McGee v. Salem*, 149 Mass. 238.

The fact that a city charter gives a right to appeal from a tax assessment, does not prevent an action to recover a tax paid in reliance on fraudulent misrepresentations. The former remedy is not exclusive. *Harrison v. Milwaukee*, 49 Wis. 247.

3. *Bruecher v. Port Chester*, 101 N. Y. 240; *Ross v. Cayuga County*, 38 Hun (N. Y.) 20; *Galveston Gas Co. v. Galveston County*, 54 Tex. 287; 72 Tex. 509.

4. *Meek v. McClure*, 49 Cal. 624.

A protest that "the lands are unequally and unjustly assessed, and the township and highway taxes are illegal and unjust," is insufficient. *Peninsula Iron Co. v. Crystal Falls*, 60 Mich. 79.

5. *Smith v. Farrelly*, 52 Cal. 77.

If payment be resisted because the property taxed is outside the limits of the taxing district, a general protest is sufficient, as the collector is bound to know the limits of his district. *Mason v. Johnson*, 51 Cal. 612.

6. In *North Carolina*, a demand within thirty days of payment is required in all cases, and the fact that it has been made must appear in the complaint. *Richmond, etc., R. Co. v. Reidsville*, 109 N. Car. 494.

7. *Arapahoe County v. Cutter*, 3 Colo. 349; *Babcock v. Granville*, 44 Vt. 325.

8. *Garland County v. Gaines*, 47 Ark. 558; *Phelps v. Thurston*, 47 Conn. 477; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 189; *Loud v. Charlestown*, 99 Mass. 208; *Grand Rapids v. Blakely*, 40 Mich. 367; *Daniels v. Watertown*, 55 Mich. 376; *Greene v.*



or other municipality that has received the money,<sup>1</sup> or against the collector, if he still retains it,<sup>2</sup> or has been notified not to pay

Mumford, 5 R. I. 472; *St. Mary's Church v. Tripp*, 14 R. I. 307; *Babcock v. Granville*, 44 Vt. 325; *Brown v. Greenhow*, 80 Va. 118.

Under code practice, the action is still essentially an action at law. *Turner v. Althaus*, 6 Neb. 54; *Rugles v. Fond du Lac*, 53 Wis. 436.

If the tax be void in part, *assumpsit* lies to recover the void portion, but not the costs of serving the warrant. *Torrey v. Millbury*, 21 Pick. (Mass.) 64.

1. *Baker v. Allen*, 21 Pick. (Mass.) 382; *Dorr v. Boston*, 6 Gray (Mass.) 131; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 189; *Loud v. Charlestown*, 99 Mass. 208; *Daniels v. Watertown*, 55 Mich. 376; *Vicksburg v. Butler*, 56 Miss. 72; *Greene v. Mumford*, 5 R. I. 472. And the liability of such local body cannot be removed by any agreement between it and the collector. *Loring v. St. Louis*, 10 Mo. App. 414.

In *Wyoming*, money received by a county can only be recovered by an action against the county treasurer, a county not being a municipal corporation within the meaning of the statute authorizing a recovery from such bodies. *Powder River Cattle Co. v. Johnson County* (Wyoming, 1892), 29 Pac. Rep. 361.

It must be proved that the authorized officer of the body sued received the money, whether paid to him directly or through a collector. *Chicago v. Fidelity Sav. Bank*, 11 Ill. App. 165; *Smith v. Readfield*, 27 Me. 145.

If a county directs and empowers a person to collect and receive taxes for it, a collection made by such person is received by the county. *Galveston County v. Galveston Gas Co.*, 72 Tex. 509.

If a tax levied by a city be paid to an officer acting under color of municipal authority, and be received by the city, it cannot defend, in an action to recover illegal taxes paid, on the ground that the money was not to be used for municipal purposes. *Grand Rapids v. Blakely*, 40 Mich. 367.

Where a county collector had paid certain taxes into the county court pending litigation as to their legality, and on the separation of a city from the county the fund was paid over to the city, it was liable to those who had

paid the taxes, they being illegal. *Loring v. St. Louis*, 10 Mo. App. 414.

The action lies against a county, town, city, or other municipality, only when its treasurer has received the money for its own purposes. Thus a town can be sued only for town taxes paid into the town treasury. *Slack v. Norwich*, 32 Vt. 818.

It cannot be sued for money in the hands of a township treasurer for a ditch tax, such tax not being a township affair. *Camp v. Algansee*, 50 Mich. 4.

If a county treasurer receives the proceeds of an illegal tax for the benefit of school districts, the action is against him, not against the county commissioners. *Pawnee County v. Atchison, etc., R. Co.*, 21 Kan. 748.

It has even been held in *New York*, that illegal taxes collected in a town (a species of a municipality not having a treasurer) and paid over to the county treasurer and partly applied by him, could not be recovered back. *Rochester v. Rush*, 80 N. Y. 302, reversing 15 Hun (N. Y.) 239.

And in *Iowa*, a county is not liable for money collected from illegal taxes, paid into the county treasury, not for county purposes generally, but for particular funds to which the tax was apportioned when collected, *e. g.*, township taxes for roads, schools, etc., except to the extent of these funds remaining in the treasury. *Stone v. Woodbury County*, 51 Iowa 522; *Iowa R. Land Co. v. Woodbury County*, 64 Iowa 212.

But in *Michigan*, a township is liable to one who has been forced to pay an illegal tax, even though the money has been paid away on highway and school orders. *Byles v. Golden*, 52 Mich. 612.

In *Connecticut*, it is held that where the money of a town is illegally appropriated by a vote of the town, an injunction will lie. The legal remedy, by a suit to recover back the tax paid, is not adequate. *Webster v. Harwinton*, 32 Conn. 131.

2. *Hardesty v. Fleming*, 57 Tex. 395; *Brown v. Greenhow*, 80 Va. 118. If the county supervisors have paid over the proceeds of an illegal railroad aid tax, it cannot be recovered from them (*Butler v. Fayette County*, 46 Iowa 326), even where such tax is illegal in

it over.<sup>1</sup> The right of action is limited by such reasonable restriction as to time as the legislature may establish.<sup>2</sup>

The complaint or declaration must state the facts constituting the alleged illegality of the tax,<sup>3</sup> but need not state the precise amount of the money illegally exacted.<sup>4</sup> If the claim be valid, the taxpayer is a creditor of the taxing district, and may recover in whatever manner the law may provide, but he cannot have his claim made a set-off against future taxes.<sup>5</sup> Interest is usually recoverable from the date of payment.<sup>6</sup>

g. REMEDIES AGAINST PUBLIC OFFICERS—(See also PUBLIC OFFICERS, vol. 19, p. 378)—(1) *Official Liability in General*.—A public officer is not liable for injuries resulting to individuals from acts done in the exercise of a discretionary authority, either inherent in the office, or conferred upon it by law in the particular case, without the clearest proof of corrupt and malicious motives,<sup>7</sup>

one township only, and they have in hand money lawfully collected from other townships and not yet paid over. They have no authority to make a set-off of this character. *Des Moines, etc., R. Co. v. Lowry*, 51 Iowa 486.

1. *Vicksburg v. Butler*, 56 Miss. 72; *Taylor v. Board of Health*, 31 Pa. St. 73.

2. *Plumer v. Marathon County*, 46 Wis. 163.

In *Iowa*, the limitation under the refunding act, is five years from the date of payment. *Brown v. Painter*, 44 Iowa 368; *Callanan v. Madison County*, 45 Iowa 561; *Hamilton v. Dubuque*, 50 Iowa 213; *Beecher v. Clay County*, 52 Iowa 140.

And if part of the claim be barred by the Statute of Limitations, recovery may still be had for the part not barred. *Magnolia Dist. Tp. v. Boyer Independent Dist.* (Iowa, 1890), 45 N. W. Rep. 907.

In *Arkansas*, the action is subject to the three years' limitation of actions of *assumpsit*. *Garland County v. Gaines*, 47 Ark. 558.

In *Michigan*, the limitation is thirty days, but this only applies in the case of assessments against the plaintiff or upon his property. *Babcock v. Beaver Creek*, 65 Mich. 479.

3. *Pelton v. Bemis*, 44 Ohio St. 51. See *People v. Cone*, 48 Cal. 427. But it has been held that a recovery may be had on other grounds, the payment being involuntary. *Babcock v. Beaver Creek*, 64 Mich. 601.

If non-residence be alleged, residence elsewhere must be proved. *Portland, etc., R. Co. v. Saco*, 60 Me. 196.

If illegality in the object of the tax be alleged, application of the tax to the illegal object need not be proved. *Gillette v. Hartford*, 31 Conn. 356.

4. *Meek v. McClure*, 49 Cal. 624.

Counts may be joined, alleging invalidity in the whole and in part. *Rugles v. Fond du Lac*, 53 Wis. 436.

5. *McVeigh v. Lanier*, 50 Ark. 384.

6. *Grand Rapids v. Blakely*, 40 Mich. 367; *Galveston County v. Galveston Gas Co.*, 72 Tex. 509; *Ersine v. Van Arsdale*, 15 Wall. (U. S.) 75. And see *Boston, etc., R. Co. v. State*, 63 N. H. 571.

7. That an assessor is not personally liable for errors in an assessment, the result of an honest exercise of the discretion and judgment vested in him by law, has been frequently held. *Sanford v. Dick*, 15 Conn. 447; *Macklot v. Davenport*, 17 Iowa 379; *Muscatine Western R. Co. v. Horton*, 38 Iowa 33; *Dillingham v. Snow*, 5 Mass. 558; *Colman v. Anderson*, 10 Mass. 119; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Baker v. Allen*, 21 Pick. (Mass.) 382; *Griffin v. Rising*, 11 Met. (Mass.) 339; *Durant v. Eaton*, 98 Mass. 469; *Wall v. Trumbull*, 16 Mich. 238; *Edes v. Boardman*, 58 N. H. 580; *Odiorne v. Rand*, 59 N. H. 504; *McDaniel v. Tebbitts*, 60 N. H. 497; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Vail v. Owen*, 19 Barb. (N. Y.) 22; *Brown v. Smith*, 24 Barb. (N. Y.) 419; *People v. Reddy*, 43 Barb. (N. Y.) 539; *Vose v. Willard*, 47 Barb. (N. Y.) 320; *Bell v. Pierce*, 48 Barb. (N. Y.) 51; *Barhyte v. Shepherd*, 35 N. Y. 238; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Williams*

or of his having exceeded his jurisdiction.<sup>1</sup> Omissions of duty, or want of ordinary care and skill, in the performance of purely ministerial acts, will, however, impose a personal liability, as every officer is bound to know his duty and to do it;<sup>2</sup> but even in the case of ministerial acts, personal liability is avoided

*v. Weaver*, 75 N. Y. 30; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *Stearns v. Miller*, 25 Vt. 20; *Wilson v. Marsh*, 34 Vt. 352; *Cooley on Taxation* 794.

An assessor is not liable to an action, for neglecting to commit the tax list to the proper collector of taxes, if he commits the warrant to himself under an erroneous view of the law. *Lincoln v. Chapin*, 132 Mass. 470.

Highway commissioners, in determining the opening of a certain road to be a public necessity, have been held to incur no liability. *Sage v. Laurain*, 19 Mich. 137.

Assessors are not liable to a parish for neglecting to assess a tax equal to the amount voted, where they acted under the honest belief that they were carrying out the views of the parish. *First Parish v. Fiske*, 8 Cush. (Mass.) 264.

It seems that an individual taxpayer has no right of action against a supervisor for assessing property on a false valuation, except on the ground of fraud or malice. *Moss v. Cummings*, 44 Mich. 359.

Township trustees, acting without corrupt or malicious motives, are not liable for a refusal to issue a certificate of compliance with the conditions upon which a tax has been voted in aid of a railroad. *Muscataine Western R. Co. v. Horton*, 38 Iowa 33.

Where the mayor and councils of a city, with malicious intent, by resolution declared a non-resident merchant to be within an ordinance, and his property was seized for a tax assessed under the ordinance, which was afterwards declared to be invalid, it was held he might maintain an action against the city for the tort. *Gould v. Atlanta*, 60 Ga. 164.

1. Where, however, officers exercising the judicial function lay their acts open to complaint on grounds going to the jurisdiction, as where they exceed their authority, or wrongfully assume powers not conferred, they are no longer exempt from personal liability for injuries resulting, and redress may be had by the taxpayer by an action appropriate to the injury sustained. It

is to such extrajudicial acts by assessors, that injuries in tax proceedings are principally referable.

That assessors cannot acquire jurisdiction by deciding that they have it, is well settled.

"Where assessors have no power to act at all in a given case, either as to person or property, their acts are void. So, when their right to act depends upon the existence of some fact, which they erroneously determine to exist, their acts are void. So, in performing a ministerial duty, their acts are void, if not in accordance with law." *National Bank v. Elmira*, 53 N. Y. 49; *Dorn v. Backer*, 61 N. Y. 261; *Matter of New York Catholic Protectory*, 77 N. Y. 342. 2. *Kellogg v. Higgins*, 11 Vt. 240; *Stearns v. Miller*, 25 Vt. 20.

In *Illinois*, the remedy for the omission of tax assessors to list and assess all property liable to taxation, is, by an action for the damage, sustained. The objection is not available as a ground for impeaching the entire tax. *Dunham v. Chicago*, 55 Ill. 357.

"Where an officer, in performing an act within the scope of his authority, commits an error, or even abuses the confidence which the law reposes in him, he is still entitled to the protection of the statute." *Brown v. Smith*, 24 Barb. (N. Y.) 419, ruling that where a farm was situated in two counties, and the assessors had jurisdiction as to the part lying in one county, their error in determining the residence of the owner, to his injury, could not subject them to a personal action. See *Dorn v. Backer*, 61 N. Y. 261; *Matter of New York Catholic Protectory*, 77 N. Y. 342.

Where supervisors have jurisdiction to issue the tax warrant, they will not be liable in trespass because they have erred in allowing an improper item. *Parish v. Golden*, 35 N. Y. 462; *Wall v. Trumbull*, 16 Mich. 228; *Cunningham v. Mitchell*, 67 Pa. St. 78.

Where a justice of the peace, on application duly made by the committee of an ecclesiastical society, with a rate bill, regular and valid on its face, grants a warrant for the collection of a tax, he acts within his jurisdiction, and

by strict obedience to the requirements of a statute, or the apparently legal commands of a superior authority,<sup>1</sup> unless the officer has knowledge of facts rendering such commands illegal.<sup>2</sup> This distinction in the liability resulting from discretionary and from ministerial acts applies even to town assessors and listers.<sup>3</sup>

although the writ was not legally imposed, he is not liable in trespass. *Prince v. Thomas*, 11 Conn. 472.

1. *Lott v. Hubbard*, 44 Ala. 593; *Sanders v. Simmons*, 30 Ark. 274; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Prince v. Thomas*, 11 Conn. 472; *Shaw v. Dennis*, 10 Ill. 405; *Allen v. Scott*, 13 Ill. 80; *Hill v. Figley*, 25 Ill. 143; *Noland v. Busby*, 28 Ind. 154; *Ford v. Clough*, 8 Me. 334; *Kellar v. Savage*, 20 Me. 199; *Tremont v. Clark*, 33 Me. 482; *Caldwell v. Hawkins*, 40 Me. 526; *Judkins v. Reed*, 48 Me. 386; *Bethel v. Mason*, 55 Me. 501; *Nowell v. Tripp*, 61 Me. 426; *Colman v. Anderson*, 10 Mass. 105; *Stetson v. Kempton*, 13 Mass. 272; *Holden v. Eaton*, 8 Pick. (Mass.) 436; *Little v. Merrill*, 10 Pick. (Mass.) 543; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Upton v. Holden*, 5 Met. (Mass.) 360; *Aldrich v. Aldrich*, 8 Met. (Mass.) 102; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Hays v. Drake*, 6 Gray (Mass.) 387; *Howard v. Proctor*, 7 Gray (Mass.) 128; *Williamstown v. Willis*, 15 Gray (Mass.) 427; *Cheever v. Merritt*, 5 Allen (Mass.) 563; *Underwood v. Robinson*, 106 Mass. 296; *Cone v. Forest*, 126 Mass. 97; *Clark v. Axford*, 5 Mich. 182; *Wall v. Turnbull*, 16 Mich. 228; *LeRoy v. East Saginaw City R. Co.*, 18 Mich. 233; *Bird v. Perkins*, 33 Mich. 28; *Byles v. Genung*, 52 Mich. 504; *Turner v. Franklin*, 29 Mo. 285; *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis Bldg., etc., Assoc. v. Lightner*, 47 Mo. 393; *State v. Duile*, 48 Mo. 282; *Walden v. Dudley*, 49 Mo. 419; *Ranney v. Bader*, 67 Mo. 476; *Henry v. Sargeant*, 13 N. H. 321; *Kelley v. Noyes*, 43 N. H. 209; *Beach v. Furman*, 9 Johns. (N. Y.) 229; *Alexander v. Hoyt*, 7 Wend. (N. Y.) 89; *Reynolds v. Moore*, 9 Wend. (N. Y.) 35; *Bennett v. Burch*, 1 Den. (N. Y.) 141; *Abbott v. Yost*, 2 Den. (N. Y.) 86; *Patchin v. Ritter*, 27 Barb. (N. Y.) 34; *Doolittle v. Doolittle*, 31 Barb. (N. Y.) 312; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Bellinger v. Gray*, 51 N. Y. 610; *Woolsey v. Morris*, 96 N. Y. 311; *Bailey v. Wortsman* (Supreme Ct.), 2 N. Y. St. Rep. 246; *Smith v. Mosher*, 9 N. Y. Supp. 786; 56 Hun (N. Y.) 643;

*State v. Lutz*, 65 N. Car. 503; *Gore v. Mastin*, 66 N. Car. 371; *Loomis v. Spencer*, 1 Ohio St. 154; *Moore v. Allegheny City*, 18 Pa. St. 55; *Cunningham v. Mitchell*, 67 Pa. St. 78; *Peckham v. Bicknell*, 11 R. I. 596; *State v. Jervey*, 4 Strobh. (S. Car.) 304; *McLean v. Cook*, 23 Wis. 364; *Ersline v. Hohnbach*, 14 Wall. (U. S.) 613; *Bailey v. Railroad Co.*, 22 Wall. (U. S.) 604; *Cooley on Taxation* 797.

A collector's warrant protects him against all errors but his own. *Carville v. Addition*, 62 Me. 459.

Where an officer having several processes in his hands, some valid and some invalid, levies under all of them upon the property of the party against whom they are issued, this does not alone constitute the officer a trespasser, although the invalidity appeared upon the face of the invalid processes, or was known to the officer. *Woolsey v. Morris*, 96 N. Y. 311.

In *Vermont*, however, a regular tax bill and warrant are not, of themselves, a sufficient justification to a town collector for distraining property. He must show the legality of all previous proceedings. *Collamer v. Drury*, 16 Vt. 574; *Downer v. Woodbury*, 19 Vt. 329; *Downing v. Roberts*, 21 Vt. 441; *Spear v. Tilson*, 24 Vt. 420; *Shaw v. Peckett*, 25 Vt. 423; *Wheelock v. Archer*, 26 Vt. 380. See *Hathaway v. Goodrich*, 5 Vt. 65.

In an action of trespass against a supervisor of taxes, the justification must be proved by showing his jurisdiction to impose the taxes and to issue the warrant for their collection. Proof that the assessment roll came into his hands, and that the various taxes had been required by competent authorities, is sufficient for this. *Clark v. Axford*, 5 Mich. 182.

For the effect of a replication *de injuria*, etc., to a plea of justification, see *Downer v. Woodbury*, 19 Vt. 329.

2. *Teachman v. Dougherty*, 81 Ill. 324.

3. The setting in the list personal property, such as money, debts, etc., is a matter resting in the discretion of listers, and they are only liable for

(2) *Tort (Trespass)*.—Agreeably to these general principles, an action of tort (or trespass) has been held to lie, where persons undertook to act as assessors without having been elected as such;<sup>1</sup> where assessors entered on the roll, as liable to be taxed, the names of persons not liable in the particular district,<sup>2</sup> or, where, after the deposit of the roll for examination, they changed the character of the property assessed;<sup>3</sup> or assessed a farm, situate in two towns, in the town where the owner did not reside.<sup>4</sup> The action lies against assessors for making an assessment without proper authority,<sup>5</sup> or for a larger sum than was voted,<sup>6</sup> for

errors purposely made, out of malice to the party injured. *Stearns v. Miller*, 25 Vt. 20.

For malfeasance in office, assessors, as well as other officers, are liable criminally. *Dillingham v. Snow*, 5 Mass. 558.

1. *Allen v. Archer*, 49 Me. 346.

2. *Ware v. Percival*, 61 Me. 391; *Martin v. Mansfield*, 3 Mass. 419; *Agry v. Young*, 11 Mass. 220; *Gage v. Currier*, 4 Pick. (Mass.) 399; *Inglee v. Bosworth*, 5 Pick. (Mass.) 498; *Withington v. Eveleth*, 7 Pick. (Mass.) 106; *Freeman v. Kenney*, 15 Pick. (Mass.) 44; *Lyman v. Fiske*, 17 Pick. (Mass.) 231; *Kelley v. Noyes*, 43 N. H. 209. Even though, at the time of assessment, the question as to the individual's residence was, from the facts brought to the knowledge of the assessors, fairly one of doubt. *Dorwin v. Strickland*, 57 N. Y. 492.

In assessing property not taxable, the assessor acts ministerially, and not judicially, and is personally liable. *Ford v. McGregor*, 20 Nev. 446; *Whitmore v. McGregor*, 20 Nev. 451.

3. *Bennett v. Buffalo*, 17 N. Y. 383; *Clark v. Norton*, 49 N. Y. 243; *Westfall v. Preston*, 49 N. Y. 349. See *Overing v. Foote*, 65 N. Y. 263.

4. *Dorn v. Backer*, 61 N. Y. 261. But not where the owner was assessed in the wrong town at his own request, *Pease v. Whitney*, 8 Mass. 93; nor where, from his course of conduct, it appeared he acquiesced therein. *Hilton v. Fonda*, 86 N. Y. 339.

5. *E. g.*, where the assessment exceeded the legitimate powers of the town to make (*Paine v. Ross*, 5 Me. 400; *Drew v. Davis*, 10 Vt. 506), and this, notwithstanding the assessment may have included other sums lawfully voted and raised by the town. *Stetson v. Kempton*, 13 Mass. 271; *Inglee v. Bosworth*, 5 Pick. (Mass.) 498.

So where the tax was irregularly

voted, it was held that the assessors were liable, while the collector, being a mere ministerial officer, and acting in pursuance of a regular warrant from a tribunal acting on a subject within their jurisdiction, was not liable, and the action would not lie against the town, because they did not require the defendants to assess the tax, and had not received the fruits; nor against the district, because in the very limited corporate powers and duties with which school districts are invested, a liability to such suits is not imposed on them. *Little v. Merrill*, 10 Pick. (Mass.) 543.

Where the clerk of a school district wrongfully certified to town assessors that at a legal meeting of the district it was voted to raise a certain sum, whereupon the assessors assessed the same, it was held, that one arrested for not paying the tax could not maintain trespass against the clerk, the injury being but a remote consequence of his act. *Taft v. Metcalf*, 11 Pick. (Mass.) 456.

The assessors were held liable for assessing a tax for a school district which was not legally established. *Withington v. Eveleth*, 7 Pick. (Mass.) 106; *Dickinson v. Billings*, 4 Gray (Mass.) 44; *Judd v. Thompson*, 125 Mass. 553.

Where an unauthorized tax is collected by levy and sale, and the taxpayer recovers a judgment against the town in *assumpsit*, for the proceeds of the sale, he cannot sue the assessors. *Ware v. Percival*, 61 Me. 391.

6. *Libby v. Burnham*, 15 Mass. 144; *Joyner v. School Dist. No. 3*, 3 Cush. (Mass.) 567; though the excess be of a few cents only. *Huse v. Merriam*, 2 Me. 375.

And if other taxes, legal in themselves, are blended and incorporated with such illegal tax, the whole are uncollectable, and the assessors are liable for the full value of property distrained and sold. *Drew v. Davis*, 10 Vt. 506.

making an informal assessment,<sup>1</sup> for malicious overvaluation,<sup>2</sup> for assessing exempt property,<sup>3</sup> or that of a non-resident,<sup>4</sup> and for delay in filing their abstract of the list.<sup>5</sup>

The action lies against collectors for collecting taxes under an uncertified roll,<sup>6</sup> or on a void levy,<sup>7</sup> or from a non-resident,<sup>8</sup> or from a person exempt from taxation,<sup>9</sup> or for selling more property than was required to pay the tax,<sup>10</sup> or for selling it in the wrong place.<sup>11</sup> It lies against trustees of a school district for adopting an erroneous basis for fixing the amount of tax to be paid;<sup>12</sup> for omission to give statutory notice, where they did not adopt the valuation upon the last assessment roll.<sup>13</sup> It lies against a county treasurer who seizes property to pay a tax assessed without color of law, or under an unconstitutional law;<sup>14</sup> against selectmen who, without right, doom one liable to taxation;<sup>15</sup> and against a town supervisor or other officer for knowingly giving an illegal warrant to the collector.<sup>16</sup>

(3) *Case*.—In those states which retain the common-law distinction between trespass and case, the latter is the proper action where assessors enter on the roll the names of persons not liable to taxation in the particular district,<sup>17</sup> or increase the valuation of property after the list has passed beyond their control,<sup>18</sup> or make an assessment which is in any way excessive or illegal.<sup>19</sup> It also

1. *Colby v. Russell*, 3 Me. 227.

Similarly, for omissions from the assessment, *Eames v. Johnson*, 4, Allen (Mass.) 382.

2. *Parkinson v. Parker*, 48 Iowa 667.

An averment that the overvaluation was made "willfully and against law," does not charge that intent to injure, which is necessary to sustain the action. *Ballerino v. Mason*, 83 Cal. 447.

In *Moss v. Cummings*, 44 Mich. 359, it was said that the making an assessment on a false valuation should be punished criminally.

3. *National Bank v. Elmira*, 53 N. Y. 49.

4. *People v. Chenango County*, 11 N. Y. 563; *Mygatt v. Washburn*, 15 N. Y. 316; *Wade v. Matheson*, 4 Lans. (N. Y.) 158.

5. *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550.

Where the illegality affected only a small portion of the list, the plaintiff should have paid the tax and sued the town in *assumpsit*. *Phelps v. Thurston*, 47 Conn. 477.

6. *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Westfall v. Preston*, 49 N. Y. 349; *Smith v. Mosher*, 9 N. Y. Supp. 786; 56 Hun (N. Y.) 643.

7. *McPike v. Pew*, 48 Mo. 525; *Willis v. Miller*, 29 Fed. Rep. 238. As to

evidence, see *Bartlett v. Kinsley*, 15 Conn. 327.

8. *Suydam v. Keys*, 13 Johns. (N. Y.) 444. But see *Patchin v. Ritter*, 27 Barb. (N. Y.) 34.

Trespass does not lie against the town for this cause, whether the assessors or collectors are liable or not, but the town may be sued in *assumpsit* if the tax is paid. *Phelps v. Thurston*, 47 Conn. 477; *Alger v. Easton*, 119 Mass. 77.

9. *Baldwin v. McClinch*, 1 Me. 102.

10. *Cone v. Forest*, 126 Mass. 97.

11. *Prince v. Thomas*, 11 Conn. 472.

12. *Alexander v. Hoyt*, 7 Wend. (N. Y.) 89.

13. *Baley v. Wortsman* (Supreme Ct.), 2 N. Y. St. Rep. 246; *Peckham v. Bicknell*, 11 R. I. 596.

14. *Loomis v. Spencer*, 1 Ohio St. 153.

15. *Walker v. Cochran*, 8 N. H. 166; *Henry v. Sergeant*, 13 N. H. 321. See

*Perry v. Buss*, 15 N. H. 222.

16. *Billinger v. Gray*, 51 N. Y. 610; *Willis v. Miller*, 29 Fed. Rep. 238.

17. *Henry v. Edson*, 2 Vt. 499; *Fairbanks v. Kittredge*, 24 Vt. 9.

18. *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201.

19. The *scienter* is all that need be alleged in such a case. *Stearns v. Miller*, 5 Vt. 20.

lies against a highway surveyor for seizing and selling property to satisfy a tax not legally voted, even though the party were liable to be taxed for the object for which the tax was assessed;<sup>1</sup> and against trustees of a school district for issuing a warrant for the collection of an excessive sum.<sup>2</sup>

(4) *Trover*.—Trover lies against a collector, where the assessors, instead of doubling the value of the apparent taxable property, as a penalty for failure to list, proceeded to fix upon mere rumor a value upon property not visible;<sup>3</sup> against trustees of a school district who issued the tax list before the tax was legally voted;<sup>4</sup> and against a collector who sells a distress for non-payment of taxes after the time limited for making such sale.<sup>5</sup> In trover for the sale of property for village taxes, the regularity of the incorporation of the village cannot be inquired into.<sup>6</sup>

(5) *Mandamus*.—(See MANDAMUS, vol. 14, p. 192.)

(6) *Replevin*.—(See REPLEVIN, vol. 20, p. 1071.)

**XX. OCCUPATION, BUSINESS, AND PRIVILEGE TAXES—1. Power to Impose—***a. IN GENERAL—CONSTITUTIONAL LIMITATIONS.*—The power to impose privilege and occupation taxes exists independently and concurrently in the state and federal government, subject to constitutional restrictions;<sup>7</sup> in the state government, subject to the exclusive rights conferred on Congress to regulate interstate commerce;<sup>8</sup> and in the federal government, subject to

But no presumption of illegality arises from the mere fact that an assessment was made. *Perry v. Buss*, 15 N. H. 222.

1. *Grafton Bank v. Kimball*, 20 N. H. 107.

2. Or, *assumpsit* will lie against the trustees for the excess of money in their hands, arising from the sale, over and above what is sufficient to pay the amount due. Trespass or trover will not lie. *Seaman v. Benson*, 4 Barb. (N. Y.) 444.

An action on the case cannot be maintained against assessors for omitting to take the oath of office. *First Parish v. Fiske*, 8 Cush. (Mass.) 264.

3. *Howes v. Bassett*, 56 Vt. 141.

4. *Mead v. Gale*, 2 Den. (N. Y.) 232. Here the tax had been voted and the warrant made out, but the vote was repealed, and at a later meeting the repealing vote was itself repealed. *Held*, that the whole proceeding must be construed as of the date of the last meeting.

But in *Massachusetts*, assessors are protected by the records which testify a meeting to have been duly called. *Saxton v. Nimms*, 14 Mass. 315. See *Withington v. Eveleth*, 7 Pick. (Mass.)

106; *Little v. Merrill*, 10 Pick. (Mass.) 543.

5. *Pierce v. Benjamin*, 14 Pick. (Mass.) 356. In that case, the sale not realizing the full amount of the tax, the owner subsequently paid the residue to the collector, and required a receipt in full for the tax. This was held not to be a waiver of the right to bring the action. Damages were measured at the value of the goods when converted, less the amount applied in payment of the tax.

6. *Bird v. Perkins*, 33 Mich. 28.

7. See *supra*, this title, *The Power to Tax*; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *License Tax Cases*, 5 How. (U. S.) 504; *Pervear v. Massachusetts*, 5 Wall. (U. S.) 475; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Nathan v. Louisiana*, 8 How. (U. S.) 73; *Dobbins v. Erie County*, 16 Pet. (U. S.) 435.

8. See INTERSTATE COMMERCE, vol. 11, p. 548; *Brown v. Maryland*, 12 Wheat. (U. S.) 410; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Nathan v. Louisiana*, 8 How. (U. S.) 82; *Welton v. Missouri*, 91 U. S. 278.

Whenever the subjects for which the power to regulate commerce is asserted, are national in their nature and admit

the prohibition of any interference with internal regulations of the states.<sup>1</sup>

These taxes are not taxes upon property,<sup>2</sup> and, consequently, are not subject to constitutional restrictions upon the power to tax property; such, for example, as that taxes shall be uniform and equal.<sup>3</sup> Nor, under the general requirement that all taxation

of one uniform system of regulation, they require exclusive legislation by Congress. *Philadelphia, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.

It is no objection to a state law requiring a license for the sale of an article, that letters patent have been granted for it. *Webber v. Virginia*, 103 U. S. 344. An ordinance requiring a license for the sale of a patented article is not an invasion of national authority, even though the peddler himself is a manufacturer and patentee of the article sold. *People v. Russell*, 49 Mich. 617; 43 Am. Rep. 478.

1. *U. S. v. DeWitt*, 9 Wall. (U. S.) 41; *Slaughter House Cases*, 16 Wall. (U. S.) 36; *New York v. Miln*, 11 Pet. (U. S.) 102; *License Tax Cases*, 5 Wall. (U. S.) 462; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Block v. Jacksonville*, 36 Ill. 301; *State v. Stutz*, 20 Iowa 488; *State v. Carney*, 20 Iowa 82; *Kleizer v. State*, 15 Ind. 449; *Com. v. Holbrook*, 10 Allen (Mass.) 200; *Com. v. Keenan*, 11 Allen (Mass.) 262; *Com. v. Thorniley*, 6 Allen (Mass.) 445; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *People v. Russell*, 49 Mich. 617; 43 Am. Rep. 478.

A license under an act of Congress, will not give authority to carry on an occupation in a particular state where it is forbidden. *McGuire v. Com.*, 3 Wall. (U. S.) 384. So the payment of a license granted by the *United States* for the sale of intoxicating liquors, will not authorize the sale in violation of the laws of the particular state. *Com. v. Thorniley*, 6 Allen (Mass.) 445; *Com. v. Holbrook*, 10 Allen (Mass.) 200; *State v. Carney*, 20 Iowa 82; *Block v. Jacksonville*, 36 Ill. 301.

2. *Decker v. McGowan*, 59 Ga. 805; *Burch v. Savannah*, 42 Ga. 600; *Bohler v. Schneider*, 49 Ga. 195; *Perdue v. Ellis*, 18 Ga. 586; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Rome v. McWilliams*, 52 Ga. 251; *Davis v. Macon*, 64 Ga. 128; 37 Am. Rep. 60; *Johnston v. Macon*, 62 Ga. 645; *Weaver v. State*, 89 Ga. 639; *Temple v. Sumner*, 51 Miss. 13; 24 Am. Rep. 615; *Orton v. Brown*, 35 Miss. 426; *State v. Phila-*

*delphia, etc., R. Co.*, 45 Md. 361; 24 Am. Rep. 511; *Corson v. State*, 57 Md. 251; *Kitson v. Ann Arbor*, 26 Mich. 325; *Youngblood v. Sexton*, 32 Mich. 406; *Walcott v. People*, 17 Mich. 68; *State v. Western Union Tel. Co.*, 73 Me. 518; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Straub v. Gordon*, 27 Ark. 625; *Coite v. Society for Savings*, 32 Conn. 173; *Walters v. Duke*, 31 La. Ann. 668; *Meriam v. New Orleans*, 14 La. Ann. 318; *Municipality No. 2 v. Dubois*, 10 La. Ann. 56; *Gilkesson v. Justices*, 13 Gratt. (Va.) 577; *Slaughter v. Com.*, 13 Gratt. (Va.) 767; *Ex p. Cohen*, 13 Nev. 425; *Carter v. Dow*, 16 Wis. 298.

Such a tax is not affected by the limitation of a power of a parish to impose taxes on property. *Walters v. Duke*, 31 La. Ann. 668; *Blanks v. Blastrop*, 18 La. Ann. 534.

If the tax attaches to the property sold or thing sold, it is a property tax. *Gould v. Atlanta*, 55 Ga. 678.

A tax upon an occupation is not a tax upon property, although the amount and value of the stock in trade of the dealer is adopted as a standard. *Corson v. State*, 57 Md. 251; or upon the value of the property, *State v. Western Union Tel. Co.*, 73 Me. 518; or, as in the case of a bank, when the amount of the taxes is ascertained by the average deposits, *Jones v. Winthrop Sav. Bank*, 66 Me. 242; or in any case when the tax is measured by the amount of the net earnings or income. *Philadelphia Contributorship v. Com.*, 98 Pa. St. 48.

The tax assessed on the amount of sales, not being a specific sum imposed on the sale of particular property without regard to its value, is not a property tax. But a tax of one dollar on the sale of every horse sold belonging to drovers, without regard to its value, is a property tax. *Livingston v. Albany*, 41 Ga. 21. See also *Kenny v. Harwell*, 42 Ga. 427.

3. *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Burch v. Savannah*, 42 Ga. 600;



shall be uniform and equal, is it necessary that all occupations and privileges should be taxed; but it is sufficient if all in the same class are taxed alike.<sup>1</sup>

An imposition is invalid which discriminates between residents and non-residents,<sup>2</sup> whether as residents or non-residents of the

*Bohler v. Schneider*, 49 Ga. 195; *Kenny v. Harwell*, 42 Ga. 416; *Rome v. McWilliam*, 52 Ga. 251; *St. Louis v. Green*, 7 Mo. App. 468; *Washington v. State*, 13 Ark. 752; *Henry v. State*, 26 Ark. 523; *Straub v. Gordon*, 27 Ark. 625; *Ottawa County v. Nelson*, 19 Kan. 234; 27 Am. Rep. 101; *Fretwell v. Troy*, 18 Kan. 271; *Francis v. Atchison*, etc., R. Co., 19 Kan. 303; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Ex p. Hurl*, 49 Cal. 557; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Walker v. Springfield*, 94 Ill. 364; *Thomasson v. State*, 15 Ind. 449; *Baker v. Cincinnati*, 11 Ohio St. 534; *Marmet v. State*, 45 Ohio St. 63; *Leavenworth v. Booth*, 15 Kan. 628; *State v. U. S., etc., Express Co.*, 60 N. H. 219; *Standard Underground Cable Co. v. Atty. Gen'l*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Cincinnati Gas Light, etc., Co. v. State*, 18 Ohio St. 243; *New Orleans v. Kaufman*, 29 La. Ann. 283; 29 Am. Rep. 328; *New Orleans v. Turpin*, 13 La. Ann. 56; *Wintz v. Girardey*, 31 La. Ann. 381; *Texas Banking, etc., Co. v. State*, 42 Tex. 636; *Anlanier v. Governor*, 1 Tex. 665; *Bright v. McCullough*, 27 Ind. 223; *Ex p. Robinson*, 12 Nev. 263.

1. *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182; *Gatlin v. Taboro*, 78 N. Car. 119; *Slaughter v. Com.*, 13 Gratt. (Va.) 776; *State v. Columbia*, 6 S. Car. 8; *Durach's Appeal*, 62 Pa. St. 491; *Straub v. Gordon*, 27 Ark. 625; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Fretwell v. Troy*, 18 Kan. 271; *Ottawa County v. Nelson*, 19 Kan. 234; 27 Am. Rep. 101; *Pleuler v. State*, 11 Neb. 547; *Savannah v. Weed*, 84 Ga. 683; *Weaver v. State*, 89 Ga. 639; *Goodwin v. Savannah*, 53 Ga. 414; *Ex p. Williams*, 31 Tex. Crim. App. 262; *Bright v. McCullough*, 27 Ind. 223; *Pullman Palace Car Co. v. State*, 64 Tex. 274; 53 Am. Rep. 758; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121.

A license fee is a tax, within the meaning of a constitutional provision

that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying them. *St. Louis v. Spiegel*, 90 Mo. 587.

In *Louisiana*, the constitution requires that the license tax shall be the same upon all who are engaged in the particular profession or calling taxed, without reference to the ability, fortunes, or successes of those engaged in it. *New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 449; *Municipality No. 2 v. Du Bois*, 10 La. Ann. 56; *Walters v. Duke*, 31 La. Ann. 668; *State v. Lathrop*, 10 La. Ann. 398. The provision merely requires that a tax on each member of the same class shall be the same. It does not prevent dividing objects of taxation into classes and imposing different taxes on each class. *New Orleans v. Kaufman*, 29 La. Ann. 283; 29 Am. Rep. 328. A tax on all persons in a district keeping powder magazines with more than fifty pounds of powder therein, is unconstitutional, as others may follow the same occupation without obtaining a license. *Police Jury v. Cochran*, 20 La. Ann. 373.

The tax upon warehousemen which is measured by the number of warehouses employed, is held to be uniform and equal, *Hodgson v. New Orleans*, 21 La. Ann. 301; as is a tax upon keepers of billiard tables, the whole being assessed upon each and every table. *Meriam v. New Orleans*, 14 La. Ann. 318.

2. See *INTERSTATE COMMERCE*, vol. 11, p. 548; *Holloway v. Police Jury*, 16 La. Ann. 203; *Marshalltown v. Blum*, 58 Iowa 184; 43 Am. Rep. 115; *St. Louis v. Spiegel*, 90 Mo. 587; *Albertson v. Wallace*, 81 N. Car. 479; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554.

So a tax discriminating against persons, non-residents of a township, *Marshalltown v. Blum*, 58 Iowa 184; 43 Am. Rep. 115; or between merchants and manufacturers, residing without the limits of the state, and those residing in the city, *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554; or against goods manufactured in other states sold by sample in favor of goods held within the state for sale, is null and void. *Ex p. Thornton*, 12 Fed. Rep. 538.

state itself, or of the political divisions within the same, or which creates a monopoly.<sup>1</sup>

*b.* DELEGATION OF THE POWER.—In the absence of constitutional restrictions, the legislative power to tax occupations and privileges may be delegated to political subdivisions of the state, to be exercised within their corporate limits.<sup>2</sup>

The power does not exist in a municipal corporation, unless conferred by the legislature.<sup>3</sup> And the power, when so conferred, must be exercised within the scope of the language used, which is not to be extended by construction, but which is to be construed strictly.<sup>4</sup>

A statute requiring a license from any person engaged in hiring laborers in the state, for employment beyond its limits, does not discriminate against non-residents, nor is it otherwise unconstitutional. *Shepperd v. Sumter County*, 59 Ga. 535.

1. In *Logan v. Pyne*, 43 Iowa 524, it was held that a city charter granting the right to "exercise and enjoy all rights, immunities, powers and privileges appertaining to a municipal corporation," and to "license, tax and regulate hackney carriages, omnibuses," etc., does not authorize the city authorities to grant to one person the sole and exclusive right to run omnibuses in the city.

2. *Butler's Appeal*, 73 Pa. St. 448; *Durach's Appeal*, 62 Pa. St. 491; *Tonti v. Allegheny County*, 10 Pittsb. L. J. 241; *Ex p. Montgomery*, 64 Ala. 463; *Montgomery v. Shoemaker*, 51 Ala. 114; *San Jose v. San Jose R. Co.*, 53 Cal. 475; *Ex p. Hurl*, 49 Cal. 557; *Sacramento v. Crocker*, 16 Cal. 120; *Wiggins v. Chicago*, 68 Ill. 372; *Fretwell v. Troy*, 18 Kan. 271; *Wiley v. Owens*, 39 Ind. 429; *Hodgson v. New Orleans*, 21 La. Ann. 301; *Simmons v. State*, 12 Mo. 268; 49 Am Dec. 131; *St. Louis v. Laughlin*, 49 Mo. 559; *American Union Express Co. v. St. Joseph*, 66 Mo. 675; 27 Am Rep. 382; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Rome v. McWilliams*, 52 Ga. 251; *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

The municipality need not tax pursuits and occupations in the same manner as that adopted by the legislature in regard to state taxation. *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554.

An express provision that the legislature may tax business, etc., does not preclude the legislature from delegating the power. *Huck v. Chicago*, etc., R. Co., 86 Ill. 352; *Wiggins v. Chicago*, 68 Ill. 372.

In *Texas*, under the constitution of 1876, no municipal corporation has power to tax an occupation to an extent beyond one half the amount levied by the state. See *Ex p. Gregory*, 1 Tex. App. 753; *Ex p. Slaren*, 3 Tex. App. 662.

3. *Fowle v. Alexandria*, 3 Pet. (U. S.) 398; *New Iberia v. Mignes*, 32 La. Ann. 923; *Mays v. Cincinnati*, 1 Ohio St. 268; *Cincinnati v. Bryson*, 15 Ohio 625; 45 Am. Dec. 593; *Chicago v. Bartree*, 100 Ill. 61; *Bennett v. Birmingham*, 31 Pa. St. 15; *Baker v. State*, 30 Fla. 41.

A city charter providing that the council may raise annually by taxes and assessments such sums of money as it shall deem necessary to defray expenses, in such manner as it shall deem expedient, has been held to authorize the city to impose a tax upon lawyers. *Ould v. Richmond*, 23 Gratt. (Va.) 464; 14 Am. Rep. 139. In *Home Ins. Co. v. Augusta*, 50 Ga. 530, the general power given to the city by its charter to make assessments upon the inhabitants, was held to authorize the imposition of taxes upon occupations, etc.

But in *Latta v. Williams*, 87 N. Car. 126, it was held that the power to levy and collect the taxes on all subjects of state taxation, not to exceed one dollar on the poll and thirty-three and one third cents on real estate and personal property, etc., did not confer upon the city, power to tax occupations.

**County Taxes.**—In the absence of statutory provision, counties have no power to levy privilege and occupation taxes similar to those provided for under state authority. *Gibson County v. Pullman Southern Car Co.*, 42 Fed. Rep. 572.

4. *Joyce v. East St. Louis*, 77 Ill. 156; *Latta v. Williams*, 87 N. Car. 126; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *St. Louis v. Laughlin*, 49 Mo.

Under the power to license, regulate, or restrain, a municipal corporation cannot impose taxes for purposes of revenue.<sup>1</sup>

A municipality may tax the occupations of persons whose business is licensed by the state;<sup>2</sup> but while this is so, the municipality cannot require such persons to procure a license from it as a condition precedent to pursuing the occupation.<sup>3</sup> Nor can a munic-

559; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554.

Authority to license, tax, etc., wagons and other vehicles, etc., and to "prescribe the weight of loads to be carried and the rates of carriage," has been held to be applicable only to such vehicles in respect of which it is proper and customary with municipal authorities to prescribe "rates of carriage." *Joyce v. East St. Louis*, 77 Ill. 156.

And authority to tax carts, etc., using the streets of a town, does not authorize the imposition of a tax on wagons owned by non-residents of the town not habitually using the streets. *Bennett v. Birmingham*, 31 Pa. St. 15.

1. *Burlington v. Putnam Ins. Co.*, 31 Iowa 102; *Burlington v. Bumgardner*, 42 Iowa 673; *Chicago v. Bartree*, 100 Ill. 61; *New York v. Second Ave. R. Co.*, 32 N. Y. 261; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134; *Cincinnati v. Bryson*, 15 Ohio 625; 45 Am. Dec. 593; *Mestayer v. Corrige*, 38 La. Ann. 707. The words "to license" may imply the power to tax, when such is the manifest intention, but taken disconnected and alone, they will not generally confer that authority. *St. Louis v. Boatmen's Ins. Co.*, 47 Mo. 150.

The power to tax tipping houses must be derived from the direct tax power conferred in the charter, and cannot be derived from the power to regulate and restrain them. *Columbia v. Beasley*, 1 Humph. (Tenn.) 240.

In *Essex County v. Barber*, 7 N. J. L. 64, the power to license inns and taverns was held not to authorize the borough to tax inn-keepers and receive fees from them for their licenses.

Nor, on the other hand, does the power to tax confer authority to license; the objects attained by the exercise of the respective powers are not the same. *Burlington v. Bumgardner*, 42 Iowa 674.

The general power, however, to tax, restrain, and suppress, embraces the power to license. *Mt. Carmel v. Wabash County*, 50 Ill. 69. And the power to license may be authorized by the grant of the power to regulate. *Chi-*

*cago Packing, etc., Co. v. Chicago*, 88 Ill. 221; 30 Am. Rep. 545.

In *San Jose v. San Jose, etc., R. Co.*, 53 Cal. 475, it was said that where power is conferred on a municipality to license and regulate occupations, the whole charter and all general legislation of the state pertaining to the subject, must be consulted, in order to determine whether the power to license and regulate includes the power to tax such occupations for revenue purposes.

2. *Iberia v. Chiapella*, 30 La. Ann. 1143; *State v. Traders' Bank*, 41 La. Ann. 329; *Chicago Packing, etc., Co. v. Chicago*, 88 Ill. 221; 30 Am. Rep. 545; *Wright v. Atlanta*, 54 Ga. 645; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *State v. Spencer*, 49 Mo. 342; *Sights v. Yarnalls*, 12 Gratt. (Va.) 292; *Ould v. Richmond*, 23 Gratt. (Va.) 464; 14 Am. Rep. 139; *E. p. Schmidt*, 2 Tex. App. 196.

A city may be empowered to tax lottery offices, although licensed by the legislature, provided no bonus was given for the privilege. *Wendover v. Lexington*, 15 B. Mon. (Ky.) 258.

The liability may be both to the state and to the city. *State v. Traders' Bank*, 41 La. Ann. 329. A county may levy a tax upon a license to brokers, granted by the state. *State v. Spencer*, 49 Mo. 342. An occupation may be subjected to the taxes imposed by the state, parish and corporation. *Iberia v. Chiapella*, 30 La. Ann. 1143.

3. *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Baldwin County v. Milledgeville*, 42 Ga. 325; *Wright v. Atlanta*, 54 Ga. 645; *Williams v. Garignes*, 30 La. Ann. 1094; *Napier v. Hodges*, 31 Tex. 287.

A physician licensed by the authority of the state to practice his profession cannot be required by a municipal corporation to take out a license before he can practice in the city. *Savannah v. Charlton*, 36 Ga. 460. But he may be required to pay a tax upon the exercise of the privilege granted by the license. *Home Ins. Co. v. Augusta*, 50 Ga. 530.

**Delegation of the Power to License.**—It is held that where the corporate authorities are empowered to grant a particular license, the jurisdiction of the

ipality to which the power has been delegated redelegate the power to its officers.<sup>1</sup>

**2. Taxable Subjects—What Usually Taxed—***a. IN GENERAL.*—Subject to constitutional restrictions, all occupations and callings may be subjected to taxation<sup>2</sup> in the discretion of the legislature, which may select some for this purpose, and exempt others.<sup>3</sup> Such occupations as are taxed as privileges are those other than the ordinary and every-day employments of life, or such as for the exercise of which a franchise is required.<sup>4</sup>

Exemption from these taxes cannot be claimed on the ground that the property employed in the business or occupation is

state over the subject is withdrawn to that extent. *Floyd v. Eatonton*, 14 Ga. 354. See also *Cuthbert v. Conly*, 32 Ga. 214; although the state is not thereby prevented from imposing a special tax thereon. *Decker v. McGowan*, 59 Ga. 805. *Contra*: But in *Simpson v. Savage*, 1 Mo. 359, the contrary seems to have been held; and an auctioneer, who had paid a license fee to the corporation, was compelled to obtain one from the state as well; and this view was adopted in *Ex p. Liebenhauer*, 14 Nev. 371.

1. *East St. Louis v. Wehrung*, 50 Ill. 28; *Johnston v. Macon*, 62 Ga. 645; *Darling v. St. Paul*, 19 Minn. 389; *Brooklyn v. Breslin*, 57 N. Y. 591.

The power conferred on the city council cannot be delegated to the mayor of the city by ordinance. *Kinmundy v. Mahan*, 72 Ill. 462.

But in *Decorah v. Dunstan*, 38 Iowa 96, an ordinance authorizing the mayor to fix the amount of the license was held to be valid. But see *East St. Louis v. Wehrung*, 50 Ill. 28, holding that a corporation is not warranted in delegating any discretionary authority to others.

2. *Sacramento v. California Stage Co.*, 12 Cal. 134; *Sacramento v. Crocker*, 16 Cal. 120; *Ex p. Hurl*, 49 Cal. 557; *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161; *Portland Bank v. Althrop*, 12 Mass. 252; *Com. v. People's Sav. Bank*, 5 Allen (Mass.) 428; *Biddle v. Com.*, 13 S. & R. (Pa.) 405; *State v. North*, 27 Mo. 464; *Com. v. Moore*, 25 Gratt. (Va.) 951; *Nathan v. Louisiana*, 8 How. (U. S.) 73; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Savannah v. Charlton*, 36 Ga. 460; *Charleston v. Goldsmith*, 12 Rich. (S. Car.) 470; *Sinclair v. State*, 69 N. Car. 47; *State v. Columbia*, 6 S. Car. 1; *Charleston v. Oliver*, 16 S. Car. 47; *State v. Hayne*, 4 S. Car. 403; *License Tax Cases*, 5

Wall. (U. S.) 472; *Lanier v. Macon*, 59 Ga. 187; *Rome v. McWilliams*, 52 Ga. 271.

3. *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161; *Butler's Appeal*, 73 Pa. St. 448; *Durach's Appeal*, 62 Pa. St. 491; *New Orleans v. Mülé*, 38 La. Ann. 826; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121.

A license may be required for selling in particular places, even though revenue, as well as local policy, may be one of the objects of the requisition. *Mork v. Com.*, 6 Bush (Ky.) 397.

The legislature may impose a single tax upon a particular class of occupations and declare it to be in lieu of all other taxes, whatsoever. *Vicksburg Bank v. Worrell*, 67 Miss. 47.

But where the legislature has imposed a license tax upon persons pursuing a certain business, it cannot, in the absence of any valuable consideration, exempt any particular person or persons pursuing that calling, from the payment of such tax. *New Orleans v. Louisiana Sav. Bank*, 31 La. Ann. 637.

The question whether certain individuals fall within the class designated by the statute providing for the tax, is one of fact. *Bohler v. Schneider*, 49 Ga. 195; *Decker v. McGowan*, 59 Ga. 805.

4. *Munn v. People*, 69 Ill. 80; *Wiggins Ferry Co. v. St. Louis*, 102 Ill. 560; *Chilvers v. People*, 11 Mich. 43; *Drysdale v. Badat*, 45 Miss. 445; *Illinois Mut. F. Ins. Co. v. Peoria*, 29 Ill. 180.

In *Tennessee*, the exercise of "privileges," as that term is used in the constitution, is defined to be the exercise of an occupation or business which requires a license from some proper authority designated by a general law, and which is not open to all, or to any one, without such license. *Columbia v. Guest*, 3 Head (Tenn.) 414; *Cate v. State*, 3 Sneed (Tenn.) 121; *Jenkins v.*

exempt,<sup>1</sup> or has been already taxed;<sup>2</sup> or that the person or corporation pursuing the occupation pays an income tax.<sup>3</sup>

Certain pursuits and privileges are expressly exempted by constitutional provisions in several of the states.<sup>4</sup> An enumeration, however, of some as subjects of taxation, is not a prohibition upon the power of the legislature to tax others.<sup>5</sup>

The statutes imposing these taxes must be construed strictly;<sup>6</sup>

Ewin, 8 Heisk. (Tenn.) 456; *State v. Crawford*, 2 Head (Tenn.) 462; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276. The permission or license to retail goods is such a privilege, and subject to taxation, *Mays v. Erwin*, 8 Humph. (Tenn.) 290; or the business of a wholesale grocer, under a license. *French v. Baker*, 4 Sneed (Tenn.) 193.

Any avocation may be made a privilege by the legislature by the requirement of a license tax for its exercise. *Mabry v. Tarver*, 1 Humph. (Tenn.) 94. Positive prohibition without license is not necessary. *Dun v. Cullen*, 13 Lea (Tenn.) 202. The license creating the privilege may be acquired by the payment of the privilege tax merely. *State v. Schlier*, 3 Heisk. (Tenn.) 281.

In *Arkansas*, under a provision authorizing the imposition of taxes on privileges, those occupations only were held subject to taxation which were recognized as privileges at common law. *Washington v. State*, 13 Ark. 752. But in *Baker v. State*, 44 Ark. 134, it was held that the general assembly was not restrained from levying a tax upon the franchise of a corporation. And see *Straub v. Gordon*, 27 Ark. 625.

A corporation, however, cannot create a privilege for the purpose of taxing it. *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554. So, a city ordinance imposing a tax for keeping a livery stable, could not be sustained, the legislature not having made such an occupation a privilege. *Columbia v. Guest*, 3 Head (Tenn.) 413.

1. *Philadelphia Contributorship v. Com.*, 98 Pa. St. 48; *Monroe Sav. Bank v. Rochester*, 37 N. Y. 365; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611.

So a savings institution may be taxed, although its capital is invested in federal securities. *Society for Savings v. Coite*, 6 Wall. (U. S.) 594.

**Police Regulations.**—An exemption of a corporation from taxation, will not exempt it from license taxes imposed as reasonable police regulations. *Frankford, etc., Pass. R. Co. v. Phila-*

*delphia*, 58 Pa. St. 119; 98 Am. Dec. 242; *Johnson v. Philadelphia*, 60 Pa. St. 445.

2. *Macon v. Macon Sav. Bank*, 60 Ga. 133; *Johnston v. Macon*, 62 Ga. 645; *St. Louis v. Green*, 7 Mo. App. 468; *Albertson v. Wallace*, 81 N. Car. 479; *Western Union Tel. Co. v. State*, 55 Tex. 314; 40 Am. Rep. 99; *State v. Stephens*, 4 Tex. 137; *Frommer v. Richmond*, 31 Gratt. (Va.) 646; *Woolman v. State*, 2 Swan (Tenn.) 353; *Lewellen v. Lockharts*, 21 Gratt. (Va.) 570; *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509; *New Orleans v. People's Ins. Co.*, 27 La. Ann. 519; *New Orleans v. Globe Mut. L. Ins. Co.*, 27 La. Ann. 656.

3. *Pullman Palace Car Co. v. State*, 64 Tex. 274; 53 Am. Rep. 758.

4. **Constitutional Exemptions.**—In the constitution of *Texas*, power is given to the general assembly to tax all persons pursuing any occupation, etc., provided that the term "occupation, shall not be construed as including pursuits either agricultural or mechanical." This proviso is held to exempt from occupation taxes, agricultural and mechanical occupations. *Higgins v. Ricker*, 47 Tex. 393.

In *Ex p. Butin*, 28 Tex. App. 304, it was held that a statute imposing an occupation tax upon persons or firms who peddle out cooking-stoves or ranges, does not conflict with the above provision.

In *Louisiana*, there is a similar exemption. Const. Art. 206. But under it, a master builder or contractor who employs assistants may be compelled to pay a license tax. The exemption is held to include those persons only who are engaged in the actual manual labor. See *Theobalds v. Conner*, 42 La. Ann. 787.

5. *State v. Lancaster County*, 4 Neb. 537; *Pullen v. Wake County*, 66 N. Car. 364.

6. *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Savannah v. Hartridge*, 8 Ga. 23; *Joyce v. East St. Louis*, 77 Ill. 156; *Bangle v. Holden*, 52 Miss. 804; *St.*

only such occupations or privileges as are described clearly can be taxed.<sup>1</sup> Where it is the occupation which is taxed, a single act or transaction is not such an engaging in it as will subject the person thus acting to the tax;<sup>2</sup> and one who acts for himself in his own private affairs is not subject to a tax imposed upon an occupation which consists of acts or transactions done for or on behalf of another.<sup>3</sup>

*b. PARTICULAR PURSUITS* — (1) *Professional Occupations.* — These taxes are imposed sometimes upon attorneys at law for the privilege of practising, even though they have obtained licenses to practise.<sup>4</sup> So the practice of medicine has been subjected to

*Louis v. Laughlin*, 49 Mo. 559; *State v. Field*, 49 Mo. 270; *State v. Hall*, 73 N. Car. 252; *State v. Yearby*, 82 N. Car. 561; *Mays v. Cincinnati*, 1 Ohio St. 268; *Pleuler v. State*, 11 Neb. 547; *Higgins v. Rinker*, 47 Tex. 393.

In *Com. v. Campbell*, 33 Pa. St. 380, it was held that an act requiring all merchants and dealers to take out an annual license, does not embrace manufacturers and mechanics, unless they keep a store or warehouse separate from the factory for the sale of their wares.

If a billiard table be kept as an occupation, such keeping may be taxed under a provision imposing taxes upon those pursuing any occupation, trade, or profession; but trade or profession imports a profitable pursuit, and if the table is kept for amusement and not for profit, it is not subject to taxation. The question as to the purpose for which the table was kept is one of fact for the jury. *Tarde v. Benesman*, 31 Tex. 277.

In *New Orleans v. Clark*, 15 La. Ann. 614, it was held that an ordinance imposing a certain tax on each printing office doing job work, does not apply exclusively to printing offices publishing a newspaper, and to job work conjunctively, but to any printing office doing such work.

1. *New Iberia v. Minguet*, 32 La. Ann. 923; *Plaquemine v. Roth*, 29 La. Ann. 261; *Ex p. Ah Pong*, 19 Cal. 106; *State v. Bowers*, 14 Ind. 195; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Society, etc. v. Diers*, 10 Abb. Pr. N. S. (N. Y.) 216; *Norris v. Com.*, 27 Pa. St. 494; *Rowland v. Kleber*, 1 Pittsb. (Pa.) 68; *Barton v. Morris*, 10 Phila. (Pa.) 360. And see *Com. v. Thayer*, 5 Met. (Mass.) 246; *State v. Walker*, 28 La. Ann. 636.

2. *Woody v. Com.*, 29 Gratt. (Va.) 837; *State v. Whittaker*, 33 Mo. 457; *State v. Cox*, 32 Mo. 566.

Renting a single room for the purpose of dramatic exhibition, does not constitute carrying on a theatre business. *Gillman v. State*, 55 Ala. 248.

A traveling peddler may make a valid sale and delivery of goods without a license, when not engaged in the business of peddling. *Brett v. Marston*, 45 Me. 401.

The rule is different, where the imposition is on the performance of the thing or the transaction of the business and not the occupation. It is not necessary to establish that the defendant assume to act as a tavern keeper in order to recover a penalty for selling liquor without a license. *Smith v. Adrian*, 1 Mich. 495.

3. *Joyce v. East St. Louis*, 77 Ill. 156. By ordering sewing machines at the request of persons wishing to buy them, receiving them when sent in pursuance of the order, and delivering them to the purchaser, a merchant does not become a dealer in them or an agent to sell them, within the provisions of a law imposing a tax upon dealers and agents and persons engaged in selling sewing machines. *Weaver v. State*, 89 Ga. 639.

So a farmer purchasing stock to consume the products of his farm, though with the intention of selling it again, is not subject to the tax on cattle broken. *U. S. v. Kenton*, 2 Bond (U. S.) 97.

But one owning a cotton pickery cannot avoid the payment of a license fee imposed upon it on the ground that he did not use it except for the purpose of picking and cleaning his own cotton, which he had purchased to sell again; that in such case he is as much liable as they who use it for picking and cleaning cotton for other persons for a commission. *State v. Hemard*, 23 La. Ann. 263.

4. *Cousins v. State*, 50 Ala. 113; 20 Am. Rep. 290; *State v. King*, 21 La.

an occupation tax; <sup>1</sup> and even ministers of the gospel and professors in colleges have had these taxes imposed upon their occupations.<sup>2</sup>

(2) *Merchants, Dealers, and Manufacturers.*—Sometimes occupation, business, and privilege taxes are imposed upon the various occupations of merchants and traders generally,<sup>3</sup> and on the

Ann. 201; *Savannah v. Hines*, 53 Ga. 616; *Young v. Thomas*, 17 Fla. 169; 35 Am. Rep. 93; *St. Louis v. Sternberg*, 69 Mo. 289; *Stewart v. Potts*, 49 Miss. 749; *Languille v. State*, 4 Tex. App. 312; *Ex p. Williams*, 31 Tex. Crim. App. 262; *State v. Hayne*, 4 S. Car. 403; *Ould v. Richmond*, 23 Gratt. (Va.) 464; 14 Am. Rep. 139. An attorney's license is not a contract which is violated by the imposition of a tax upon it. *State v. Gazlay*, 5 Ohio 15; *Simmons v. State*, 12 Mo. 268; 49 Am. Dec. 131; *State v. Lackland*, 12 Mo. 279; *Cohen v. Wright*, 22 Cal. 293.

Such a tax is not subject to the objection that it is a poll tax. *Egan v. Charles County Ct.*, 3 Har. & M. (Md.) 169.

The right to practise law in the state courts is not a privilege or immunity of a citizen of the *United States*, within the meaning of the Federal Constitution, and the power rests with the states to prescribe the qualifications for admission to the bar of its own courts. *Bradwell v. Illinois*, 16 Wall. (U. S.) 130.

A tax imposed upon certain enumerated occupations and "other employments" has been held to include the practice of law. *State v. Waples*, 12 La. Ann. 343.

Under a statute imposing a tax on any person, firm or company desiring to engage in any business or profession, it is held that each member of a firm practising law was subject to a tax. *Jones v. Stallworth*, 44 Ala. 657.

In *Tennessee*, it is held that the right to practise law is not subject to taxation. *Lawyer's Tax Cases*, 8 Heisk. (Tenn.) 565.

The power to delegate authority to municipalities to impose taxes on lawyers, is undoubted. *Wilmington v. Macks*, 86 N. Car. 88; *Holland v. Isler*, 77 N. Car. 1; *Goldthwaite v. Montgomery*, 50 Ala. 486; *McCaskell v. State*, 53 Ala. 510; *Ex p. Montgomery*, 64 Ala. 463.

The city council may require attorneys within the city to be placed in different classes for the purpose of taxa-

tion, and may delegate to a committee the power of assigning the attorneys of the city to the several classes; this being merely a ministerial act. *Ould v. Richmond*, 23 Gratt. (Va.) 464; 14 Am. Rep. 139.

"Professions" clearly comprehends lawyers. *Lanier v. Macon*, 59 Ga. 187. And the power to tax inhabitants who transact business, authorizes a tax on the business of lawyers. *Savannah v. Hines*, 53 Ga. 616. But in *St. Louis v. Laughlin*, 49 Mo. 559, where a city charter authorized the municipality to license certain enumerated occupations "and all other trades, avocations, or professions whatever," the power to license lawyers was denied upon the principle that where general words follow particular ones, they should be construed as applicable to the persons of the same general character or class, and the profession of law was not *eiusdem generis*.

1. *Holland v. Isler*, 77 N. Car. 1. But when licensed by the state, the city cannot require a physician, under a penalty, to take out a license, although it may tax the privilege granted by the state. *Savannah v. Charlton*, 36 Ga. 460.

2. In *Miller v. Kirkpatrick*, 29 Pa. St. 226, the term "profession," used in *Pennsylvania Act* of April 29th, 1844, was held to embrace the calling of a minister of the gospel; and in *Union County v. James*, 21 Pa. St. 525, a professor in college was held to be within the same act.

3. *Com. v. Moore*, 25 Gratt. (Va.) 951; *Galveston County v. Gorham*, 49 Tex. 279; *Sacramento v. Crocker*, 16 Cal. 119; *Albertson v. Wallace*, 81 N. Car. 479; *State v. Cohen*, 84 N. Car. 771.

A merchant is a person who deals in the selling of goods, wares and merchandise at a store, stand or place occupied for that purpose, and it is immaterial that he has, by his labor, changed the form of the goods sold. *State v. Whittaker*, 33 Mo. 457.

But one who manufactures and supplies goods on previous orders of his customers alone is not a merchant, even though he keeps on hand, but not

business of manufacturers.<sup>1</sup> Numerous other callings subjected thereto are treated elsewhere in this work.<sup>2</sup>

(3) *Banks, Bankers, etc.*—Under the power to tax occupations, the business of a chartered bank or of bankers may be taxed;<sup>3</sup> also the business of licensed brokers.<sup>4</sup>

c. TAXES ON CORPORATE FRANCHISES.—(See TAXATION (CORPORATE), vol. 25.)

d. TAXES ON LEGACIES AND INHERITANCES.—(See SUCCESSION TAXES, vol. 24, p. 431.)

for sale, the materials from which the manufactured articles are produced. *State v. Richeson*, 45 Mo. 575; *State v. West*, 34 Mo. 424.

A trustee to whom goods are assigned who merely sells them without replenishing the stock, need not procure a merchant's license. *Ayrnett v. Edmundson*, 9 Baxt. (Tenn.) 610.

A dealer, in the popular sense, is not one who buys to keep, or makes to sell, but one who buys to sell again. *Norris v. Com.*, 27 Pa. St. 494. Farmers, selling the products of their farms, are not subject to the tax imposed on "dealers in goods, wares, merchandise, commodities or effects of whatsoever kind or nature." *Barton v. Morris*, 10 Phila. (Pa.) 360. But a miller or manufacturer of flour, who purchases grain, as well as raises it on his farm, and retails the flour at other places than his mill, is liable to such a tax. *Berks County v. Bertolet*, 13 Pa. St. 521.

A tax imposed on traders, describing their occupation as "buying and selling," is held to include only those who buy and sell the same article in the same condition as traders, and not to embrace butchers, *State v. Yearby*, 82 N. Car. 561; or the proprietors of a saw mill who buy timber, saw it and then sell it. *State v. Chadbourne*, 80 N. Car. 479; 30 Am. Rep. 94. As to butchers, the contrary is held in *State v. Whitaker*, 33 Mo. 457.

1. A manufacturer is included within the description "persons doing business." *Hart v. Beauregard*, 22 La. Ann. 238. See, as to who is a manufacturer in this connection, MANUFACTURER, vol. 14, p. 268.

2. LICENSE, vol. 13, p. 514; AUCTIONS AND AUCTIONEERS, vol. 1, p. 977; COMMERCIAL TRAVELERS, vol. 3, p. 315; HAWKERS AND PEDDLERS, vol. 9, p. 307; INTOXICATING LIQUORS, vol. 11, p. 567; LOTTERIES, vol. 13, p. 1167; MANUFACTURER, vol. 14, p. 268; MARKETS, vol. 14, p. 459; THEATRES.

As to foreign corporations, see INTERSTATE COMMERCE, vol. 11, p. 548; TAXATION (CORPORATE), vol. 25.

3. *Macon v. Macon Sav. Bank*, 60 Ga. 133; *New Orleans v. New Orleans Sav. Inst.*, 32 La. Ann. 527; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514.

The business of a bank is not exempt because the bank is incorporated by the state. *State v. Columbia*, 6 S. Car. 1.

A bank which is in the hands of a receiver and prohibited from transacting business is not subject to the occupation tax, *Com. v. Lancaster Sav. Bank*, 123 Mass. 493; but is not exempt when remaining in the hands of its officers under temporary injunction.

Bankers licensed as such, who sold government securities in their own right, were not subject to the duties imposed on brokers. *U. S. v. Fisk*, 3 Wall. (U. S.) 445. But sales made by brokers on their own account, are subject to the duties imposed on their sales generally. *U. S. v. Cutting*, 3 Wall. (U. S.) 441.

A license fee and tax may be imposed on the business of shaving paper. *Young v. Governor*, 11 Humph. (Tenn.) 147.

A savings bank is not required to take out a license as a broker, under a statute requiring brokers to be licensed. *State v. Field*, 49 Mo. 270.

4. *Braun v. Chicago*, 110 Ill. 186; *Northrup v. Shook*, 10 Blatchf. (U. S.) 243.

As to who is a broker, see BROKERS, vol. 2, p. 591.

**Exchange Broker.**—The imposition of a tax upon the business of an exchange broker is not unconstitutional, although he be a dealer in foreign exchange exclusively. *Nathan v. Louisiana*, 8 How. (U. S.) 75.

**Real Estate Brokers.**—The occupation of a real estate broker is taxable as a privilege, *Wiltse v. State*, 8 Heisk. (Tenn.) 544, or under a general power



*e.* DOG TAXES.<sup>1</sup>—The law recognizes property in dogs and may tax them as such.<sup>2</sup> But usually, these taxes are imposed as police regulations, in the form of license fees upon the owner or keeper, and, therefore, are not within constitutional requirements that taxes on property shall be according to value.<sup>3</sup>

**3. How Imposed—*a.* MODE OF IMPOSING.**—The power to tax occupations and privileges involves the right to determine the amount of the tax;<sup>4</sup> and the authority to license carries with it the power to impose the terms and conditions upon which licenses shall be granted,<sup>5</sup> and to select the mode in which the taxes

to tax brokers. *Little Rock v. Barton*, 33 Ark. 436.

1. See *ANIMALS*, vol. 1, p. 571; *LICENSE*, vol. 13, p. 570; *POLICE POWER*, vol. 18, p. 755.

2. *Cooley on Taxation*, p. 29; *Washington v. Meigs*, 1 *McArthur* (D.C.) 53. In *Marshfield v. Middlesex*, 55 Vt. 545, dogs were held to be ratable property within the pauper law.

3. *Blair v. Forehand*, 100 Mass. 136; 1 Am. Rep. 94; 97 Am. Dec. 82; *Van Horn v. People*, 46 Mich. 183; *Com. v. Markham*, 7 Bush (Ky.) 486; *Mowery v. Salisbury*, 82 N. Car. 175; *Newton v. Atchison*, 31 Kan. 157; *Tulloss v. Sedan*, 31 Kan. 165; *Ex p. Cooper*, 3 Tex. App. 489; *Morey v. Brown*, 42 N. H. 373; *Cole v. Hall*, 103 Ill. 30; *State v. Topeka*, 36 Kan. 81; *Cherokee v. Fox*, 34 Kan. 16; *Holst v. Roe*, 39 Ohio St. 343; *Tenney v. Lenz*, 16 Wis. 566; *Carter v. Dow*, 16 Wis. 298.

Dogs in cities may be classified, and the dogs of one class be licensed while others may be exempt from the tax. *State v. Topeka*, 36 Kan. 81.

An ordinance requiring the owner to procure a license for each dog owned within the city, is not in violation of a statute exempting or allowing for every citizen of the state two dogs free from taxation. *Com. v. Markham*, 7 Bush (Ky.) 486.

In *Massachusetts*, every owner or keeper of a dog is required to have him registered and licensed. See *Com. v. Kelliher*, 12 Allen (Mass.) 480. The license is valid in any part of the commonwealth and is transferrable with the dog, provided that certain requisites and formalities are complied with. And see *Com. v. Brimbleom*, 4 Allen (Mass.) 584; *Com. v. Palmer*, 134 Mass. 537. The owner is not liable for the penalty if he is not the keeper of the dog. *Com. v. Canada*, 107 Mass. 405. But the keeper, although not the owner, is liable. *Jones v. Com.*, 15

*Gray* (Mass.) 193. The fact that a man applied for a license to keep a dog, is evidence that he was the owner or keeper. *Com. v. Gorman*, 16 *Gray* (Mass.) 601. As to the description necessary, see *Com. v. Brahany*, 123 Mass. 245.

**Indictment.**—An averment that defendant did keep a certain dog, without the dog being then and there licensed according to law, is a sufficient allegation that the dog was not licensed as the statute requires. It is not necessary to aver that the dog was not registered, numbered and described. *Com. v. Thompson*, 2 Allen (Mass.) 507.

**Fund for Killed Sheep.**—It is sometimes provided that the fund arising from the dog tax shall be applied to the claim for sheep killed by dogs. See *Shelby Tp. v. Randles*, 57 Ind. 390. A statute providing that the dog tax collected within a city or town shall be applied to the payment of losses suffered from the killing or wounding of sheep within the county or township, is not unconstitutional on the ground that it creates an advantage for one community as against another. *Longyear v. Buck*, 83 Mich. 237.

4. *Darling v. St. Paul*, 19 Minn. 389; *St. Paul v. Colter*, 12 Minn. 41; 90 Am. Rep. 278. See also *Ex p. Thornton*, 12 Fed. Rep. 538; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492.

A constitutional requirement that licenses be graduated, leaves it to the legislature to determine the method to be adopted in effecting such graduation. *State v. Traders' Bank*, 41 La. Ann. 329.

5. *Cincinnati v. Bryson*, 15 Ohio 625; 45 Am. Dec. 593; *Bertholf v. O'Reilly*, 74 N. Y. 509; 30 Am. Rep. 323; *St. Louis v. Boatmen's Ins., etc., Co.*, 47 Mo. 150; *St. Paul v. Colter*, 12 Minn. 41; 90 Am. Rep. 278; *Lanquille v. State*, 4 Tex. App. 312; *Pervear v. Massachusetts*, 5 Wall. (U. S.) 475.

A requirement that an applicant for

shall be levied.<sup>1</sup> The amount of the tax or license fee may be regulated by and estimated upon the income from the business taxed;<sup>2</sup> or by the value of the property used in its prosecution,<sup>3</sup> or upon the amount of business done;<sup>4</sup> or it may be arbitrarily fixed by the taxing power,<sup>5</sup> subject only to the restriction that the burden must rest equally upon all of a class.<sup>6</sup>

A license fee imposed for the purpose of regulation, however, should be limited to the necessary expense of issuing it, and the

a license must give a bond conditioned for the payment of all fines and costs assessed for any violation of the provisions of a license law, is constitutional and valid. *Kane v. State*, 78 Ind. 103.

It is no defense to a charge of failure to perform a condition of a license requiring the conspicuous posting of the peddler's name, residence, and number of his license upon his parcels or vehicle, that he has no vehicle and that the parcels which he sells are carried on his person. *Com. v. Cusick*, 120 Mass. 183.

1. See *State v. Stephens*, 4 Tex. 137; *Society for Savings v. Coite*, 6 Wall. (U. S.) 606.

2. *Philadelphia Contributorship, etc. v. Com.*, 98 Pa. St. 48; *Lehigh Crane Iron Co. v. Com.*, 55 Pa. St. 448; *Goldsmith v. Augusta, etc., R. Co.*, 62 Ga. 468; *People v. New York*, 18 Wend. (N. Y.) 605; *Burlington v. Putnam Ins. Co.*, 31 Iowa 102.

Under the *Texas* statute of 1866, taxes are dependent upon the income derived from sales of goods made in excess of their cost after deducting expenses. *Millar v. Douglass*, 42 Tex. 288.

3. See *Mayes v. Erwin*, 8 Humph. (Tenn.) 290; *Bank of Utica v. Utica*, 4 Paige (N. Y.) 399; 27 Am. Dec. 21.

The tax may be levied upon the amount of purchases made for the business. *State v. Stephens*, 4 Tex. 137; upon the number of vehicles belonging to the carrier. *Goodwin v. Savannah*, 53 Ga. 414.

A license tax on bakers may be regulated by the weight of the bread, but an ordinance regulating the weight and price of bread is unconstitutional. *Mobile v. Yuille*, 3 Ala. 137.

4. See *Albertson v. Wallace*, 81 N. Car. 479; *Walker v. Springfield*, 94 Ill. 364; *Rome v. McWilliams*, 52 Ga. 251; *Berks County v. Bertolet*, 13 Pa. St. 523; *Ex p. Hurl*, 49 Cal. 557; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Ould v. Richmond*, 23 Gratt. (Va.) 464; 14

Am. Rep. 139. As upon the gross amount of sales, *Paddleford v. Savannah*, 14 Ga. 438; *Pearce v. Augusta*, 37 Ga. 597.

In *Harness v. Williams*, 64 Miss. 600, it was held that in estimating the value of a merchant's stock for the purpose of determining the amount of his privilege tax, cotton taken from his customers for goods sold by him to them is not to be estimated.

**Interstate Commerce.**—An occupation tax imposed on a telegraph company, which graduates the tax according to the business done, regardless of a distinction between business done wholly within the state and business done in part without the state, is free from the objection that it regulates or obstructs interstate commerce. *Western Union Tel. Co. v. State*, 55 Tex. 314.

5. See *Wynne v. Wright*, 1 Dev. & B. (N. Car.) 19; *Cowles v. Brittain*, 2 Hawks (N. Car.) 204; *Moseley v. Tift*, 4 Fla. 402; *State v. U. S., etc., Express Co.*, 60 N. H. 219.

6. *Sacramento v. Crocker*, 16 Cal. 119; *Cutliff v. Albany*, 60 Ga. 597; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Ex p. Marshall*, 64 Ala. 266; *Police Jury v. Cochran*, 20 La. Ann. 373; *State v. King*, 21 La. Ann. 261; *East St. Louis v. Wehrung*, 46 Ill. 392.

Though taxes must be uniform throughout the district levying them, they need not be the same throughout different districts, and the fact that the same license fee is not required by all cities in a state, is no valid objection. *Wiley v. Owens*, 39 Ind. 429.

A law imposing a smaller license tax on proprietors of bars and drinking saloons kept on steamboats, than upon the owners of bars kept on land, is not unconstitutional. *State v. Rolle*, 30 La. Ann. 991; 31 Am. Rep. 234.

An occupation tax, rated according to the population of the community where the business is transacted, is not unconstitutional. *Texas Banking, etc., Co. v. State*, 42 Tex. 636. See also

additional labor of officers and expenses thereby incurred;<sup>1</sup> though it may be made sufficiently high to produce a fund with which to enforce regulations adopted to restrain the improper exercise of the pursuit.<sup>2</sup>

b. UPON WHOM IMPOSED.—Each member of a firm is not liable for the tax imposed upon the business transactions,<sup>3</sup> unless the tax is personal, when the tax must be paid by everyone following the vocation.<sup>4</sup> A person paying a tax on one business, who adds to his occupation another, even though a kindred business, may be liable to double taxation.<sup>5</sup> But where the one business is a necessary or ordinary incident of the other, payment of the tax upon the principal business will suffice.<sup>6</sup>

*Ex p. Marshall*, 64 Ala. 266; *State v. Schlier*, 3 Heisk. (Tenn.) 281.

1. **License Fee.**—*St. Louis v. Boatmen's Ins., etc., Co.*, 47 Mo. 150; *Mes-tayer v. Corrige*, 38 La. Ann. 707; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134; *Ash v. People*, 11 Mich. 347; 83 Am. Dec. 740; *Cincinnati v. Bryson*, 15 Ohio 625; 45 Am. Dec. 593; *Johnson v. Philadelphia*, 60 Pa. St. 445. And see *Charleston v. Rogers*, 2 McCord (S. Car.) 495; *Baker v. Panola County*, 30 Tex. 86.

2. *Smith v. Madison*, 7 Ind. 86; *Carter v. Dow*, 16 Wis. 298; *Fire Department v. Helfenstein*, 16 Wis. 136. And see *Allerton v. Chicago*, 9 Biss. (U. S.) 552.

In *Johnson v. Philadelphia*, 60 Pa. St. 445, it was held that the imposition of a reasonable charge for a license as a police regulation is valid, although its incidental operation augments the receipts into the treasury.

In *St. Paul v. Colter*, 12 Minn. 41; 90 Am. Rep. 278, it was held that proof of the amount of license fee reasonably necessary to regulate the business, is not admissible in a prosecution for violating an ordinance imposing a fee.

3. See *Carter v. State*, 60 Miss. 459, where the tax was imposed upon the business of keeping a restaurant. In *Savannah v. Hines*, 53 Ga. 616, the tax was imposed on the practice of the law.

4. As sometimes in the case of practitioners at law. *Jones v. Stallworth*, 44 Ala. 657. See also *Long v. State*, 27 Ala. 32; *Stokes v. Prescott*, 4 B. Mon. (Ky.) 37. But see *Ex p. Butin*, 28 Tex. App. 304, where the peddler's tax was imposed upon "every person or firm who peddles."

In *Meyer v. Larkin*, 3 Cal. 403, it was held that a license tax upon a foreign miner employed by one of a part-

nership to work in mines belonging to the firm, was a charge upon the employer, and not upon the firm.

**Agents.**—As a personal privilege, the tax is imposed upon agents. *Taylor v. Ashby*, 3 Mont. 248. See *Temple v. Sumner*, 51 Miss. 13; 24 Am. Rep. 615.

5. *Jacko v. State*, 22 Ala. 73; *Kelly v. Dwyer*, 7 Lea (Tenn.) 180; *State v. Holmes*, 28 La. Ann. 765; 26 Am. Rep. 110.

A merchant who carries on a retail and also a wholesale business is liable to the tax imposed on both. *New Orleans v. Koen*, 38 La. Ann. 328.

A tobacco dealer who takes out a license as a storager and also as a tobacco auctioneer, but charges commissions on the amount of sales as well as other charges, must also obtain a license as a commission merchant and pay the tax assessed thereon. *Neal v. Com.* 21 Gratt. (Va.) 511.

Under the license of a retail merchant, a person cannot sell drugs, where a different license is required from druggists. *State v. Holmes*, 28 La. Ann. 765; 26 Am. Rep. 110.

6. *Griffin v. Powell*, 64 Ga. 625.

One who pays a privilege tax for running a livery stable, is not liable for the tax levied upon the privilege of running hacks, buggies, etc. *Bell v. Watson*, 3 Lea (Tenn.) 328; *Williams v. Garignes*, 30 La. Ann. 1094. A bookseller cannot be compelled to pay an additional privilege tax imposed on keepers of second-hand goods because he deals in old books. *Eastman v. Chicago*, 79 Ill. 178.

In *Police Jury v. Marrero*, 38 La. Ann. 896, it was held that a retail dealer whose ordinary license is five dollars, but who combines the sale of liquor in less quantities than one pint, for which a license of fifty dollars is required, can

c. WHERE IMPOSED.—Occupation and privilege taxes may be said to be local rather than general,<sup>1</sup> and are not to be imposed on occupations or privileges carried on outside the limits of the taxing district.<sup>2</sup> An apparent exception may be said to exist in the case of licenses imposed under the police power; as, for example, for the regulation of the liquor traffic in immediate proximity to the territorial limits of the district or municipality.<sup>3</sup>

The fact that all the taxes required by law have been paid in another state or district, does not relieve a business from taxation in the place where it is carried on.<sup>4</sup> A business is not taxable in two different districts, however, where it is managed and the principal part of its transactions is carried on in one, though some of its enterprises extend incidentally into the other.<sup>5</sup>

4. Collection.—(See also *supra*, this title, *Collection*).—Occupation and privilege taxes are imposed usually in the form of license fees, the payment of which may be made a condition precedent to the issue of the license,<sup>6</sup> or the beginning of the exercise of the occupation or privilege.<sup>7</sup>

only be required to pay a total license of fifty dollars.

1. *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654; *Com. v. Stodder*, 2 Cush. (Mass.) 562; 48 Am. Dec. 679; *Pleuler v. State*, 11 Neb. 547; *Bates v. Mobile*, 46 Ala. 158; *Minor v. Fredonia*, 27 N. Y. 155; *Edenton v. Capehart*, 71 N. Car. 156; *Capella v. Carradine*, 19 La. Ann. 305. And see *State v. Hibernia Ins. Co.*, 38 La. Ann. 465; *State v. Charleston*, 2 Spears (S. Car.) 623.

2. *Fisher v. Rush County*, 19 Kan. 414. But a law imposing a tax on all articles of trade or commerce sold in a city, includes sales by agents made out of the city and state, but delivered from a store in the city. *Shriver v. Pittsburg*, 66 Pa. St. 446.

3. *Falmouth v. Watson*, 5 Bush (Ky.) 660; *Com. v. Stodder*, 2 Cush. (Mass.) 563; 48 Am. Dec. 679; *Pleuler v. State*, 11 Neb. 547. And see *Scott v. Robinson*, 20 Gratt. (Va.) 661.

Such regulation is permissible even though impositions for regulation are also imposed in the district in which the pursuit is carried on. The legislature may, for police purposes, prescribe the limits of municipal bodies, enlarging or contracting them at pleasure. *Chicago Packing, etc., Co. v. Chicago*, 88 Ill. 221; 30 Am. Rep. 545.

4. See *Clark v. Mobile*, 67 Ala. 217; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Kip v. Paterson*, 26 N. J. L. 298; *Capella v. Carradine*, 19 La. Ann. 305.

The payment of taxes due in the home state of a merchant, does not authorize him to sell his goods in other states free of taxation. *Ex p. Thornton*, 12 Fed. Rep. 538.

5. *St. Charles v. Nolle*, 51 Mo. 122; 11 Am. Rep. 440; *Com. v. Stodder*, 2 Cush. (Mass.) 562; 48 Am. Dec. 679; *Capella v. Carradine*, 19 La. Ann. 305.

Authority to impose a license tax upon all owners of carts, etc., using the paved streets of the city, does not authorize the imposition of a tax on wagons, etc., owned by non-residents of the city, and used occasionally in carrying goods through it to an adjoining town. *Bennett v. Birmingham*, 31 Pa. St. 15.

6. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292; *Cincinnati v. Bryson*, 15 Ohio 625; 45 Am. Dec. 593.

7. *Bancroft v. Dumas*, 21 Vt. 456; *Alexander v. O'Donnell*, 12 Kan. 608; *Doran v. Phillips*, 47 Mich. 228; *State v. Holmes*, 28 La. Ann. 765; 26 Am. Rep. 110; *License Tax Cases*, 5 Wall. (U. S.) 462; *Brooklyn v. Breslin*, 57 N. Y. 591; *Com. v. Byrne*, 20 Gratt. (Va.) 165.

A statute requiring the payment of a license tax as a condition precedent to engaging in certain occupations, but permitting the tax on other occupations to be paid quarterly, and permitting still other occupations to be pursued without a license, is not unconstitutional. *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182.

Authority may be given to collect a tax or a license fee by an ordinary action at law;<sup>1</sup> and fines and penalties may be imposed and collected for violation of the license,<sup>2</sup> or for acting without a license.<sup>3</sup> The legislature may make it a criminal offense for any

1. *Los Angeles v. Southern Pac. R. Co.*, 61 Cal. 59; *Sacramento v. Crocker*, 16 Cal. 119; *Stokes v. New York*, 14 Wend. (N. Y.) 87; *Tarde v. Benesman*, 31 Tex. 277; *Aulanier v. Governor*, 1 Tex. 653.

But, unless authorized by statute, a civil action cannot be maintained to recover the amount of the license. *People v. Craycroft*, 2 Cal. 243; 56 Am. Dec. 331; *People v. Raynes*, 3 Cal. 366; *Santa Cruz v. Spreckels*, 57 Cal. 133. But see *Texas Banking, etc., Co. v. State*, 42 Tex. 636.

2. *Beall v. State*, 4 Blackf. (Ind.) 110; *Com. v. Cusick*, 120 Mass. 183; *Brooklyn v. Breslin*, 57 N. Y. 591; *State v. Hayne*, 4 S. Car. 403; *Tarde v. Benesman*, 31 Tex. 277; *Archer v. State*, 9 Tex. App. 78. And see *Sterne v. State*, 20 Ala. 43.

In *Drexel v. Com.*, 46 Pa. St. 31, it was held that a statute imposing a tax upon brokers on account of their receipts from commissions, discounts, etc., and requiring them to make returns to the auditor general, imposes a duty upon them to keep such accounts as will exhibit their receipts, and a failure to keep such accounts and make return, is a sufficient ground for the imposition of the penalty imposed by the act. The penalty is incurred by each and every neglect. *Com. v. Cooke*, 50 Pa. St. 201.

**Suits for penalties** should be prosecuted in the name of the state, *Aulanier v. Governor*, 1 Tex. 653, unless it is otherwise provided by statute. See *Higby v. Fishbourne*, 5 Ill. 165; *Wallack v. New York*, 3 Hun (N. Y.) 84.

**The process** required in cases of suits for a penalty incurred by violating an ordinance, is sufficient, if it sets out the substance of the ordinance and the nature of the offense charged. *Kip v. Paterson*, 26 N. J. L. 208.

**Burden of Proof.**—The state should make out a *prima facie* case by showing everything necessary to make out the right to recover the tax. See *Weaver v. State*, 89 Ga. 639; *State v. Hirsch*, 45 Mo. 429; *State v. Richardson*, 45 Mo. 575. But in an action for a penalty for acting without a license, it is not necessary to establish the fact that the accused had no license. This

will be taken to be true unless disproved. *Smith v. Adrian*, 1 Mich. 495. See also *Sharp v. State*, 17 Ga. 290.

Where the amount of a tax is variable at the will of the proper municipal officers, it is not a matter of judicial knowledge; and an indictment or information for pursuing the business without the payment of the tax, should allege, and the proof establish, the amount which had been fixed. *Archer v. State*, 9 Tex. App. 78.

3. *State v. Hayne*, 4 S. Car. 403; *Rome v. McWilliams*, 52 Ga. 251; *Chilvers v. People*, 11 Mich. 43; *Carr v. State*, 5 Tex. App. 153; *Harris v. State*, 4 Tex. App. 131; *Tonella v. State*, 4 Tex. App. 325.

The penalty may be a double tax. *State v. Manz*, 6 Coldw. (Tenn.) 557.

The failure to obtain a license for acts which were misdemeanors at common law, leaves the party as he would have been at common law—a public wrongdoer subject to indictment and punishment. *People v. Raynes*, 3 Cal. 366. Gaming debts are not legalized by legislative acts permitting gaming houses to be licensed. The license simply operates as a permission, and removes the misdemeanor at common law, but does not change the character of the contract. *Carrier v. Brannan*, 3 Cal. 328.

**Forfeiture of Goods.**—In *Virginia*, judgment for the forfeiture of the goods used may be given on presentment and information. *Com. v. Collins*, 9 Leigh (Va.) 666.

A statute requiring the forfeiture of goods carried for sale without a license, does not apply to goods forwarded from without the state, upon the order of a purchaser, though such order was procured through an agent of the sellers who was unlawfully traveling and offering goods for sale. *Burbank v. McDuffee*, 65 Me. 135.

**Validity of Contracts.**—As to the validity of contracts made in transacting business without a license as required, see LICENSE, vol. 13, p. 516. And see *Anding v. Levy*, 57 Miss. 51; 34 Am. Rep. 435; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449, where contracts made by a trader without a license are avoided by statute.

person subject to an occupation tax to pursue such occupation without first paying the tax.<sup>1</sup>

Power in any tribunal, body, or officer to issue a license and require a tax to be paid, carries with it the right to receive payment, unless a different disposition of the fee is provided for.<sup>2</sup>

**XXI. LOCAL ASSESSMENTS—1. Nature and Purpose—Distinguished from Taxation Generally.**—Local or special assessments are levied by virtue of an exercise of the taxing power,<sup>3</sup> but, in many respects, differ from general taxes levied for governmental or municipal purposes. They are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and are governed by principles which do not apply

1. *Cincinnati v. Buckingham*, 10 Ohio 257; *White v. Kent*, 11 Ohio St. 550; *Shelton v. Mobile*, 30 Ala. 540; 68 Am. Rep. 143; *Huntington v. Cheesbro*, 57 Ind. 74; *Languille v. State*, 4 Tex. App. 312; *St. Louis v. Sternberg*, 69 Mo. 289; *Chilvers v. People*, 11 Mich. 43; *Mork v. Com.*, 6 Bush (Ky.) 397; *Stewart v. Potts*, 49 Miss. 749; *State v. Hayne*, 4 S. Car. 403; *Com. v. Byrne*, 20 Gratt. (Va.) 165. And if a statute enjoins an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the legislative injunction. *Keller v. State*, 11 Md. 526; 69 Am. Dec. 226.

An information or an indictment for violating a license, or for acting without a license, must allege facts showing that the accused had engaged in the prohibited pursuit, and that there was a violation or absence of the license. See *Crews v. State*, 10 Tex. App. 292; *Alcott v. State*, 8 Blackf. (Ind.) 6; *Bacon v. Wood*, 3 Ill. 265; *Sterne v. State*, 20 Ala. 43; *Prigmore v. Thompson*, Minor (Ala.) 420; *May v. State*, 9 Ala. 167; *State v. Aikin*, 7 Yerg. (Tenn.) 268; *Greer v. Bumpass*, Mart. & Y. (Tenn.) 94; *Cousins v. Com.*, 19 Gratt. (Va.) 807; *Com. v. Fox*, 10 Phila. (Pa.) 204; *Com. v. Smith*, 6 Bush (Ky.) 263; *Com. v. Dudley*, 3 Metc. (Ky.) 221; *Mork v. Com.*, 6 Bush (Ky.) 397; *State v. Willis*, 37 Mo. 192; *State v. Powell*, 10 Rich. (S. Car.) 373; *Com v. Brouckheimer*, 14 Gray (Mass.) 29; *Com. v. Twitchell*, 4 Cush. (Mass.) 74.

2. *Williams v. Com.*, 13 Bush (Ky.) 304.

A payment of the tax and the receipt therefor, amount in substance to a license, and confer on the party making the payment, a right to carry on the business for the time for which the tax has been paid, on complying with the

law in other respects. *Galloway v. Stewart*, 49 Ind. 156; 19 Am. Rep. 677.

3. *Burnett v. Sacramento*, 12 Cal. 83; *Emery v. San Francisco Gas Co.*, 28 Cal. 346; *Taylor v. Palmer*, 31 Cal. 240, 250; *Palmer v. Way*, 6 Colo. 106; *Pueblo v. Robinson*, 12 Colo. 593; *Nichols v. Bridgeport*, 23 Conn. 189; *Hayden v. Atlanta*, 70 Ga. 817; 7 Am. & Eng. Corp. Cas. 228; *Adams County v. Quincy*, 130 Ill. 566; *Palmer v. Stumph*, 29 Ind. 335; *Bradley v. McAttee*, 7 Bush (Ky.) 667; *Municipality No. 2 v. White*, 9 La. Ann. 446; *Moale v. Baltimore*, 5 Md. 314; *Baltimore v. Greenmount Cemetery*, 7 Md. 517; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Gould v. Baltimore*, 59 Md. 378; *Noonan v. Stillwater*, 33 Minn. 198; *Hennepin County v. Bartleson*, 37 Minn. 343; *Williams v. Detroit*, 2 Mich. 560; *McComb v. Bell*, 2 Minn. 295; *Williams v. Cammack*, 27 Minn. 209; *Garrett v. St. Louis*, 25 Mo. 505; *Newby v. Platte County*, 25 Mo. 258; *Harvard College v. Boston*, 104 Mass. 482; *State v. Fuller*, 34 N. J. L. 227; *State v. Newark*, 35 N. J. L. 168; *Brewster v. Syracuse*, 19 N. Y. 118; *New York Protestant Episcopal School v. Davis*, 31 N. Y. 582; *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Brooklyn*, 4 N. Y. 419, *overruling* 6 Barb. (N. Y.) 209; *Matter of Van Antwerp*, 56 N. Y. 265; *Roosevelt Hospital v. New York*, 84 N. Y. 112; *Wilson v. Auburn*, 27 Neb. 440; *Scoville v. Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 Ohio St. 246; *In re Washington Avenue*, 69 Pa. St. 352; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Bishop v. Tripp*, 15 R. I. 466; *Roundtree v. Galveston*, 42 Tex. 612; *Allen v. Drew*, 44 Vt. 175; *Weeks v. Milwaukee*, 10 Wis. 256; *Soens v. Racine*, 10 Wis. 271; *Holton v. Milwaukee*, 31

generally.<sup>1</sup> They do not recur annually or at stated periods, but are imposed only as occasion arises;<sup>2</sup> and they can only be levied on real estate.<sup>3</sup> Finally, while the improvement for which the special assessment is levied is public in its character, authorizing the levy of a tax, the property within the limited area over which the assessment is imposed, is specially benefited by it, and its value enhanced in excess of the general good, and therefore the property so benefited should be charged with its share of the expense in proportion to the special benefit which it derives, and not merely on an *ad valorem* basis, as in the case of a general tax.<sup>4</sup>

These differences have compelled the courts to recognize an important distinction between the terms "taxes" and "assessments," when used in constitutions, statutes, and covenants. These terms are regarded as distinct and as having a different meaning.<sup>5</sup> Thus, where there is an exemption from "taxation," such exemption is limited to taxation for general governmental and municipal purposes, and does not extend to or include special assessments.<sup>6</sup> Similarly, constitutional provisions that all taxes shall be equal and uniform apply only to general taxation and have no application to local assessments.<sup>7</sup> An assessment is not

Wis. 27; *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

1. *Munson v. Atchafalaya Basin Levee Dist.*, 43 La. Ann. 15.

2. *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 262; *Macon v. Patty*, 57 Miss. 386.

3. *Macon v. Patty*, 57 Miss. 386.

4. *Taylor v. Palmer*, 31 Cal. 254; *People v. Austin*, 47 Cal. 353; *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 262; *Hayden v. Atlanta*, 70 Ga. 817; 7 Am. & Eng. Corp. Cas. 228; *Stephani v. Bishop of Chicago*, 2 Ill. App. 249; *Palmer v. Stumph*, 29 Ind. 335; *Ross v. Stackhouse*, 114 Ind. 206; *Munson v. Atchafalaya Basin Levee Dist.*, 43 La. Ann. 15; *Davies v. New Orleans*, 40 La. Ann. 806; *Brooks v. Baltimore*, 48 Md. 265; *Gould v. Baltimore*, 59 Md. 380; *Alexander v. Baltimore*, 5 Gill (Md.) 389; *Thomas v. Gain*, 35 Mich. 155; *Rogers v. St. Paul*, 22 Minn. 494; *Daily v. Swope*, 47 Miss. 379; *Macon v. Patty*, 57 Miss. 386; *Lockwood v. St. Louis*, 24 Mo. 22; *Neenan v. Smith*, 50 Mo. 529; *Tide-water Co. v. Coster*, 18 N. J. Eq. 527; *In re Elizabeth*, 49 N. J. L. 504; *Howell v. Essex County Road Board*, 32 N. J. Eq. 675; *Matter of New York*, 11 Johns. (N. Y.) 77; *Matter of Van Antwerp*, 56 N. Y. 265; *Roosevelt Hospital v. New York*, 84 N. Y. 112; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Hill v. Higdon*, 5 Ohio St. 247; *Reeves v. Wood County*, 8 Ohio St. 339; *Ray-*

*mond v. Cleveland*, 42 Ohio St. 522; *Kirby v. Shaw*, 19 Pa. St. 258; *Schenky v. Com.*, 36 Pa. St. 29; *McGonigle v. Allegheny*, 44 Pa. St. 121; *In re Washington Avenue*, 69 Pa. St. 358; *Hale v. Kenosha*, 29 Wis. 605; *Norfolk v. Ellis*, 26 Gratt. (Va.) 227; *Richmond, etc., R. Co. v. Lynchburg*, 81 Va. 476; *Green v. Ward*, 82 Va. 327.

5. See *Munson v. Atchafalaya Basin Levee Dist.*, 43 La. Ann. 15; *People v. Austin*, 47 Cal. 353; *Macon v. Patty*, 57 Miss. 386; *Hayden v. Atlanta*, 70 Ga. 817; 7 Am. & Eng. Corp. Cas. 228; *Lima v. Lima Cemetery Assoc.*, 42 Ohio St. 128; *Davies v. New Orleans*, 40 La. Ann. 806; *Pray v. Northern Liberties*, 31 Pa. St. 71; *In re Washington Avenue*, 69 Pa. St. 359.

6. See *supra*, this title, *Exemptions*. See also *Roosevelt Hospital v. New York*, 84 N. Y. 108; *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255; *Lima v. Lima Cemetery Assoc.*, 42 Ohio St. 128; *Boston Seamen's Friend Soc. v. Boston*, 116 Mass. 181; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *Patterson v. Society, etc.*, 24 N. J. L. 400.

7. See *infra*, this title, *Constitutionality*. See also *Taylor v. Palmer*, 31 Cal. 240; *Brooks v. Baltimore*, 48 Md. 269; *Hill v. Higdon*, 5 Ohio St. 243; *Reeves v. Wood County*, 8 Ohio St. 333; *Hale v. Kenosha*, 29 Wis. 599; *In re Opening of Streets*, 20 La. Ann. 499; *Munson v. Atchafalaya Basin*

a tax, within the meaning of a statute limiting the time within which the collection of taxes may be enforced.<sup>1</sup>

A covenant that a vendor shall pay all "taxes" assessed against the property prior to the surrender of possession to the vendee, does not bind the vendor to pay a local assessment so levied,<sup>2</sup> and on the other hand, a condition in a lease that the lessee shall pay all "assessments," does not bind him to pay taxes levied for general purposes.<sup>3</sup>

**2. Principle of the Imposition—Benefits.**—One of the features distinguishing local assessments from general taxation, is that local assessments are imposed according to the benefit derived from the improvement, and not *ad valorem*. This principle of benefit equalling the assessment is the foundation of special assessments. If there be no special and peculiar benefit, the

Levee Dist., 43 La. Ann. 15; Hayden v. Atlanta, 70 Ga. 817; 7 Am. & Eng. Corp. Cas. 228; Richmond, etc., R. Co. v. Lynchburg, 81 Va. 473; Auburn v. Paul, 84 Me. 215.

1. Gould v. Baltimore, 59 Md. 378. But compare Dalrymple v. Milwaukee, 53 Wis. 178.

2. Beals v. Providence Rubber Co., 11 R. I. 381; Love v. Howard, 6 R. I. 116; Municipality No. 2 v. Curell, 7 La. 203. But, if there are words in the covenant evincing an intent of the parties to extend the liability to such assessments, it is otherwise. Thus, a lessee has been held liable where the covenant was to pay "taxes and assessments," Codman v. Johnson, 104 Mass. 491; to pay "rates, taxes and duties," Curtis v. Pierce, 115 Mass. 186; to pay "taxes and duties," Blake v. Baker, 115 Mass. 188; to pay "all duties, taxes and assessments," etc., New York v. Cashman, 10 Johns. (N. Y.) 96.

In Cassady v. Hammer, 62 Iowa 359, however, it was held that an agreement in a lease "to pay all taxes assessed . . . during the continuance of the lease," included special assessments for local improvements, such as for paving and curbing the adjacent street. The court said that the question presented arose upon the meaning of the word "taxes" as used in the lease; that the assessment was made under a statute, wherein an assessment was denominated a special tax; referred to the fact that, in its previous decisions, an assessment like that in question had been called a tax; cited Burlington, etc., R. Co. v. Spearman, 12 Iowa 112; Morrison v. Hershire, 32 Iowa 271, and Sioux City v. Independent School Dist., 55 Iowa 150; and said that the

term "special tax," as denoting an assessment for a local improvement, had come into general use and was understood by every one, notwithstanding holdings that a statute providing for the exemption of a certain class of property from taxation did not exempt from assessment for local improvements, an exemption from taxation being an exception to be construed strictly. The court adverted to Love v. Howard, 6 R. I. 116; Municipality No. 2 v. Curell, 7 La. 203, cases where a lessee had agreed to pay special taxes, and where it was held that he was not liable for a special assessment, but said that in the former case the assessment was made under a statute enacted after the execution of the lease, and that in the latter case the agreement was to pay taxes annually levied, and that the parties must have had in mind annual or general taxes. As supporting this view of the question, the court cited Blake v. Baker, 115 Mass. 188, referred to in the preceding paragraph.

3. Stephani v. Bishop of Chicago, 2 Ill. App. 249. But compare Bleecker v. Ballou, 3 Wend. (N. Y.) 263.

#### **Distinguished from Special Taxation.**

—In Sterling v. Galt, 117 Ill. 11, Mulkey, C. J., said: "A special assessment differs from special taxation mainly in this: that the assessment cannot in any case, or under any circumstances, exceed the benefits the property will derive from the improvement, and the owner of the property assessed has the right, if dissatisfied with the assessment, to have this question passed upon by a jury, and if not content with their finding, to have it reviewed in an appellate tribunal; whereas, in cases of special taxation, the jury have nothing to do



assessment is simply an arbitrary exaction which cannot be sustained.<sup>1</sup>

If the cost of the improvement exceeds the peculiar benefit to the neighboring property, the excess must be levied on the public at large; the special assessment is necessarily limited by the extent of the peculiar benefit.<sup>2</sup>

with the amount which is by ordinance assessed upon the contiguous property."

1. *Creighton v. Manson*, 27 Cal. 613; *Taylor v. Palmer*, 31 Cal. 254; *Matter of Market Street*, 49 Cal. 549; *Schumacker v. Toberman*, 56 Cal. 510; *Nichols v. Bridgeport*, 23 Conn. 189; *St. John v. East St. Louis*, 50 Ill. 92; *Lee v. Ruggles*, 62 Ill. 427; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656; *Yeatman v. Crandall*, 11 La. Ann. 220; *In re New Orleans Drainage Co.*, 11 La. Ann. 373; *In re Opening of Streets*, 20 La. Ann. 497; *Davidson v. New Orleans*, 34 La. Ann. 170; *Dyar v. Farmington*, 70 Me. 527; *Burns v. Baltimore*, 48 Md. 204; *Baltimore v. Hanson*, 61 Md. 462; *Thomas v. Gain*, 35 Mich. 155; *White v. Saginaw*, 67 Mich. 40; *State v. Ramsey County Dist. Ct.*, 29 Minn. 62; *McCormack v. Patchin*, 53 Mo. 33; *Hanscom v. Omaha*, 11 Neb. 41; *Lansing v. Lincoln*, 32 Neb. 470; *State v. Newark*, 27 N. J. L. 190; *State v. Jersey City*, 36 N. J. L. 56; *State v. Elizabeth*, 37 N. J. L. 330; *State v. Reed*, 43 N. J. L. 195; *In re Drainage of Lands*, 35 N. J. L. 500; *In re Pequest River*, 42 N. J. L. 553; *Stuart v. Palmer*, 74 N. Y. 189; *Chamberlain v. Cleveland*, 34 Ohio St. 561; *Wewell v. Cincinnati*, 45 Ohio St. 424; *In re Washington Avenue*, 69 Pa. St. 352; *Seely v. Pittsburgh*, 82 Pa. St. 360; *Cleveland v. Tripp*, 13 R. I. 50.

But in *Pearson v. Zable*, 78 Ky. 170, Cofer, J., said: "But it by no means follows that each piece of property within the bounds over which the assessment extends must in fact derive benefit from the improvement. The area over which the assessment extends constitutes for the occasion a tax district; whether the property within that district, considered as an entirety, will be benefited by the proposed improvement, is a question to be decided primarily by the legislature. And when that department, whether acting directly or through the local authorities, to which it may have delegated the power to determine when such improvements shall be made, directs an improvement to be made and the costs of making it

to be assessed upon the adjacent property, there is a decision by the legislature that the property within the district will be benefited."

In *Preston v. Rudd*, 84 Ky. 150, Holt, J., said: "The question of assessment or apportionment cannot be governed by advantage or disadvantage to one person within the district. If so, public improvements could rarely be made. The legislature must necessarily look at the district as a whole, and upon this general view determine whether such benefits will accrue from the improvement as will authorize its cost to be imposed upon the adjacent property. Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement; the principle is that the territory is benefited; that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily, individual cases of hardship will arise; but it approaches equality as nearly as is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited. This rule, however, cannot be so extended as to entirely take from the citizen his property. This would work, 'a manifest injustice.' It would be spoliation, and not taxation. Under the guise of benefit and taxation, he cannot be thus arbitrarily deprived of his property."

In *U. S. v. Edmunds*, 3 Mackey (D. C.) 142, it was held that the clause of an act of Congress providing for assessments "upon property adjoining and to be especially benefited," was a mere designation of the property liable to assessment, and not a limitation upon the power of apportionment.

2. *Creighton v. Manson*, 27 Cal. 613; *St. John v. East St. Louis*, 50 Ill. 92; *Crawford v. People*, 82 Ill. 557; *Sterling v. Galt*, 117 Ill. 11; *White v. Saginaw*, 67 Mich. 33; *Adams v. Bay City*, 78 Mich. 215; *Hanscom v. Omaha*, 11 Neb. 37; *Tide-water Co. v. Coster*, 18 N. J. Eq. 527, *aff'd* 18 N. J. Eq. 54;

If the owners of the adjacent property are compelled to contribute to the cost of the improvement, beyond the enhancement of the value of their own property, the exaction of such excess is a taking of private property for public use without just compensation.<sup>1</sup>

In consonance with these principles it has also been held that, although a tax may be placed exclusively on the political subdivision of the state to whose benefit the tax will enure, yet the legislature cannot impose it upon any district smaller in extent than such political subdivision without imposing it upon the basis of the benefit to the property on which it is imposed.<sup>2</sup>

To sustain a special assessment, the special benefit must accrue to the land as real estate; and not to its owner merely as an individual.<sup>3</sup> The special benefit which will justify an assessment must be immediate, and of such a character that it can be seen and traced; remote and contingent benefits are not sufficient and cannot be considered.<sup>4</sup>

**3. Power to Make—*a*. STATUTES AND CITY ORDINANCES.**—The levying of local assessments need not be exercised directly by the legislature, but may be delegated to municipal corporations.<sup>5</sup> The power is usually exercised by means of such a delegation, and some courts have held that, as the power to levy local assessments is of municipal rather than state consequence,

*State v. Jersey City*, 36 N. J. L. 56; *Chamberlain v. Cleveland*, 34 Ohio St. 561; *Hammett v. Philadelphia*, 65 Pa. St. 146.

1. *Creighton v. Manson*, 27 Cal. 624; *Lent v. Tillson*, 72 Cal. 441; *In re New Orleans Drainage Co.*, 11 La. Ann. 373; *White v. Saginaw*, 67 Mich. 33, 40; *Tide-water Co. v. Coster*, 18 N. J. Eq. 528, *aff'd* 18 N. J. Eq. 54; *State v. Newark*, 37 N. J. L. 422; *Matter of Canal Street*, 11 Wend. (N. Y.) 155.

2. *State v. Fuller*, 39 N. J. L. 576. See also *Dyar v. Farmington*, 70 Me. 515, 522; *Brewer Brick Co. v. Brewer*, 62 Me. 62; *McCormack v. Patchin*, 53 Mo. 33.

3. *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 663; *Neenan v. Smith*, 50 Mo. 529; *Green v. Ward*, 82 Va. 324.

4. *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255; *New York, etc., R. Co. v. New Haven*, 42 Conn. 279; *Hartford v. West Middle Dist.*, 45 Conn. 462; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656; *State v. Newark*, 27 N. J. L. 101; *State v. Jersey City*, 36 N. J. L. 58; *State v. Elizabeth*, 37 N. J. L. 330; *In re Pequest River*, 39 N. J. L. 436; *State v. Elizabeth*, 40 N. J. L. 276; *Matter of Fourth Ave.*, 3 Wend. (N. Y.) 452; *Boston, etc.,*

*R. Co. v. Middlesex County*, 1 Allen (Mass.) 331; *Old Colony, etc., R. Co. v. Plymouth County*, 14 Gray (Mass.) 156; *Mt. Auburn Cemetery v. Cambridge (Mass. 1889)*, 4 L. R. A. 836; *Omaha v. Schaller*, 26 Neb. 522; *Hammett v. Philadelphia*, 65 Pa. St. 155; *In re Washington Avenue*, 69 Pa. St. 353. But compare *Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89; *New York, etc., R. Co. v. New Britain*, 49 Conn. 40.

5. *Harward v. St. Clair, etc., Drainage Co.*, 51 Ill. 130; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *Gage v. Graham*, 57 Ill. 144; *Board of Directors v. Houston*, 71 Ill. 318; *Udike v. Wright*, 81 Ill. 49; *West Chicago Park Com'rs v. Western Union Tel. Co.*, 103 Ill. 33; *Cornell v. People*, 107 Ill. 372; *Owners of Lands v. People*, 113 Ill. 296; *Wetherell v. Devine*, 116 Ill. 631; *Wilson v. Board of Trustees*, 133 Ill. 443; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 178; *Bradley v. McAtee*, 7 Bush (Ky.) 667; *Burgess v. Pue*, 2 Gill (Md.) 11; *Alexander v. Baltimore*, 5 Gill (Md.) 392; *Hoyt v. East Saginaw*, 19 Mich. 39; *School Furniture Co. v. Grand Rapids*, 92 Mich. 564; *Hennepin County v. Bartleson*, 37 Minn. 343;

and as it is recognized as a power inherent in or at least necessary to the complete working of a municipal government, the legislature has no authority to order directly an improvement within a city and levy an assessment to pay for it, but can duly empower the city authorities to make the improvement and levy the assessment.<sup>1</sup>

A delegation of authority to levy an assessment must, however, be distinctly and expressly made.<sup>2</sup> Consequently, it cannot be implied from a general grant of power to levy taxes for municipal purposes,<sup>3</sup> or from a grant of authority to provide for the general improvement and regulation of streets and sidewalks, or from similar provisions.<sup>4</sup> So, the power to lay a sidewalk cannot be inferred from a grant of authority to macadamize a street;<sup>5</sup> authority to levy a special assessment to improve a turnpike does not authorize an assessment for the improvement of only a certain

*In re* Washington Avenue, 69 Pa. St. 352; *Adams v. Fisher*, 63 Tex. 651; 75 Tex. 657; *Johnson v. Milwaukee*, 40 Wis. 315; *Willard v. Presbury*, 14 Wall. (U. S.) 676.

The power to levy local assessments may be constitutionally delegated by the legislature to a board of assessors acting independently of the city council. *Little Rock v. Board of Imp.*, 42 Ark. 152.

In *Nebraska*, it has been held that the provisions of art. 9, § 6 of the constitution, to the effect that the legislature "would vest the corporate authority of cities, towns, and villages with power to make local improvements by special assessments or by special taxation of the property benefited," do not prohibit the legislature from conferring the power upon counties to make local improvements, and of special assessment or taxation upon the property benefited. *State v. Dodge County*, 8 Neb. 124; *State v. Lancaster County*, 4 Neb. 540; *Darst v. Griffin*, 31 Neb. 668.

1. *Taylor v. Palmer*, 31 Cal. 252; *People v. Lynch*, 51 Cal. 15; *People v. Houston*, 54 Cal. 539.

2. *Wright v. Chicago*, 20 Ill. 252; *Chicago v. Law*, 144 Ill. 576; *Caldwell v. Rupert*, 10 Bush (Ky.) 179; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Halpin v. Campbell*, 71 Mo. 493; *State v. Guttentberg*, 39 N. J. L. 660; *Albuquerque v. Zliger* (N. Mex. 1891), 27 Pac. Rep. 315; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Matter of Second Ave. Church*, 66 N. Y. 395; *Stebbins v. Kay*, 123 N. Y. 31; *Lima v. Lima Cemetery Assoc.*, 42 Ohio St. 128; *Philadelphia v. Hoxie*, 38 Pa. St. 339;

*Reed v. Erie*, 79 Pa. St. 346; *Green v. Ward*, 82 Va. 324; *Whiting v. West Point*, 88 Va. 905; *Allen v. Galveston*, 51 Tex. 302.

3. *Augusta v. Murphey*, 79 Ga. 101; 17 Am. & Eng. Corp. Cas. 621; *Fairfield v. Ratcliff*, 20 Iowa 396; *Simpson v. Kansas City*, 46 Kan. 438; 37 Am. & Eng. Corp. Cas. 252; *Annapolis v. Harwood*, 32 Md. 471; *Sharp v. Speir*, 4 Hill (N. Y.) 76.

4. *Wright v. Chicago*, 20 Ill. 252; *Chicago v. Law*, 144 Ill. 575; *Fairfield v. Ratcliff*, 20 Iowa 396; *Leavenworth v. Rankin*, 2 Kan. 357. But it has been held that power to lay a sidewalk is implied in a power to improve a street. *State v. Portage*, 12 Wis. 562.

**Paving of Street Crossings.**—In *Powell v. St. Joseph*, 31 Mo. 347, it appeared that the defendant corporation was authorized to assess the cost of paving streets to the owners of adjoining property, in proportion to their fronts. This was held to authorize the city authorities to apportion the cost of paving the street crossings, as well as of such parts of the street as were in front of lots, among the lot holders of the adjoining blocks, in proportion to the front feet. See also *Williams v. Detroit*, 2 Mich. 560; *Creighton v. Scott*, 14 Ohio St. 438.

The laying of a cross-walk is paving within the meaning of the acts authorizing assessments by a city, and the relaying of such cross-walks is likewise a repaving. *Matter of Burke*, 62 N. Y. 224; *Matter of Phillips*, 60 N. Y. 16.

5. *Himmelmann v. Satterlee*, 50 Cal. 68; *Dyer v. Chase*, 52 Cal. 440; *Fairfield v. Ratcliff*, 20 Iowa 396.

Authority to macadamize a street

portion thereof;<sup>1</sup> and power to drain does not include the power to construct a levee.<sup>2</sup> But an express power to make an improvement necessarily implies the power to do everything that is required to carry such power into effect. Hence, an express power to construct sidewalks implies a right in the city to contract such obligations as are necessary to execute the power.<sup>3</sup>

Certain powers are further regarded as continuing. Thus, the power to improve implies the power to repair,<sup>4</sup> and a power to pave implies a power to repair and repave when the condition of the street requires it.<sup>5</sup> Unless the power conferred upon the municipal authorities to make an improvement, and to levy a special assessment therefor, is limited and controlled by statute, the grantees of the power are the sole and exclusive judges of the time, mode, and manner of making the improvement.<sup>6</sup> But the local body to which the power to make the improvement and levy the assessment is delegated must itself exercise the power conferred upon it, and cannot in its turn delegate the power, so far as it is the exercise of legislative or judicial discretion, to other agencies.<sup>7</sup> This limitation, however, does not apply to such matters as are merely ministerial in their nature, and relate only to the execution of the powers conferred upon the municipality.<sup>8</sup>

does not necessarily confer authority to curb the sidewalks. *Beaudry v. Valdez*, 32 Cal. 276.

1. *Elliott v. Berry*, 41 Ohio St. 110.

2. *Updike v. Wright*, 81 Ill. 49.

3. *Galveston v. Loonie*, 54 Tex. 517.

4. *Adams v. Fisher*, 75 Tex. 657.

5. *Gurnee v. Chicago*, 40 Ill. 170; *Lafayette v. Fowler*, 34 Ind. 140; *Yeakel v. Lafayette*, 48 Ind. 116; *Kokomo v. Mahan*, 100 Ind. 242; *Municipality No. 2 v. Dunn*, 10 La. Ann. 57; *Williams v. Detroit*, 2 Mich. 581; *Sheley v. Detroit*, 45 Mich. 434; *Wilkins v. Detroit*, 46 Mich. 120; *McCormack v. Patchin*, 53 Mo. 33; *Wistar v. Philadelphia*, 80 Pa. St. 511; *Adams v. Fisher*, 75 Tex. 657.

6. *Matter of Dugro*, 50 N. Y. 513; *Matter of Zborowski*, 68 N. Y. 88; *Foss v. Chicago*, 56 Ill. 354; *Cram v. Chicago*, 139 Ill. 265.

7. *Richardson v. Heydenfeldt*, 46 Cal. 68; *People v. Clark*, 47 Cal. 456; *Randolph v. Gawley*, 47 Cal. 458; *People v. Ladd*, 47 Cal. 603; *Himmelman v. McCreery*, 51 Cal. 562; *Foss v. Chicago*, 56 Ill. 354; *Jenks v. Chicago*, 56 Ill. 397; *Lake Shore, etc., R. Co. v. Chicago*, 56 Ill. 454; *Wright v. Chicago*, 60 Ill. 312; *McDonnell v. Chicago*, 60 Ill. 350; *Bryan v. Chicago*, 60 Ill. 507; *Bowen v. Chicago*, 61 Ill. 268; *Workmen v. Chicago*, 61 Ill. 463; *Walker v. Chicago*, 62 Ill. 287; *Hydes*

*v. Joyes*, 4 Bush (Ky.) 464; *Scofield v. Lansing*, 17 Mich. 437; *Ruggles v. Collier*, 43 Mo. 353; *St. Louis v. Clemens*, 43 Mo. 395; *Haegle v. Malinckrodt*, 46 Mo. 577; *Thompson v. Booneville*, 61 Mo. 282; *Thompson v. Schermerhorn*, 6 N. Y. 92; *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105; *Matter of Emigrant Industrial Sav. Bank*, 75 N. Y. 393; *Phelps v. New York*, 112 N. Y. 216; *Whyte v. Nashville*, 2 Swan (Tenn.) 364.

But in *Hitchcock v. Galveston*, 96 U. S. 341, it was held that a delegation by the city council, which has power to construct sidewalks at the expense of the abutters, of power to the mayor and chairman of the street committee to make a contract for the work, was not invalid. *Strong, J.*, in delivering the opinion, said: "We waste no time in vindicating this proposition. It is true the council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents." See *Ray v. Jeffersonville*, 90 Ind. 567; *People v. Lohnas*, 54 Hun (N. Y.) 604.

8. See *infra*, this title, *Ordinances, Resolutions, etc.* See also *Bartram v. Bridgeport*, 55 Conn. 122; *Collins v. Holyoke*, 146 Mass. 289; *Cuming v. Grand Rapids*, 46 Mich. 158; *Baisch*

b. CONSTITUTIONALITY.—In the absence of a constitutional prohibition, a state legislature may delegate to municipalities the power to levy local assessments upon property specially benefited by public improvements within their borders. And when the amount of the assessment does not exceed the special benefit, it is a valid exercise of the taxing power of the state.<sup>1</sup> It is well settled that if provision is made for giving notice to the owners of property, and each proprietor has an opportunity at some stage of

*v. Grand Rapids*, 84 Mich. 666; *Davies v. Saginaw*, 87 Mich. 439; *Rogers v. St. Paul*, 22 Minn. 494; *State v. Ramsey County Dist. Ct.*, 33 Minn. 235; *Sheehan v. Gleeson*, 46 Mo. 100; *Tipton v. Norman*, 72 Mo. 380; *Burchell v. New York (Supreme Ct.)*, 9 N. Y. Supp. 196; *Green v. Board*, 82 Va. 324.

1. *People v. Brooklyn*, 4 N. Y. 419; *Litchfield v. McComber*, 42 Barb. (N. Y.) 288; *McLaughlin v. Miller*, 124 N. Y. 510; *Manice v. New York*, 8 N. Y. 120; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Wright v. Boston*, 9 Cush. (Mass.) 233; *Boston Seamen's Friend Soc. v. Boston*, 116 Mass. 181; *Boylston Market Assoc. v. Boston*, 113 Mass. 528; *Holt v. Somerville*, 127 Mass. 408; *Jones v. Boston*, 104 Mass. 461; *Prince v. Boston*, 111 Mass. 226; *Butler v. Worcester*, 112 Mass. 541; *Howe v. Cambridge*, 114 Mass. 388; *Salem Turnpike, etc., v. Essex County*, 100 Mass. 282; *Goddard Petitioner*, 16 Pick. (Mass.) 504; *Lafayette v. Fowler*, 34 Ind. 140; *Snyder v. Rockport*, 6 Ind. 240; *Turpin v. Eagle Creek, etc., v. Gravel Road Co.*, 48 Ind. 45; *Maloy v. Marietta*, 11 Ohio St. 636; *Corry v. Campbell*, 25 Ohio St. 134; *Gest v. Cincinnati*, 26 Ohio St. 275; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 160; *Ernst v. Kunkle*, 5 Ohio St. 520; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Strand v. Philadelphia*, 61 Pa. St. 257; *Wray v. Pittsburgh*, 46 Pa. St. 365; *In re Washington Avenue*, 69 Pa. St. 358; *Michener v. Philadelphia*, 118 Pa. St. 535; *Harrisburg v. Segelbaum*, 151 Pa. St. 172; *Oil City v. Oil City Boiler Works*, 152 Pa. St. 354; *Brooks v. Baltimore*, 48 Md. 265; *Alexander v. Baltimore*, 5 Gill (Md.) 383; *Moale v. Baltimore*, 5 Md. 314; *Cruikshanks v. City Council*, 1 McCord (S. Car.) 360; *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177; *Bradley v. McAtee*, 7 Bush (Ky.) 667; *Uhrig v. St. Louis*, 44 Mo. 458; *St. Louis v. Clemens*, 36 Mo. 467; *Keith v. Birmingham*, 100 Mo. 300; *Rogers v. St. Paul*,

22 Minn. 494; *Smith v. Aberdeen*, 25 Miss. 458; *Bedard v. Hall*, 44 Ill. 91; *Parker v. Challiss*, 9 Kan. 155; *In re Dorance Street*, 4 R. I. 230; *Deblois v. Barker*, 4 R. I. 445; *State v. Dean*, 23 N. J. L. 335; *Woodhouse v. Burlington*, 47 Vt. 301; *U. S. v. Memphis*, 97 U. S. 284.

And it has been held that it is as competent to provide for repairs by special assessments, as for making the original improvement. *Bradley v. McAtee*, 7 Bush (Ky.) 667; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; *Gurnee v. Chicago*, 40 Ill. 165; *Sheley v. Detroit*, 45 Mich. 431; *Municipality No. 2 v. Dunn*, 10 La. Ann. 57; *Estes v. Owen*, 90 Mo. 113; *State v. Newark*, 49 N. J. L. 239; *Blount v. Janesville*, 31 Wis. 648; *Warner v. Knox*, 50 Wis. 429; *Willard v. Presbury*, 14 Wall. (U. S.) 676; *Kokomo v. Mahan*, 100 Ind. 242.

But in *Pennsylvania*, it is held that where a street is once opened, paved, etc., it is assimilated with the rest of the city and made a part of it. All the peculiar benefits of the locality have been received and enjoyed, and the cost of repaving such street cannot be provided for by local assessments, but must be defrayed by general taxation. *Hammett v. Philadelphia*, 65 Pa. St. 146; *Boyer v. Reading*, 151 Pa. St. 185; *Protestant Orphan Asylum's Appeal*, 111 Pa. St. 135. And the same is true of the cost of reconstructing a sewer. *Erie v. Russell*, 148 Pa. St. 384.

Macadamizing is an original paving within the meaning of the rule, and the rule should be applied, even though the cost of the original paving was not assessed upon the abutting property. *Harrisburg v. Segelbaum*, 151 Pa. St. 172; *Williamsport v. Beck*, 128 Pa. St. 147. The same rule is applicable to the cost of widening the footway of a street already paved and in good condition. *Wistar v. Philadelphia*, 80 Pa. St. 505. But a worn-out sidewalk may be replaced at the expense of the

the proceedings to be heard as to what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law.<sup>1</sup> Neither are such assessments obnoxious to provisions in state constitutions requiring that taxation shall be

owners of abutting property. *Smith v. Kingston*, 120 Pa. St. 357.

The fact that sewers have been constructed on the front and rear of a city lot, and the owner has contributed his share of the cost thereof, will not exempt the lot from a further assessment to defray the expenses of constructing a sewer under a side street adjacent thereto. *Michener v. Philadelphia*, 118 Pa. St. 535.

In *State v. Charleston*, 12 Rich. (S. Car.) 702, it was held that the *South Carolina* act of 1850, authorizing the city council of Charleston, where a street has been widened by taking a strip of land off the lots on one side and adding it to the street, to assess the expense, or a portion thereof, upon the lot holders on the opposite side of the street, whose lands have not been taken for public use, is unconstitutional.

A statute is not unconstitutional because it authorizes assessments upon property not bordering on the street to be improved, if the property is near to and specially benefited by the improvement. *Ray v. Jeffersonville*, 90 Ind. 557; *Little Rock v. Katzenstein*, 52 Ark. 107; *Guild v. Chicago*, 82 Ill. 472; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656; *Lansing v. Lincoln*, 32 Neb. 457.

But in *St. Louis v. Juppier* (Mo. 1887), 8 West. Rep. 245, it was held that an assessment could not be levied on a lot which did not abut on the new alley, for the cost of opening which, the assessment was attempted to be levied.

And in *State v. Reid* (N. J. 1886), 5 Cent. Rep. 92, it was held that an assessment for constructing a sewer should not be made on property which did not abut on the street under which the sewer was constructed, unless such property was benefited by the flow of surface water therefrom.

An act authorizing the making of a road or avenue through an agricultural district, and providing for the payment of the cost thereof by local assessment on lands within different distances from the road, is unconstitutional as providing for local assessments for a general public benefit. Such a mode of apportioning taxation must be confined to thickly populated districts, such as

cities and villages. *In re Washington Avenue*, 69 Pa. St. 352.

It has been held that a bridge crossing a stream at a public highway in a city, is a public, and not a local, improvement, and that the cost of its construction must be borne by the general public and not assessed upon adjacent property. *In re Saw Mill Run Bridge*, 85 Pa. St. 163. But see *Guilder v. Otsego*, 20 Minn. 74, and *Maltby v. Tautges*, 50 Minn. 248.

An act delegating the power to make local assessments is not unconstitutional because it contains no provision for a jury. *Howe v. Cambridge*, 114 Mass. 388; *Dorgan v. Boston*, 12 Allen (Mass.) 234; *Chapin v. Worcester*, 124 Mass. 464; *Jones v. Boston*, 104 Mass. 461; *Grace v. Board of Health*, 135 Mass. 493; *Briggs v. Union Drainage Dist.*, 140 Ill. 53.

1. *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Wurts v. Hoagland*, 114 U. S. 606; *Spencer v. Merchant*, 125 U. S. 345; *Roach v. Nevin*, 128 U. S. 578, *aff'g Nevin v. Roach*, 86 Ky. 492; *Palmer v. McMahan*, 133 U. S. 660; *Lent v. Tillson*, 140 U. S. 316, *aff'g* 72 Cal. 404; *Paulsen v. Portland*, 149 U. S. 30, *aff'g* 16 Oregon 450; *Scott v. Toledo*, 36 Fed. Rep. 385; *Murdock v. Cincinnati*, 44 Fed. Rep. 726; *In re Madera Irrigation Dist. Bonds*, 92 Cal. 296; *Hutson v. Woodbridge Protection Dist.*, 79 Cal. 90; *Hyde Park v. Spencer*, 118 Ill. 446; *McChesney v. Hyde Park* (Ill. 1891), 28 N. E. Rep. 1102; *Garvin v. Daussman*, 114 Ind. 429; *Reinken v. Fuehring*, 130 Ind. 382; *Law v. Johnston*, 118 Ind. 261; *Speer v. Athens*, 85 Ga. 49; *Davis v. Lynchburg*, 84 Va. 861; *Ulman v. Baltimore*, 72 Md. 609; *Hurford v. Omaha*, 4 Neb. 336; *Eyerma v. Blaksley*, 78 Mo. 145; *St. Louis v. Ranken*, 96 Mo. 497; *In re Ryers*, 72 N. Y. 1; *Stuart v. Palmer*, 74 N. Y. 184; *State v. Stewart*, 74 Wis. 621; *Meggett v. Eau Claire*, 81 Wis. 326; *St. Paul v. Nickl*, 42 Minn. 262.

In *Meggett v. Eau Claire*, 81 Wis. 326, it appeared that the city charter required the city clerk, after an improvement had been determined upon

and the amount chargeable to each lot, had been ascertained by the city council, to issue to the occupant of each lot, a certificate stating the amount assessed and chargeable to such lot. And it was also provided that an estimate of the whole expense of the improvement, and the amount charged to each lot, should be made and filed in the office of the city clerk, for the inspection of those interested, before the work should be ordered to be done, and that notice should be given in the official paper of the city of the filing of such estimate and of the letting of the contract for the performance of the work. It was held that these proceedings, when taken together, constituted due process of law.

And in *Matter of Amsterdam*, 126 N. Y. 158, it appeared that the commissioners of assessment were required by the charter to file a report of their work, with the city clerk, and then a notice was to be published that such report was on file for the inspection of all persons interested, and that it would be presented at a specified time to the supreme court for confirmation, and that all persons desiring to object, might file their objections with the city clerk. On the day appointed, the court was to hear the parties on the report, and might confirm or annul it. It was held that these proceedings constituted due process of law, and afforded sufficient notice to those whose property did not abut on the street, as well as to the owners of abutting property; *reversing* on this point, 55 Hun (N. Y.) 270.

An act which confers upon drainage commissioners the power to levy local assessments, and provides a summary process for collecting the same, but provides no opportunity for the owners of land to be heard as to the validity of assessments, is unconstitutional as not affording due process of law. *Hutson v. Woodbridge Protection Dist.*, 79 Cal. 90.

And it matters not that land-owners have actual knowledge of the proceedings, if no notice has been given. *Scudder v. Jones* (Ind. 1892), 32 N. E. Rep. 221.

But it has been held that a city charter, being the organic act of a municipality, is analogous to a state constitution, and is, therefore, not open to attack on constitutional grounds if it fails in terms to express either the necessity for notice or the time and manner of giving the same. But the assessment

proceedings will be void if due notice is not given, and the owners of property are not afforded an opportunity to be heard. *Paulsen v. Portland*, 149 U. S. 38, *approving* *Gilmore v. Hentig*, 33 Kan. 156, and *citing* *Cleveland v. Tripp*, 13 R. I. 50; *Davis v. Lynchburg*, 84 Va. 861; *Williams v. Detroit*, 2 Mich. 560; *Gatch v. Des Moines*, 63 Iowa 718; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 835. See also *State v. Elizabeth*, 40 N. J. L. 278; *Strowbridge v. Portland*, 8 Oregon 67; *Paulson v. Portland*, 16 Oregon 450; *Galveston v. Heard*, 54 Tex. 420; *Scott v. Toledo*, 36 Fed. Rep. 385; *Murdock v. Cincinnati*, 39 Fed. Rep. 891; *Ford v. North Des Moines*, 80 Iowa 626; *Lyman v. Plummer*, 75 Iowa 353.

But a special act of the legislature providing for the opening and grading of a particular street, and for the appointment of commissioners with full power to assess benefits, without a provision requiring notice to be given to the owners of the property upon which the assessments are to be made, is unconstitutional. *Stuart v. Palmer*, 74 N. Y. 183. And the same is true of an act providing for assessments for water rates upon vacant lots, without notice to the owners thereof. *Rensen v. Wheeler*, 105 N. Y. 573. And when the duty of distribution of the expense of local improvements by assessments upon property in certain districts, is, by the legislature, devolved upon any board or officer, some provision for notice to property owners is essential to the validity of the assessment. *McLaughlin v. Miller*, 124 N. Y. 517. See also *People v. Turner*, 117 N. Y. 227; *Ulman v. Baltimore*, 72 Md. 587, *overruling* *Baltimore v. Scharf*, 56 Md. 50; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Moale v. Baltimore*, 61 Md. 224; *Alberger v. Baltimore*, 64 Md. 1, and *approving* *Baltimore v. Scharf*, 54 Md. 499.

And in *Matter of Trustees of Union College*, 129 N. Y. 308, it was held that the provisions of a city charter in reference to the apportionment and assessment of water rates upon lots, without provision for giving the owners or occupants notice or an opportunity to be heard, were unconstitutional and the assessments made therefor were void.

To the same effect are *Boorman v. Santa Barbara*, 65 Cal. 313, and *Sligh v. Grand Rapids*, 84 Mich. 497.

In *Spencer v. Merchant*, 100 N. Y. 585, it appeared that a special law for

uniform and equal, and assessed upon property in proportion to its money value; such provisions apply only to taxation for purposes of revenue, where the taxpayer receives no special benefit not common to the public.<sup>1</sup>

the opening and grading of a street had been declared unconstitutional on the ground that it provided for no notice to the property owners. *Stuart v. Palmer*, 74 N. Y. 183. Some of the assessments, however, were paid, and the legislature passed another bill fixing the amount of unpaid taxes, and describing the property upon which assessments were to be made to pay the sum, and this without any notice to the owners of such property. But the bill did provide for a notice to the property owners of proceedings to determine the proportional amount each one should pay. It was held that this was sufficient to sustain the constitutionality of the law, and that the legislature had power to determine the aggregate amount of the tax, and to define the property upon which it should be assessed, without providing for notice to the owners thereof. This decision was affirmed in *Spencer v. Merchant*, 125 U. S. 345, *Matthews and Harlan, JJ.*, dissenting on the ground that there is no distinction in principle between this case and *Stuart v. Palmer*, 74 N. Y. 183, which they deemed to be correctly decided.

It has been held that, where the property owner has a right to a notice of sale before the sale of his land to pay an assessment thereon, and may thereupon appeal to the court for the correction of errors, such notice and opportunity to be heard are sufficient to sustain the constitutionality of the law. *Yeomans v. Riddle*, 84 Iowa 147, *citing Allen v. Armstrong*, 16 Iowa 508; *Stewart v. Polk County*, 30 Iowa 28. See also *Nichols v. Bridgeport*, 23 Conn. 189.

Personal notice is not necessary; notice by publication is sufficient. *Lyman v. Plummer*, 75 Iowa 353; *Matter of Amsterdam*, 126 N. Y. 158, *distinguishing Stuart v. Palmer*, 74 N. Y. 184; *Remsen v. Wheeler*, 105 N. Y. 579; *Spencer v. Merchant*, 100 N. Y. 585; 125 U. S. 356; *People v. Turner*, 117 N. Y. 227. See also *Paulsen v. Portland*, 149 U. S. 30, *aff'g* 16 Oregon 450; *Meggett v. Eau Claire*, 81 Wis. 326; *Williams v. Detroit*, 2 Mich. 560; *Ricketts v. Hyde Park*, 85 Ill. 110.

And where the only act necessary to ascertain the amount of an assessment upon the property is a plain mathemat-

ical calculation, and no discretion is left to the city council or other officers, no notice of the apportionment is necessary, especially as the amount assessed is a lien on the property only, and some sort of notice must be given before a sale thereof can be made. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Gillette v. Denver*, 21 Fed. Rep. 822; *Amery v. Keokuk*, 72 Iowa 701; *Clapp v. Hartford*, 35 Conn. 66; *Cleveland v. Tripp*, 13 R. I. 50. See also *infra*, this title, *Notice*.

Where the property owner may appeal to the courts and have all material questions reviewed, except the necessity for the improvement, it cannot be said that his property rights are affected without due process of law. *State v. Stewart*, 74 Wis. 620.

1. *Burnett v. Sacramento*, 12 Cal. 76; *Emery v. San Francisco Gas Co.*, 28 Cal. 346; *Creighton v. Manson*, 27 Cal. 613; *Taylor v. Palmer*, 31 Cal. 240; *Piper's Appeal*, 32 Cal. 530; *Chambers v. Satterlee*, 40 Cal. 497; *Mahoney v. Braverman*, 54 Cal. 565; *In re Madera Irrigation Dist. Bonds*, 92 Cal. 296; *Winona, etc., R. Co. v. Watertown*, 1 S. Dak. 46; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Garrett v. St. Louis*, 25 Mo. 505; *Newby v. Platte County*, 25 Mo. 258; *Palmyra v. Morton*, 25 Mo. 593; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Lockwood v. St. Louis*, 24 Mo. 22; *St. Joseph v. Anthony*, 30 Mo. 537; *Adams v. Lindell*, 72 Mo. 198; *St. Joseph v. Owen*, 110 Mo. 445; *Williams v. Cammack*, 27 Miss. 209; *Daily v. Swope*, 47 Miss. 367; *Vasser v. George*, 47 Miss. 730; *Macon v. Patty*, 57 Miss. 378; *Burnes v. Atchison*, 2 Kan. 449; *Hines v. Leavenworth*, 3 Kan. 186; *Ottawa v. Barney*, 10 Kan. 270; *Ottawa v. Nelson*, 19 Kan. 240; *Newman v. Emporia*, 41 Kan. 583; *King v. Portland*, 2 Oregon 146; *Cook v. Portland*, 20 Oregon 580; *Goodrich v. Winchester, etc., Turnpike Co.*, 26 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Reinken v. Fuehring*, 130 Ind. 382; *Huidekoper v. Meadville*, 83 Pa. St. 156; *Chester v. Black*, 132 Pa. St. 568; *Beaumont v. Wilkesbarre*, 142 Pa. St. 198; *Greensburg v. Laird*, 8 Pa. Co. Ct. Rep. 608; *Hill v.*



Higdon, 5 Ohio St. 243; Carlisle v. Hetherington, 47 Ohio St. 247; Marion v. Epler, 5 Ohio St. 250; Reeves v. Wood County, 8 Ohio St. 333; Northern Ind. R. Co. v. Connelly, 10 Ohio St. 159; Baker v. Cincinnati, 11 Ohio St. 34; Maloy v. Marietta, 11 Ohio St. 636; State v. Dean, 23 N. J. L. 335; State v. Jersey City, 24 N. J. L. 662; Louisville v. Hyatt, 2 B. Mon. (Ky.) 177; Lexington v. McQuillan, 9 Dana (Ky.) 513; Malchus v. Highlands, 4 Bush (Ky.) 547; Hurford v. Omaha, 4 Neb. 336; State v. Dodge County, 8 Neb. 124; Austin v. Seattle, 2 Wash. 667; Howell v. Tacoma, 3 Wash. 711; Spokane Falls v. Browne, 3 Wash. 84; Auburn v. Paul, 84 Me. 212; Hayden v. Atlanta, 70 Ga. 817; 7 Am. & Eng. Corp. Cas. 228; First M. E. Church v. Atlanta, 76 Ga. 181; Speer v. Athens, 85 Ga. 49; Taylor v. Boyd, 63 Tex. 533; Adams v. Fisher, 63 Tex. 651; Texas Transp. Co. v. Boyd, 67 Tex. 153; Rountree v. Galveston, 42 Tex. 612; Shuford v. Lincoln County, 86 N. Car. 552; Wilmington v. Yopp, 71 N. Car. 76; Cain v. Davie County, 86 N. Car. 8; Busbee v. Wake County, 93 N. Car. 143; Raleigh v. Peace, 110 N. Car. 32; Lowell v. Hadley, 8 Met. (Mass.) 191; Dorgan v. Boston, 12 Allen (Mass.) 223; Holt v. Somerville, 127 Mass. 408; Edgerton v. Green Cove Springs, 19 Fla. 140; Municipality No. 2 v. Dunn, 10 La. Ann. 57; Yeatman v. Crandall, 11 La. Ann. 220; Excelsior Planting, etc., Co. v. Green, 39 La. Ann. 455; Wallace v. Shelton, 14 La. Ann. 498; Richardson v. Morgan, 16 La. Ann. 429; Munson v. Atchafalaya Basin Levee Dist., 43 La. Ann. 15; Ellis v. Ponchartrain Levee Dist., 43 La. Ann. 33; People v. Brooklyn, 4 N. Y. 419; Sharp v. Speir, 4 Hill (N. Y.) 76; Matter of New York, 11 Johns. (N. Y.) 77; Livingston v. New York, 8 Wend. (N. Y.) 85; Matter of Furman St., 17 Wend. (N. Y.) 649; Nichols v. Bridgeport, 23 Conn. 189; Bridgeport v. New York, etc., R. Co., 36 Conn. 255; Norfolk v. Ellis, 26 Gratt. (Va.) 227; Richmond, etc., R. Co. v. Lynchburg, 81 Va. 473; Davis v. Lynchburg, 84 Va. 861; Boro v. Phillips County, 4 Dill. (U. S.) 216.

*Illinois*.—Chicago v. Larned, 34 Ill. 203, decided under the *Illinois* constitution of 1848, is the leading case holding that local assessments are subject to the rule of uniformity. This case was followed in *Ottawa v. Spencer*, 40 Ill. 211, and *Chicago v. Baer*, 41 Ill. 306. But the language of the constitu-

tion of 1848, which gave rise to these decisions, was omitted from the constitution of 1870, and the subsequent decisions of that court are in substantial conformity with the rule as stated in the text. *Fagan v. Chicago*, 84 Ill. 234; *Bigelow v. Chicago*, 90 Ill. 53; *White v. People*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255; *Enos v. Springfield*, 113 Ill. 65; *Galesburg v. Searles*, 114 Ill. 217; *Watson v. Chicago*, 115 Ill. 78; *Sterling v. Galt*, 117 Ill. 15; *Murphy v. People*, 120 Ill. 234; *Springfield v. Green*, 120 Ill. 269.

In this state a distinction is made between "special assessments," which are quasi public and are levied on all the property benefited, by some uniform rule; and "special taxation," which is strictly local and is levied only on contiguous property. In the former, the assessments may not in any case exceed the benefits, and the property owner is entitled to have the question of benefits submitted to a jury; whereas in the latter, the jury have nothing to do with the amount assessed. *Sterling v. Galt*, 117 Ill. 18; *Enos v. Springfield*, 113 Ill. 70; *Springfield v. Green*, 120 Ill. 269; *Kuehnir v. Freeport*, 143 Ill. 99; *Davis v. Litchfield*, 145 Ill. 326.

*Minnesota*.—In *Minnesota*, it was held in an early decision that this provision in the constitution precluded the levying of local assessments upon the basis of benefits, *Stinson v. Smith*, 8 Minn. 366; but the constitution was so amended in 1869 as to give the legislature complete discretion as to the basis upon which such assessments shall be levied. *Guilder v. Otsego*, 20 Minn. 74; *Noonan v. Stillwater*, 33 Minn. 198; *State v. Hennepin County Dist. Ct.*, 33 Minn. 235; *State v. Ramsey County Dist. Ct.*, 33 Minn. 295; *Hennepin County v. Bartleson*, 37 Minn. 343; *Maltby v. Tautges*, 50 Minn. 248.

And the legislature may authorize counties as well as municipal corporations to make such assessments. *Dowlan v. Sibley County*, 36 Minn. 430.

*Wisconsin*.—In *Weeks v. Milwaukee*, 10 Wis. 242, the court seemed to be in doubt as to whether or not local assessments were within the provision of the *Wisconsin* constitution concerning equal taxation; but subsequent decisions in that state have settled the rule as laid down in the text. *Lumsden v. Cross*, 10 Wis. 282; *Bond v. Kenosha*, 17 Wis. 284; *Johnson v. Milwaukee*, 40 Wis. 315; *Dalrymple v. Milwaukee*, 53

Neither do such assessments fall under the constitutional inhibition against taking private property for public use without just compensation,<sup>1</sup> although it has been held that, if the assessments are in excess of the benefits conferred, there is, *pro tanto*, an unconstitutional taking of private property.<sup>2</sup> So, also, there are many well-considered cases holding that statutes which authorize personal judgments against the owners of property assessed are obnoxious to the constitution, in that they authorize the taking of private property for which there is not necessarily any compensation given in return. If the land with its increased value is insuf-

Wis. 178; *Warner v. Knox*, 50 Wis. 434; *Teegarden v. Racine*, 56 Wis. 545; *Meggett v. Eau Claire*, 81 Wis. 326.

But assessments to pay subscriptions in aid of railroads are general taxes and are subject to the rule of uniformity. *Hale v. Kenosha*, 29 Wis. 599.

*Arkansas*.—In *McGehee v. Mathis*, 21 Ark. 40, it was held that the constitutional rule of uniformity did not apply to local assessments for benefits. This case was reversed on other grounds in 4 Wall. (U. S.) 143, and was overruled on this point in *Peay v. Little Rock*, 32 Ark. 31, in which the court adopted the rule laid down in *Chicago v. Larned*, 34 Ill. 276. See also *Monticello v. Banks*, 48 Ark. 251; *Davis v. Gaines*, 48 Ark. 382, holding that such assessments must be *ad valorem* and uniform.

*Tennessee*.—In *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, it was held that the rule of uniformity applied to all forms of taxation, including local assessments.

*Alabama*.—In *Mobile v. Dargan*, 45 Ala. 310, and *Mobile v. Royal St. R. Co.*, 45 Ala. 322, it was held that the rule of uniformity included local assessments. But the soundness of these decisions was questioned in *Irwin v. Mobile*, 57 Ala. 6; and they were expressly overruled in *Birmingham v. Klein*, 89 Ala. 461.

*Colorado*.—In *Colorado*, it was formerly held that the rule of uniformity should be applied, except for such improvements as came clearly within the domain of the police power of the state. *Palmer v. Way*, 6 Colo. 106; *Brown v. Denver*, 7 Colo. 305; *Keese v. Denver*, 10 Colo. 112; *Pueblo v. Robinson*, 12 Colo. 593; *Wilson v. Chilcott*, 12 Colo. 600.

But in *Denver v. Knowles*, 17 Colo. 204, this distinction was entirely swept away and the court adopted the rule that the word "tax," as used in the constitution of the state, referred only to

ordinary public taxes and not to assessments for local improvements in cities and towns.

*Virginia*.—Notwithstanding the well-considered cases of *Norfolk v. Ellis*, 26 Gratt. (Va.) 224; *Richmond, etc., R. Co. v. Lynchburg*, 81 Va. 473; *Davis v. Lynchburg*, 84 Va. 861, which are in line with the great weight of authority, *Richardson, J.*, has said much in *Norfolk v. Chamberlain*, 89 Va. 196, which, if it does not unsettle the law in that state, may provoke further litigation on this point.

1. *Nichols v. Bridgeport*, 23 Conn. 189; *Allen v. Drew*, 44 Vt. 187; *In re Dorrance Street*, 4 R. I. 230; *In re Washington Avenue*, 69 Pa. St. 352; *Woodbridge v. Detroit*, 8 Mich. 278; *School Furniture Co. v. Grand Rapids*, 92 Mich. 571; *Warren v. Henly*, 31 Iowa 31; *Peoria v. Kidder*, 26 Ill. 351; *White v. People*, 94 Ill. 604; *Garrett v. St. Louis*, 25 Mo. 505; *Uhrig v. St. Louis*, 44 Mo. 458; *Keith v. Bingham*, 100 Mo. 300; *People v. Brooklyn*, 4 N. Y. 419; *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Lawrence*, 41 N. Y. 140; *Scoville v. Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 Ohio St. 243; *Reeves v. Wood County*, 8 Ohio St. 333; *Maloy v. Marietta*, 11 Ohio St. 636; *Baltimore v. Greenmount Cemetery Co.*, 7 Md. 517; *Griffin v. Dogan*, 48 Miss. 11; *Jones v. Boston*, 104 Mass. 461; *State v. Fuller*, 34 N. J. L. 227; *State v. Newark*, 35 N. J. L. 168; *Sutton v. Louisville*, 5 Dana (Ky.) 28; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; *Howell v. Bristol*, 8 Bush (Ky.) 493; *Covington v. Worthington*, 88 Ky. 206; *Holton v. Milwaukee*, 31 Wis. 27.

2. *Zoeller v. Kellogg*, 4 Mo. App. 163; *Louisville v. Louisville Rolling Mill Co.*, 3 Bush (Ky.) 416; *Excelsior Planting, etc., Co. v. Green*, 39 La. Ann. 455; *Hanscom v. Omaha*, 11 Neb. 41; *Tide Water Co. v. Coster*, 18 N. J. Eq. 527; *Chamberlain v. Cleveland*, 34 Ohio

ficient to pay the amount of the assessment levied upon it, it is difficult to conceive of any constitutional warrant for the seizure of other property to pay the same.<sup>1</sup>

c. CONSTRUCTION OF STATUTES.—Grants of power to make local assessments are strictly construed and must be strictly followed.<sup>2</sup>

4. **Improvements for Which Made**—a. **STREETS**—(See also **STREETS AND SIDEWALKS**, vol. 24, p. 1).—The most frequent improvements, from which such benefits result to the owners of property in the vicinity thereof as to render it assessable for the expenses incident thereto, are street improvements, such as opening, grading, paving, altering, widening, and the like. In opening a street it is necessary in the first place to secure the land for its location; this is done generally under the power of eminent domain, by virtue of which private property may be taken for public use, provided a just compensation in money be paid the owners,<sup>3</sup> and, for the purpose of providing this compensation, the property owners benefited by such new street may be assessed.<sup>4</sup> The owner himself of the land taken, when his remaining property, by reason of its vicinity to the street, is benefited, is liable to assessment, and when this is so, the benefit he receives is balanced

St. 560. See also *Creighton v. Manson*, 27 Cal. 620; *Matter of Canal St.*, 11 Wend. (N. Y.) 155; *Crawford v. People*, 82 Ill. 557; *Holton v. Milwaukee*, 31 Wis. 40.

The standard fixed by statutory enactment must be that the assessment can be laid only upon the principle of exceptional benefits, and not in excess thereof; otherwise the statute is unconstitutional. *State v. Newark*, 37 N. J. L. 417; *State v. New Brunswick*, 42 N. J. L. 510; *State v. Newark*, 45 N. J. L. 104; *State v. Jersey City*, 45 N. J. L. 256; *State v. Paterson*, 48 N. J. L. 435; *State v. Kearney Tp.* (N. J. 1893), 26 Atl. Rep. 800.

"Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed and to the extent of those benefits." *Hammitt v. Philadelphia*, 65 Pa. St. 150; *Mt. Pleasant v. Baltimore*, etc., R. Co., 138 Pa. St. 372; *Allegheny City v. Western Pa. R. Co.*, 138 Pa. St. 382.

1. *Raleigh v. Peace*, 110 N. Car. 46; *Neenan v. Smith*, 50 Mo. 525; *Higgins v. Ausmuss*, 77 Mo. 351; *Louisiana v. Miller*, 66 Mo. 467; *Gaffney v. Gough*, 36 Cal. 104; *Taylor v. Palmer*, 31 Cal. 240; *Craw v. Tolono*, 96 Ill. 255; *Virginia v. Hall*, 96 Ill. 278; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; *Burlington v. Quick*, 47

Iowa 226; *Seattle v. Yesler*, 1 Wash. Ter. 576; *Green v. Ward*, 82 Va. 324.

Judge Cooley says: "Where and what are the benefits to the individual for which he can be called upon to pay any deficiency after a sale of the estate? Unless the whole legal basis of these assessments has been misunderstood by the courts, it would seem that there are none whatever." *Cooley on Taxation* (2d ed.), p. 676.

There are many cases, however, in which such judgments have been enforced. See *infra*, this title, *Personal Liability*.

2. *Allen v. Galveston*, 51 Tex. 318; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Power's Appeal*, 29 Mich. 504. See also **STATUTES**, vol. 23, p. 395, where the cases are collected.

3. See **EMINENT DOMAIN**, vol. 6, p. 509; **STREETS**, vol. 24, p. 1.

4. *McMasters v. Com.*, 3 Watts (Pa.) 292; *Wray v. Pittsburgh*, 46 Pa. St. 365; *Lafayette v. Fowler*, 34 Ind. 140; *Matter of Twenty-Sixth St.*, 12 Wend. (N. Y.) 203; *Matter of Degraw St.*, 18 Wend. (N. Y.) 568; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Alexander v. Baltimore*, 5 Gill (Md.) 383; *Kansas City v. Baird*, 98 Mo. 215.

An assessment to pay damages for closing a road, is valid. *Matter of Barclay*, 91 N. Y. 430.

against the damages he has sustained in the taking.<sup>1</sup> Where the street is already in existence, such general improvements as grading and paving, widening and otherwise altering it, are, as a rule, considered to be productive of such benefits to property owners, by enhancing the value of their property, as to render them liable to assessment.<sup>2</sup>

*b. SIDEWALKS*—(See also *STREETS AND SIDEWALKS*, vol. 24, p. 1).—It is a valid exercise of the police power of the state to require owners of urban property to construct sidewalks in front thereof, and to keep the same in proper repair and in a

1. *McMasters v. Com.*, 3 Watts (Pa.) 292; *Alexander v. Baltimore*, 5 Gill (Md.) 383; *Trinity College v. Hartford*, 32 Conn. 452; *Power's Appeal*, 29 Mich. 504; *Covington v. Worthington*, 88 Ky. 206; *Livingston v. New York*, 8 Wend. (N. Y.) 85; See *Matter of Ninth Ave.*, 45 N. Y. 729; *State v. Ramsey Dist. Ct.*, 40 Minn. 5; *McKusick v. Stillwater*, 44 Minn. 372; *EMINENT DOMAIN*, vol. 6, p. 581.

But in *Sutton v. Louisville*, 5 Dana (Ky.) 28, it was held that an owner of private property cannot be required to pay in any direct mode for any benefit or advantage which may accrue to him from public improvements.

If the benefit which the owner of the land receives equals the value of the land taken, he cannot be said to have suffered any damages, and therefore is entitled to no compensation, *Nichols v. Bridgeport*, 23 Conn. 189; *Trinity College v. Hartford*, 32 Conn. 452; and if the benefits exceed the damages which he sustains by the taking, the balance of such benefits must be assessed upon his land. *Holton v. Milwaukee*, 31 Wis. 27. Compare *Lowe v. Omaha*, 33 Neb. 587. But see *Benton v. Brookline*, 151 Mass. 250, where it was held, under *Massachusetts Pub. St. ch. 51*, that any benefit which may be assessed as a betterment to the balance of land, a part of which is taken to widen a street, cannot be set off against damages for the part taken.

This rule applies to benefits shared by an estate in common with other estates in the neighborhood—such as are assessed under the "betterment acts." *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546; *Whitney v. Boston*, 98 Mass. 312; *Allen v. Charlestown*, 109 Mass. 243; *Upham v. Worcester*, 113 Mass. 99; *Godbold v. Chelsea*, 111 Mass. 294; *Edmands v. Boston*, 108 Mass. 535; *Prince v. Boston*, 111 Mass. 226; *Boston Seamen's Friend Soc. v.*

*Boston*, 116 Mass. 181; *Bancroft v. Boston*, 115 Mass. 377.

But direct and special benefits to an estate, as distinguished from those common to the neighborhood, may be set off against damages awarded to the owner. *Chase v. Worcester*, 108 Mass. 60; *Allen v. Charlestown*, 109 Mass. 243; *Upham v. Worcester*, 113 Mass. 97; *Green v. Fall River*, 113 Mass. 262; *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546; *Whitney v. Boston*, 98 Mass. 312.

An assessment on one lot may not be applied to reduce an award on another owned by the same person. *Genet v. Brooklyn*, 99 N. Y. 296.

A provision in a city charter which requires the jury to offset the damages and benefits and report the balance without specifying the amount of either, is illegal and should be disregarded. *Detroit v. Daly*, 68 Mich. 503.

In *Ohio*, where the constitution guarantees to owners of land taken for the use of a street full compensation therefor "without deduction for benefit," it was held that, notwithstanding this provision, an owner of land taken might be assessed his proportion of the amount necessary to compensate him for his other land taken for such street. *Cleveland v. Wick*, 18 Ohio St. 304. See *State v. West Hoboken*, 51 N. J. L. 267.

2. *Lafayette v. Fowler*, 34 Ind. 140; *Extension of Hancock St.*, 18 Pa. St. 26; *Wray v. Pittsburgh*, 46 Pa. St. 365; *Schenley v. Com.*, 36 Pa. St. 29; *McGonigle v. Allegheny*, 44 Pa. St. 118; *People v. Brooklyn*, 4 N. Y. 419; *Matter of Dugro*, 50 N. Y. 513; *Willard v. Presbury*, 14 Wall. (U. S.) 676; *Lent v. Tillson*, 140 U. S. 316; *Jones v. Boston*, 104 Mass. 461; *Macon v. Patty*, 57 Miss. 378.

But when a street railway company is required to keep certain portions of the pavement in repair, assessments may not be levied on abutting property

safe condition ; and in case of their failure to do so, when required, to authorize the city authorities to make the improvements at the expense of the property.<sup>1</sup> But the street includes the sidewalks, and the cost of their construction, as well as that of other street

for the cost of repaving such portions of a street. *Gilmore v. Utica*, 55 Hun (N. Y.) 514.

In *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656, it was said that "the statute does not define what shall be considered a local improvement. That question is left solely to the determination of the city councils or village boards. Their decision as to the utility of an improvement upon streets and whether it is to be treated as a local improvement for the purpose of raising funds by special assessment to pay for it, is final, in the absence of fraud."

The fact that a railroad runs longitudinally over an avenue opposite to the lands of a person assessed, does not change the character of the avenue as a public street, the same having been dedicated to the public before the building of the railroad, and the city council may by ordinance direct and order the grading, gravelling, and curbing of such avenue in front of the owners on either side, at their expense. *State v. Atlantic City*, 34 N. J. L. 99.

Where a street to be improved lies partly on one side and partly on the other of the boundary between a city and an incorporated village, assessments for paving the same made by two corporations on their respective abutters uniform on the property within the jurisdiction of each, are valid. *Scully v. Cincinnati*, 1 Cinc. Super Ct. 183.

In *New Jersey*, it has been held that, even where land has been dedicated by the owners for a public street, they may be assessed for improvement thereon in the same way as other property holders whose property is in the vicinity of the street. *State v. Dean*, 23 N. J. L. 335. See *Holmes v. Jersey City*, 12 N. J. Eq. 299; *State v. Hudson*, 34 N. J. L. 25.

An agreement between commissioners appointed to open a street and an owner of land through which it passes, that neither damages nor benefits shall be assessed, has been held illegal as tending to render assessments against other property unequal and partial. *St. Louis v. Meier*, 77 Mo. 13.

It has been held a question for the jury whether or not suburban property sought to be assessed for a street im-

provement has changed in character from agricultural to urban property. *Philadelphia v. Sheridan*, 148 Pa. St. 532.

The cost of improving a county road should be met by general taxation and not by local assessments. *Conger v. Bergman* (Ky. 1889), 11 S. W. Rep. 84; *Conger v. Graham* (Ky. 1889), 11 S. W. Rep. 467. But see *Malchus v. Highlands*, 4 Bush (Ky.) 547, where a local assessment according to acreage was sustained for the improvement of a road passing through a suburban district.

Where the improvement of a public street is ordered, to cause a part only of such improvement to be made and levy an assessment therefor, is premature and unauthorized. *Cincinnati v. Cincinnati, etc., Ave. Co.*, 26 Ohio St. 345; *Stockton v. Whitmore*, 50 Cal. 554. See also *Robinson v. Logan*, 31 Ohio St. 466.

1. *Paxson v. Sweet*, 13 N. J. L. 196; *State v. Jersey City*, 37 N. J. L. 128; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Downer v. Boston*, 6 Cush. (Mass.) 277; *Goddard, Petitioner*, 16 Pick. (Mass.) 504; *Lowell v. Hadley*, 8 Met. (Mass.) 180; *Henderson v. Baltimore*, 8 Md. 352; *White v. People*, 94 Ill. 604; *Washington v. Nashville*, 1 Swan (Tenn.) 177; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Mayor, etc., v. Maberry*, 6 Humph. (Tenn.) 368; *Hart v. Brooklyn*, 36 Barb. (N. Y.) 226; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503; *Sands v. Richmond*, 31 Gratt. (Va.) 571; *Royce v. Aplington* (Iowa, 1894), 57 N. W. Rep. 868; *Palmer v. Way*, 6 Colo. 106; *Bonsall v. Lebanon*, 19 Ohio 418; *Woodbridge v. Detroit*, 8 Mich. 274; *In re Dorrance Street*, 4 R. I. 230; *Deblois v. Barker*, 4 R. I. 445; *O'Leary v. Sloo*, 7 La. Ann. 25; *Hydes v. Joyes*, 4 Bush (Ky.) 464; *Maccon v. Patty*, 57 Miss. 378; *Greensburg v. Young*, 53 Pa. St. 280; *Wilkinsburg v. Home for Aged Women*, 131 Pa. St. 109; *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367.

A demand on the property owner that he construct the sidewalk, and his refusal or neglect to do so are prerequisite to the acquisition of a lien upon his property for the cost of a sidewalk con-

improvements, may be assessed on the property abutting on the street, on the basis of benefits or frontage.<sup>1</sup>

c. SEWERS.—Another instance of the power to assess property for local improvements, is the construction in cities and towns of sewers and culverts, though they are in many cases provided for by other means, as by general taxation, or by regulations for public health, made under the police power.<sup>2</sup> That they are productive of such benefits, however, as to justify local assessments, has been held frequently,<sup>3</sup> and it has been said that they are included in a general grant of power to improve and repair streets,

structed by the city. *Mt. Pleasant v. Baltimore, etc., R. Co.*, 138 Pa. St. 365.

And where no such demand is made, he should be allowed the difference between what the city charged and what it might have cost him to do the work. *Philadelphia v. Meighan* (Pa. 1894), 28 Atl. Rep. 304.

1. *Flint v. Webb*, 25 Minn. 93; *Matter of Burmeister*, 76 N. Y. 174; *Otawa v. Spencer*, 40 Ill. 211; *Kemp v. King*, 11 Mo. App. 116; *State v. Fuller*, 34 N. J. L. 227; *Sloan v. Beebe*, 24 Kan. 343; *Lufkin v. Galveston*, 58 Tex. 545; *Speer v. Athens*, 85 Ga. 49; *Wiles v. Hoss*, 114 Ind. 378, citing *State v. Berdett*, 73 Ind. 185; *Kokomo v. Mahan*, 100 Ind. 242; *Dooley v. Sullivan*, 112 Ind. 451.

When a good sidewalk is torn up by the city in changing the street grade, the lot owner cannot be taxed with the cost of a new one. *Philadelphia v. Henry* (Pa. 1894), 28 Atl. Rep. 946.

2. See DRAINS AND SEWERS, vol. 6, p. 6; POLICE POWER, vol. 18, p. 739.

3. *People v. Brooklyn*, 23 Barb. (N. Y.) 166; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Wright v. Boston*, 9 Cush. (Mass.) 233; *Clapp v. Hartford*, 35 Conn. 66; *Hungerford v. Hartford*, 39 Conn. 279; *Cone v. Hartford*, 28 Conn. 363; *Wolf v. Philadelphia*, 105 Pa. St. 25; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Lipps v. Philadelphia*, 38 Pa. St. 503; *Com. v. Wood*, 44 Pa. St. 113; *Philadelphia v. Tryon*, 35 Pa. St. 401; *Ward's Appeal*, 3 Pittsb. (Pa.) 278; *Mauch Chunk v. Shortz*, 61 Pa. St. 399; *St. Louis v. Oeters*, 36 Mo. 456; *Allen County v. Silvers*, 22 Ind. 491; *Mason v. Spencer*, 35 Kan. 512. See *State v. Charleston*, 12 Rich. (S. Car.) 702; *Clark v. People*, 146 Ill. 348; *Boyle v. Tibbey*, 82 Cal. 11.

In *Massachusetts*, sewers are built in the first instance at the expense of the city, though a portion of the costs may afterwards be assessed upon the property owners. *Bennett v. New Bed-*

*ford*, 110 Mass. 433; *Dorey v. Boston*, 146 Mass. 338.

When an assessment is levied upon adjacent property to pay the cost of constructing a sewer, it must be confined to the property benefited thereby; otherwise, it may be set aside by the court. *State v. Elizabeth*, 37 N. J. L. 330; *Thomas v. Gain*, 35 Mich. 155.

But this objection must be raised by a party aggrieved. One whose land is benefited may not contest the validity of the assessment on the ground that the property of another is assessed although not benefited. *Johnson v. Duer*, 115 Mo. 366. The existence of a private sewer is no defense to an assessment for a public one, either in whole or part. *Sargent v. New Haven*, 62 Conn. 510; *St. Joseph v. Owen*, 110 Mo. 445.

All the property benefited should be included in the assessment, otherwise its enforcement may be restrained. *Kennedy v. Troy*, 14 Hun (N. Y.) 308; *State v. Union*, 53 N. J. L. 67.

"In the case of sewers it is very common to provide that the cost shall in part be a general levy of the municipality, and in part be collected by special assessment. Perhaps more often than in the case of any other local improvement, it is just that such a division of the burden should be made. The lands on the line of a sewer do not usually receive all the special benefit." *Cooley on Taxation* (2d ed.), p. 619.

In *Colorado*, the building of sewers is to be held to fall within the domain of police regulation, and they are therefore properly built by local assessments. *Keese v. Denver*, 10 Colo. 112; *Pueblo v. Robinson*, 12 Colo. 593.

In *Hungerford v. Hartford*, 39 Conn. 279, it was held that a sewer might be constructed in part of a street of a size larger than was necessary for the accommodation of the land bordering

on that part of the street, such size being adopted so as to allow a future extension through the whole street, and the entire cost assessed upon the land-owners on that part of the street through which the sewer was made.

In *Massachusetts*, the assessment by a city under Gen. Sts., ch. 48, § 4, of the benefit to an estate from which land is taken for the construction of a common sewer, includes such benefits only as are derived in common with the other estates drained thereby, and the peculiar benefit which is derived by the release of the owner's land from the maintenance of an old sewer for the convenience of the adjoining estates may be set off by the city in the assessment of the owner's damages for the taking of his land. *French v. Lowell*, 117 Mass. 363.

In *State v. Jersey City*, 30 N. J. L. 148, it was held that the water commissioners of Jersey City are authorized to execute the plan of sewerage adopted by them, with such changes or alterations as may be found convenient and necessary in the progress of the work. If the general plan contemplated the use of an old sewer, the commissioners, if they see fit, may abandon that part of the plan and construct a new sewer in the place of the old one. In this they are the sole judges, and having acted thereon, the court has no authority to review their decision.

It is no objection to an assessment for building a sewer, that the ground through which it is laid is not a regularly laid out street. If the commissioners lay it through private property and an assessment is made before an appraisal of the property, the assessment will not be invalid. *State v. Jersey City*, 29 N. J. L. 441.

Nor is it any objection that water mains have not yet been laid along the street, as even without them, the sewer would be of some benefit. *Walker v. Aurora*, 140 Ill. 402.

In *Fort Scott v. Kaufman* (Kan. 1890), 24 Pac. Rep. 64, it was held that under *Kansas* statutes 1889, p. 834, which provides that the cost of constructing sewers in cities of the second class shall be assessed against the lots contained in the district in which the same are situated, the cost of constructing a discharge sewer situated wholly outside the district could not be assessed against the lots and pieces of ground in the district, though it was constructed and used for the sole purpose of a dis-

charge for lateral sewers in such district. But see *State v. Union*, 53 N. J. L. 67, where it appeared that the discharge sewer was in the district.

Where land under water is granted by the state, and such land being at the mouth of a sewer is filled in by the grantee, an extension of the sewer, thereby rendered necessary, amounts to a construction and cannot be classified as repairs, and must be paid for by an assessment upon the property benefited. *Cleveland v. Yonkers* (Supreme Ct.), 4 N. Y. Supp. 84.

Where a charter authorizes a city to construct sewers, and by assessments, to pay therefor upon the property benefited, an assessment cannot be levied to pay for diverting a stream from its natural course into the sewer as an independent enterprise. But if in the judgment of the municipal authorities, it is necessary for the proper drainage of the city that the stream be so diverted, and if the property relieved by the sewer of the waters of the stream, receive thereby greater benefits than the adjacent property, the assessment against it may be proportionately greater. *Sherwood v. Duluth*, 40 Minn. 22.

In *England*, the construction and repairing of sewers is done at the expense of the property benefited. *Soady v. Wilson*, 3 Ad. & El. 248; 30 E. C. L. 89; *Rex v. Tower Hamlets*, 9 B. & C. 517; 17 E. C. L. 433; *Hammersmith Bridge Co. v. Overseers*, L. R., 6 Q. B. 230. See *Emmerson v. Saltmarsh*, 7 Ad. & El. 266; 34 E. C. L. 90; *Nether-ton v. Ward*, 3 B. & Ald. 21; 5 E. C. L. 219; *St. Katherine Dock Co. v. Higgs*, 10 Q. B. 641; 59 E. C. L. 639; *Metropolitan Board of Works v. Vauxhall Bridge Co.*, 7 El. & Bl. 964; 90 E. C. L. 964; *Rooke's Case*, 5 Rep. 99; *Keighley's Case*, 10 Rep. 139; *Isle of Ely*, 10 Rep. 142; *Masters v. Scroggs*, 3 M. & S. 447; *Dore v. Gray*, 2 T. R. 358; *Reg. v. Norfolk County*, 15 Q. B. 549; 69 E. C. L. 547; *Reg. v. Warton*, 2 B. & S. 719; 110 E. C. L. 718; *Stafford v. Hamston*, 5 Moore 608.

The fact that property is benefited is not alone sufficient to warrant an assessment. There should also be an occupier of the property. *Neave v. Weather*, 3 G. & D. 221; 3 Q. B. 984; 43 E. C. L. 1067; *Tracey v. Taylor*, 3 Q. B. 966; 43 E. C. L. 1059; 3 G. & D. 14.

**Double Taxation.**—Where the maintenance of a sewerage system is paid for by special taxation, an assessment for

on the ground that their construction is necessary and proper in keeping the streets in good condition.<sup>1</sup>

*d. DRAINS.*—Where large tracts of land are rendered useless to the owners thereof by reason of stagnant water thereon, the construction of drains to carry off such water is generally provided for by special assessments, since the reclamation of the land and the protection of the public health is a public purpose sufficient to justify the levy of a tax, and the special benefits which accrue to the owners authorize this mode of assessment.<sup>2</sup>

the construction of a particular sewer, upon lands especially benefited thereby, does not constitute double taxation. *McChesney v. Hyde Park* (Ill. 1891), 28 N. E. Rep. 1102.

**Pumping Works Connected with System of Sewerage.**—In *Drexel v. Lake*, 127 Ill. 54, it was held that the charter of the Town of Lake providing that the trustees may construct and maintain drains and sewers at the expense of the real estate benefited thereby, authorizes the trustees to provide by a special assessment for a system by which the sewerage of a portion of the town is conducted to a central reservoir, and thence by a pump into a main drain, it appearing that the topography of the country will not permit of draining by gravitation. In such case, the pumping works are part of the general system of sewerage, and, although the property in the district drained directly by the main sewer without the assistance of the pumping works is not benefited by such pumping works itself, yet the sewers and pumping works do not constitute distinct improvements, but the expense of both may be provided for by one assessment.

The whole cost of a discharge sewer should not be assessed upon abutting property. A portion of the cost should be assessed upon property abutting on lateral sewers, which is also benefited by the construction of the discharge sewer. *State v. Union*, 53 N. J. L. 67; *State v. Elizabeth* (N. J. 1893), 27 Atl. Rep. 801.

A sewer benefits adjacent property by drainage of surface water as well as by affording pipe connections, and a corner lot is liable to assessments for sewers on two streets. *People v. Adams* (B'klyn City Ct.), 18 N. Y. Supp. 443.

**Assessments for Sewers in Another Town.**—The property in one town cannot be specially assessed for an improvement in another and adjoining town. But where no suitable outlet for a

sewer can be found in the town making the same, its extension a short distance into another town to a suitable outlet, is not a violation of the rule. *Shreve v. Cicero*, 129 Ill. 226. See also *Maywood County v. Maywood*, 140 Ill. 216; *Callon v. Jacksonville* (Ill. 1893), 35 N. E. Rep. 223.

1. *Cone v. Hartford*, 28 Conn. 363; *Allen County v. Silvers*, 22 Ind. 491.

2. **Drains.**—*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. (U. S.) 567; *People v. Coghill*, 47 Cal. 361; *Hagar v. Yolo County*, 47 Cal. 222; *In re New Orleans Draining Co.*, 11 La. Ann. 338; *Kinyon v. Duchene*, 21 Mich. 498; *Bench v. Otis*, 25 Mich. 29; *Atwood v. Zeluff*, 26 Mich. 118; *Nevins, etc., Tp. Draining Co. v. Alkire*, 36 Ind. 189; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *O'Reilly v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Jordan Ditching, etc., Assoc. v. Waggoner*, 33 Ind. 50; *Thompson v. Honey Creek Draining Co.*, 33 Ind. 268; *Etchison Ditching Assoc. v. Busenback*, 39 Ind. 362; *Slusser v. Ransom*, 39 Ind. 506; *Trimble v. McGee*, 112 Ind. 307; *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *People v. Jefferson County Ct.*, 56 Barb. (N. Y.) 136; *French v. Kirkland*, 1 Paige (N. Y.) 117; *Phillips v. Wickham*, 1 Paige (N. Y.) 590; *People v. Haines*, 49 N. Y. 587; *Matter of Van Buren*, 79 N. Y. 384; *Rutherford v. Maynes*, 97 Pa. St. 78; *Reeves v. Wood County*, 8 Ohio St. 333; *Sessions v. Chunkilton*, 20 Ohio St. 349; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518; *Riebling v. People*, 145 Ill. 120.

The legislature has the constitutional power to compel local improvements, which, in its judgment, will promote the health of the people, and abate nuisances, and it may open canals for irrigating arid districts, and build levees for draining lands, and impose local



c. LEVEES AND DIKES.—The same public considerations which authorize the draining of swamps and marshes at the expense of the owners, warrant also the construction of dikes and levees to prevent the inundation of low lands, and the levying of assessments upon the land benefited, to pay the cost thereof.<sup>1</sup>

assessments to pay for such works. *Hagar v. Yolo County*, 47 Cal. 222.

The draining of marshes and ponds for the promotion of public health, is regarded as a public object for the furtherance of which taxes may be assessed; but the draining of farms to render them more productive is not such an object, and a corporation organized for that purpose could not levy and collect a tax. *Anderson v. Kerns Draining Co.*, 14 Ind. 199.

But reclaiming a district from inundation, or from a swampy condition, is such a public purpose as will warrant special assessments on the land benefited. *Rutherford v. Maynes*, 97 Pa. St. 78; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9. And the same is true of irrigating arid lands. *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360.

In *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, Gray, J., said: "The statutes which have long existed in many states, authorizing the majority of owners in severalty of adjacent meadow or swamp lands, to have commissioners appointed to drain and improve the whole tract by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property."

The provision of *Illinois* const., art. 4, § 31, and of the statute of 1885 (Laws 1885, p. 77), that drainage districts shall be formed only for "agricultural or sanitary purposes," does not require that lands must be specially benefited for agricultural or sanitary purposes, before they may be assessed for drainage purposes; and special assessments may be levied upon other lands—*e. g.*, highways—if they are benefited by the construction of the drains. *Com'rs of Highways v. Drainage Com'rs*, 127 Ill. 581; 28 Am. & Eng. Corp. Cas. 333.

But in order to make a valid assessment for drainage, the public must be

concerned. Thus, in *People v. Saginaw County*, 26 Mich. 22, it was held that even the owner of the land benefited cannot be taxed to improve a drain, unless public considerations are involved.

Under a grant of power to drain lands for public health, at the expense of those benefited, an assessment will not be sustained, the greater part of which was the filling in of lands. *Matter of Van Buren*, 79 N. Y. 384.

While such drains are of public utility, assessments for their construction are not enforced on the ground of public benefits. The right to impose such assessments is founded upon the benefits which the land assessed is supposed to receive from the drain. *Heick v. Voight*, 110 Ind. 284; *Lipes v. Hand*, 104 Ind. 503.

In *Weeks v. Milwaukee*, 10 Wis. 242, it appeared that the city had so constructed its streets as to cause surface water to accumulate on the plaintiff's lot and become a nuisance. Upon the plaintiff's refusal to abate the same, the city did it, and assessed the cost upon the lot. At the plaintiff's suit, the city was enjoined from enforcing the assessment, on the ground that it had no right to create a nuisance and tax the plaintiff for abating the same.

But in *Watkins v. Milwaukee*, 55 Wis. 335, it appeared that the city had caused a similar nuisance by raising the grade of a street without providing proper drainage, and, upon the refusal of the lot owner to abate it, did so itself by filling the lot, and assessed the cost upon the property. The court refused to enjoin the city from enforcing the assessment, on the ground that it did not appear in the complaint that the plaintiff had not been benefited to the amount of the assessment by raising the street and filling the lot.

1. **Levees and Dikes.**—*Daily v. Swope*, 47 Miss. 367; *Alcorn v. Hamer*, 38 Miss. 652; *Williams v. Cammack*, 27 Miss. 209; *Crowley v. Copley*, 2 La. Ann. 329; *Yeatman v. Crandall*, 11 La. Ann. 220; *Wallace v. Shelton*, 14 La. Ann. 503; *Selby v. Levee Com'rs*, 14 La. Ann. 437; *Bishop v. Marks*, 15 La. Ann. 147;

*f. PARKS.*—Parks, open squares, and boulevards in cities, whether advantageous to the public for recreation, health, or business, are public improvements, for the cost of which local assessments may be levied upon property peculiarly benefited thereby.<sup>1</sup>

*g. WATER PIPES.*—The expense of laying water pipes in streets is usually met by general taxation, or borne by private corporations organized for the purpose; but when the work is undertaken as a public enterprise, local assessments may be levied on the real property specially benefited thereby.<sup>2</sup>

*George v. Young* (La. 1893), 14 So. Rep. 137; *Richardson v. Morgan*, 16 La. Ann. 429; *McGehee v. Mathis*, 21 Ark. 40; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Boro v. Phillips County*, 4 Dill. (U. S.) 216. See also *Carlisle v. Yoder*, 69 Miss. 384; *Hart v. Levee Com'rs*, 54 Fed. Rep. 559; *Riebling v. People*, 145 Ill. 120.

In *State v. Clinton*, 26 La. Ann. 561, it is said that the construction of levees in *Louisiana* cannot be called a local work, but even should such work be local in its character, there is no prohibition against the General Assembly authorizing local improvements to be made, and providing for payment therefor either by general taxation or local assessments. See also *State v. Maginnis*, 26 La. Ann. 558; *Levee Dist. v. Huber*, 57 Cal. 41.

The grant of power to drain will not include power to construct a levee. *Updike v. Wright*, 81 Ill. 49.

In *Boro v. Phillips County*, 4 Dill. (U. S.) 216, *Caldwell, J.*, said that the authority of the state to impose a special assessment for this purpose, on the lands benefited, is found in the police power.

1. *PARKS.*—*Holt v. Somerville*, 127 Mass. 408; *Foster v. Park Com'rs*, 131 Mass. 225; 133 Mass. 321; *Briggs v. Whitney* (Mass. 1893), 34 N. E. Rep. 179; *People v. Salomon*, 51 Ill. 37; *People v. Brislin*, 80 Ill. 423; *Dunham v. People*, 96 Ill. 331; *Cornell v. People*, 107 Ill. 372; *Kedzie v. West Park Com'rs*, 114 Ill. 280; *Le Moyne v. West Park Com'rs*, 116 Ill. 41; *Matter of Central Park Com'rs*, 50 N. Y. 493; *Owners of Ground v. Albany*, 15 Wend. (N. Y.) 374; *Matter of Central Park Com'rs*, 63 Barb. (N. Y.) 282; *Shoemaker v. U. S.*, 147 U. S. 282.

Property which can be used only for a purpose which precludes its being specially benefited by an adjoining park, should not be assessed; for example, property of a water company used

only for a site for a reservoir, *Owners of Ground v. Albany*, 15 Wend. (N. Y.) 377; and land used only for railway purposes. *Matter of Central Park Com'rs*, 63 Barb. (N. Y.) 286.

But if railway property is specially benefited, it may be assessed for park and boulevard purposes. *Chicago, etc., R. Co. v. People*, 120 Ill. 104.

An act of the legislature creating a park district of two or more towns, and enabling the corporate authorities thereof to issue bonds, levy local assessments, etc., for park purposes, is not invalid because it vests such corporate power in a board of park commissioners. When the act is adopted by a majority vote of the several towns included, such board becomes, for such purposes, the corporate authority of all, and may levy local assessments on the property benefited by the improvement. *People v. Brislin*, 80 Ill. 423; *Dunham v. People*, 96 Ill. 331; *Cornell v. People*, 107 Ill. 381.

Lands outside of the city limits may not be assessed for the establishment and maintenance of a city park. *State v. Leffingwell*, 54 Mo. 458; *Matter of Prospect Park*, 60 N. Y. 398.

And in *State v. Leffingwell*, 54 Mo. 458, it was further held that a lot owner has no proprietary interest or easement in a park on which his lot fronts, such as he has in an adjoining street, and that the doctrine which justifies local assessments upon adjoining property for benefits, has no application at all to public parks.

2. *WATER PIPES.*—*Allen v. Drew*, 44 Vt. 174. In *Allentown v. Henry*, 73 Pa. St. 404, the court, by *Mercur, J.*, said: "The tax is local, as it is imposed upon those dwelling houses only situate on the lines of the water pipes. The benefits are local, as the use of the water must necessarily be mostly restricted to the benefit of the property on those lines, both for domestic purposes and the extinguishment of fires. The effect

*h.* MISCELLANEOUS CASES.—In one state a tax levied only upon land for the purpose of constructing fences around a whole township is regarded as a local assessment, and made with reference to special benefits derived by the property from the expenditure.<sup>1</sup> So the sweeping and sprinkling of streets is classed among local improvements for which assessments may be levied.<sup>2</sup> Again, local assessments have been sustained which were made on all lands within a specified distance from a turnpike, to cover the expense of its construction.<sup>3</sup> So, also, it has been held competent to provide by local assessments for the construction of a bridge in a city;<sup>4</sup> and for the improvement of highways by both land and water;<sup>5</sup> but not for the improvement of a city market.<sup>6</sup> And it seems that the expense of lighting streets may be met by assessments on the property specially benefited, although this is usually done by general taxation.<sup>7</sup>

of supplying those streets with water is to enhance the value of the dwelling houses thereon. The maintenance of the pipes, and the supplying of water, are necessarily a continuing expense, and this tax is evidently designed to defray those expenses." See *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Northern Liberties v. Swain*, 13 Pa. St. 113; *Jones v. Water Com'rs*, 34 Mich. 273; *Philadelphia v. McCallmont*, 6 Phila. (Pa.) 543; *Ricketts v. Hyde Park*, 85 Ill. 110.

In *Baker v. Gartside*, 86 Pa. St. 498, it was held that the owner of a corner lot who had petitioned for the use of water, and paid for the pipe along the front of his property, could not be assessed for a pipe afterwards laid along the side of his lot.

A statute authorizing the assessment of arbitrary amounts upon vacant lots and upon lots with buildings thereon in which water is not taken, if the same are situated on streets in which water pipes are laid, is invalid, as authorizing special assessments without reference to benefits. *State v. Jersey City*, 43 N. J. L. 135; *Jersey City v. State*, 43 N. J. L. 638.

1. *Shuford v. Lincoln County*, 86 N. Car. 552; *Cain v. Davie County*, 86 N. Car. 8.

2. *State v. Reis*, 38 Minn. 371; 20 Am. & Eng. Corp. Cas. 473 (street sprinkling); *Reinken v. Fuehring*, 130 Ind. 382; 37 Am. & Eng. Corp. Cas. 354 (street sweeping).

3. *Goodrich v. Winchester, etc., Turnpike Co.*, 26 Ind. 119; *Law v. Madison, etc., Turnpike Co.*, 30 Ind. 77; *Center, etc., Gravel Road Co. v. Black*, 32 Ind. 468; *Rykers Ridge Turnpike Co. v.*

*Scott*, 32 Ind. 37; *Lewis v. Laylin*, 46 Ohio St. 663.

And such tax may, under statutory authority, be collected by distress and sale of the personal property of those who should pay it. *Hazzard v. Heacock*, 39 Ind. 172.

But in *Pennsylvania*, it has been held that assessments for this purpose are unauthorized, and that the improvement of highways by local assessments should be confined to densely populated districts, such as cities and villages. *In re Washington Avenue*, 69 Pa. St. 352.

4. In *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656, it was held competent to provide for the construction of a viaduct over a railroad track and a creek, by local assessments. To the same effect are *State v. Ramsey County Dist. Ct.*, 33 Minn. 295; *State v. Ensign* (Minn. 1893), 56 N. W. Rep. 41.

But in *Bloomington v. Chicago, etc., R. Co.*, 134 Ill. 451, it was held that the city council might not provide, by local assessments, for the construction of a railroad bridge across a street.

And in *Re Saw Mill Run Bridge*, 85 Pa. St. 163, it was held that the cost of a bridge which is part of the public highway within the city limits, might not be met by local assessments; and that such improvement was for the benefit of the general public, rather than of those whose lands were adjacent thereto.

5. *Johnson v. Milwaukee*, 40 Wis. 315, per *Ryan, C. J.*, citing *Soens v. Racine*, 10 Wis. 271; *Bond v. Kenosha*, 17 Wis. 284; *Hale v. Kenosha*, 29 Wis. 599; *Holton v. Milwaukee*, 31 Wis. 27.

6. *Fort Wayne v. Shoaff*, 106 Ind. 66.  
7. *Jonas v. Cincinnati*, 18 Ohio 318.

**5. Apportionment—*a.* IN GENERAL.**—The power of levying taxes for assessments includes the power of apportioning them, and therefore the question as to how the expenses of local improvements shall be defrayed, whether wholly by funds of the general treasury, or partly thereby, and partly by the property owners in the vicinity of the improvement, or wholly by the latter, is, in the absence of constitutional restriction, one of legislative discretion.<sup>1</sup> If either of the last two modes is prescribed, it is essential to determine what property is so benefited by the improvement as to render it liable to assessment, and such property constitutes what is termed the taxing district. These districts may be fixed upon in the first place by the legislature of the state itself, or by the legislative body of a municipality, whose action in such case is conclusive;<sup>2</sup> and it is only in very rare instances, as where it clearly appears that the improvement confers no benefit upon the property in the district over and above the general benefit conferred on

1. *White v. People*, 94 Ill. 604; *Dickson v. Racine*, 61 Wis. 545; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Burnett v. Sacramento*, 12 Cal. 76; *Sinton v. Ashbury*, 41 Cal. 525; *Palmer v. Way*, 6 Colo. 106; *State v. Fuller*, 34 N. J. L. 227; *Allen v. Drew*, 44 Vt. 174; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1.

In *People v. Brooklyn*, 4 N. Y. 419, it is said: "It must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation, are identical and inseparable. Taxes cannot be made without apportionment, and the power of apportionment is therefore unlimited, unless it is restrained as a part of the power of taxation."

In *Louisiana*, the owners of property benefited, are required to pay a portion of the cost of the improvements in front of their property, and the municipality to pay the residue. *Municipality No. 2 v. Dunn*, 10 La. Ann. 57. See also for other cases where a similar apportionment was held proper, *Matter of Turfler*, 44 Barb. (N. Y.) 46; *Chicago v. Larned*, 34 Ill. 203; *St. John v. East St. Louis*, 50 Ill. 92.

Where a statute provides for the appointment of commissioners who shall fix the relative amount of the cost of an improvement, to be borne respectively by the municipality and the owners of property benefited, their action in that

regard is conclusive. *Walters v. Lake*, 129 Ill. 23, citing *Fagan v. Chicago*, 84 Ill. 227; *Bigelow v. Chicago*, 90 Ill. 49; *Sterling v. Galt*, 117 Ill. 11.

**Sewers.**—As to apportionment of assessment in the case of sewers, Judge Cooley in his valuable work on *Taxation* (2d ed.), ch. 20, p. 619, says: "In the case of sewers, it is very common to provide that the cost shall in part be a general levy on the municipality, and in part be collected by special assessment. Perhaps more often than in the case of any other local improvement, it is just that such a division of the burden should be made. The lands on the line of the sewer do not usually receive all the special benefits, and therefore should not pay for all the cost, and when the district is extended to embrace other land, there is imminent danger of doing injustice by extending it too far."

Where an assessment for the expense of constructing a sewer, made upon the basis that the property benefited should pay one-half of such expense, was declared invalid by the city council, a subsequent assessment, on the basis that the property benefited should pay two-thirds of such expense, and exempting those who had fully paid their former assessment, is unequal and void. *White v. Saginaw*, 67 Mich. 33.

2. *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Lawrence*, 41 N. Y. 140; *Howell v. Buffalo*, 37 N. Y. 267; *Bigelow v. Chicago*, 90 Ill. 49; *Shaw v. Dennis*, 10 Ill. 405; *Uhrig v. St. Louis*, 44 Mo. 458; *St. Louis v. Oeters*, 36 Mo. 456; *Broadway Baptist Church v. Mc-*

Atee, 8 Bush (Ky.) 508; *Alcorn v. Hamer*, 38 Miss. 652; *Bonsall v. Lebanon*, 19 Ohio St. 518; *Scoville v. Cleveland*, 1 Ohio St. 127; *Kelly v. Cleveland*, 34 Ohio St., 468; *Hill v. Higdon*, 5 Ohio St. 243; *McLaughlin v. Miller*, 124 N. Y. 510; *Baltimore v. Hughes*, 1 Gill & J. (Md.) 493; *Wright v. Forrestal*, 65 Wis. 341; *Little Rock v. Katzenstein* (Ark. 1889), 12 S. W. Rep. 198; *Philadelphia v. Field*, 58 Pa. St. 320; *Teegarden v. Racine*, 56 Wis. 545; *Dickson v. Racine*, 61 Wis. 545.

If the taxing district is fixed by the city council, the commissioners of assessment must assess all the property within such district, and must assess it by the same rule of apportionment. *Ellwood v. Rochester*, 122 N. Y. 229.

"When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited, and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own, the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction." *Gray, J.*, in *Merchant v. Spencer*, 125 U. S. 345, *aff'g* 100 N. Y. 505.

**Construction of Statutes.—Assessment to Center of Block.**—In *Parker v. Atchison*, 48 Kan. 574, it was held that in assessing the cost of paving and curbing a street, the assessments must be made on all the lots to the center of the block on either side of said street, the distance to be improved. See also *Blair v. Atchison*, 40 Kan. 353; *Ottawa v. Burney*, 10 Kan. 270.

It is not necessary that a lot should abut upon the street to be paved and curbed, in order to make it subject to taxation for such improvements, when

it is provided by statute that the cost of the improvement shall be assessed upon all property to the center of the block on either side of the street. It is sufficient that the lot lies in that half of the block next to the street paved and curbed. *Olsson v. Topeka*, 42 Kan. 709.

For other cases upholding assessments upon property abutting on the street improved, see *Ray v. Jeffersonville*, 90 Ind. 567; *Little Rock v. Katzenstein*, 52 Ark. 107; *Guild v. Chicago*, 82 Ill. 472; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 556; *Lansing v. Lincoln*, 32 Neb. 457. But in *St. Louis v. Juppier* (Mo. 1887), 8 West. Rep. 245, such an assessment was declared invalid.

**Assessment of Unplatted Lands.**—Under the *Indiana Acts 1885*, p. 207, relating to the improvement of streets and alleys, the power to assess to a distance of one hundred and fifty feet back from the line of the improvement can be exercised only where there is a tract of unplatted land extending back that distance. The lands included in a public highway, on which the unplatted tract abuts, cannot be assessed for the improvement, neither can the highway be crossed, and tracts of land lying beyond it be assessed for such improvement. *Frankfort v. State*, 128 Ind. 438.

A city charter providing that the cost of street improvements shall be assessed upon the lots and parcels of land having a frontage upon the improved street, ratable according to the valuation of each, allows assessments only in such parts of the city as have been platted into lots and parcels extending back a uniform distance from the street. *Howell v. Tacoma*, 3 Wash. 711.

Where land within the limits of a municipal corporation is increased in value by the construction of a sewer, it is subject to a special assessment to defray the cost thereof, although it is not divided into lots or blocks, and is used merely for farming purposes. *Leitch v. La Grange*, 138 Ill. 291.

It is apparent that in an assessment by frontage to pay for a street improvement, the assessment district where the abutting lots are all subdivided and numbered, consists of the lots so abutting on the improvement; and, if unallotted land as well as subdivided and numbered lots abut upon the street, then such lots, and the front of such unallotted land to the usual depth of the lots, constitute the assessment district,

the community at large, or in cases of gross inequality, that the courts will interfere.<sup>1</sup> In the exercise of this discretion, it seems

and no assessment or charge can be made on lots or lands outside of or beyond the limits of the district thus defined. *Griswold v. Pelton*, 34 Ohio St. 482; *Cooper v. Nevin* (Ky. 1890), 13 S. W. Rep. 841.

**Power Conferred Upon Municipal Bodies.**—"The whole subject of taxing districts belongs to the legislature; so much is unquestionable. The authority may be exercised directly, or, in the case of local taxes, it may be left to local boards or bodies." *Cooley on Taxation* (2d ed.), ch. 20, p. 640; *Hoyt v. East Saginaw*, 19 Mich. 39; *Davies v. Saginaw*, 87 Mich. 439; *Teegarden v. Racine*, 56 Wis. 545; *Meggett v. Eau Claire*, 81 Wis. 326; *Piper's Appeal*, 32 Cal. 530; *Rogers v. St. Paul*, 22 Minn. 494; *Grimmell v. Des Moines*, 57 Iowa 144; *State v. Board of Public Works*, 27 Minn. 442; *Carpenter v. St. Paul*, 23 Minn. 232; *Kansas City v. Baird*, 98 Mo. 215.

A charter which authorizes a city to grade and improve streets whenever the council "may deem such improvements necessary for the public interest," part of the cost of such improvement being borne by the property owners, vests in the council the legislative power to determine whether an improvement will be for the public interest, and also to determine whether it will be of such benefit to property fronting on the street as will justify the imposition of part of the expense on the owners of such property. *Adams v. Fisher*, 75 Tex. 657.

An order that the expense shall be assessed upon real estate abutting or adjoining a street to be excavated, graded, and paved, is not a sufficient designation of a taxing district, when the street extends a considerable distance on either side of the portion to be improved. *Whitney v. Hudson*, 69 Mich. 189.

The charter of a city provided that for street paving purposes "the lots fronting on the street shall constitute one local assessment district, unless the common council shall subdivide it." It was held that if a resolution of the council declaring that such lots shall constitute one district was necessary at all, it was not fatally defective in not excepting the cost of paving the intersections of the streets from the purposes

of the assessment, since the charter also provided that that should be done by the city. *Beniteau v. Detroit*, 41 Mich. 116.

The action of a city council in including property in an improvement district, is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake. *Little Rock v. Katzenstein*, 52 Ark. 107.

**Time of Fixing District.**—In *Eyerman v. Blackley*, 78 Mo. 145, it was held that there is nothing in the charter of the city of St. Louis, which makes it necessary that an assessment district shall be established by ordinance before the board of public improvements can recommend, or the municipal assembly can pass, an ordinance for the construction of a sewer in the city.

1. "This unlimited power to tax necessarily involves the right to designate the property upon which it is to be levied; in other words, to apportion the tax, and except in cases where the proceeding is merely colorable and it is really and substantially an exercise of the right of eminent domain, the judicial tribunals cannot interfere with the legislative discretion, however erroneous it may be." *People v. Brooklyn*, 4 N. Y. 420.

"The power of taxation implies apportionment. And when the legislature have exercised the right, and made the apportionment, a court should not assume to declare it void, unless the invasion of private right was flagrant and its demonstration clear." *Redfield, J., in Allen v. Drew*, 44 Vt. 174.

The extent of the assessment district must depend upon the facts of each case; but where, in any case, it is made clearly to appear that through fraud or mistake property is improperly included or excluded, the court may interfere to vacate or set aside an assessment. *State v. Ramsey County Dist. Court*, 33 Minn. 295.

The action of the legislature, or its duly authorized instrumentalities, in imposing special assessments for local improvements, will not be disturbed by the courts, unless it clearly appears that authority was wanting, or that the prescribed method of assessment contravenes some constitutional principle. The legislature is the primary judge of

that several districts may be made for a single work,<sup>1</sup> and in some instances more than one street has been embraced in one district for the purpose of a special assessment.<sup>2</sup>

In the second place the district, instead of being defined by legislative authority, may be defined by certain local officers, to whom the power is delegated upon some principle indicated by the statute under which they act, usually that of benefits, in which

the validity of the assessment. *Raleigh v. Peace*, 110 N. Car. 32.

Benefit to the owner of the real estate assessed, so far as necessary to be passed upon, as well as the necessity or reasonableness of the improvement, being for the determination of the legislature, is concluded by the act authorizing the assessment, and will not be inquired into by the courts, unless in extraordinary cases presenting a manifest abuse of legislative authority. Such assessments, not being an exercise of the right of eminent domain, do not fall within the constitutional provision that private property shall not be taken or damaged for public purposes without just and adequate compensation. *Speer v. Athens*, 85 Ga. 49.

Thus, where the city council provides in an ordinance for the paving of a street in a particular district, and imposes a special assessment for that purpose upon the district, and the paving appears from the ordinance to be for the general benefit of the city, and not for the benefit of the particular district, such assessment will be vacated by the court. *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; *Burns v. Baltimore*, 48 Md. 198; *In re Washington Avenue*, 69 Pa. St. 352.

Again, in *Thomas v. Gain*, 35 Mich. 155, it was held that, although the legislature has the authority to prescribe the rule for apportioning benefits in levying assessments, the rule adopted must at least be one which it is legally possible may be just and equal as between the parties assessed. Therefore, an assessment levied according to the superficial area of the lots, without regard to actual or probable benefits, or whether such lots are contiguous or not, whether directly benefited or not, or whether city or out lots, was declared unconstitutional and void by the court.

See further, as to the power of courts to interfere with the legislative power in determining taxing districts, *Preston v. Roberts*, 12 Bush (Ky.) 570; *Brown v.*

*Denver*, 3 Colo. 169; *State v. St. Louis*, 1 Mo. App. 510.

1. *Brevort v. Detroit*, 24 Mich. 322; *Schenley v. Com.*, 36 Pa. St. 29; *Scoville v. Cleveland*, 1 Ohio St. 126. See *Creighton v. Scott*, 14 Ohio St. 438; *Beniteau v. Detroit*, 41 Mich. 116.

2. *Parker v. Challiss*, 9 Kan. 155; *Challiss v. Parker*, 11 Kan. 394; *State v. Ramsey County Dist. Court*, 33 Minn. 295; *Matter of Ingraham*, 64 N. Y. 310; *Manice v. New York*, 8 N. Y. 120. But this may not be done unless the city charter authorizes it. *Arnold v. Cambridge*, 106 Mass. 352; *Mayall v. St. Paul*, 30 Minn. 294. See also *Rex v. Tower Hamlets*, 9 B. & C. 517; 17 E. C. L. 433.

But while there may be objection to an improvement of two streets under one proceeding, and payment therefor by one assessment, a sewer which runs along more than one street and does not branch or separate is but one work and can be built and paid for under one proceeding and by one assessment. *Grimmell v. Des Moines*, 57 Iowa 144. See *Burlington v. Quick*, 47 Iowa 222; *Kendig v. Knight*, 60 Iowa 29.

The right to deal with a public improvement as a whole in making assessments, is determined by its unity, and not simply by the fact that the street through which it extends is called at different points by different names. A resolution declaring the necessity of grading a particular street may properly include branches thereof which surround a space that lies across the way, but which really constitute a part of the thoroughfare. *Cuming v. Grand Rapids*, 46 Mich. 150.

In *Stoddard v. Johnson*, 75 Ind. 20, it was held that while the *Indiana* Act of 1877, section 12, does not authorize the including of more than one improvement in a single petition, still it does not forbid a petition for an improvement, whether it be a single or continuous line or a line with branches, so long as all parts are connected.

Under the provision of the charter of St. Paul, the work of grading, filling,

case their determination, in the absence of fraud or mistake, is conclusive.<sup>1</sup> But while this principle of benefits underlies all local assessments, it is not always so expressed in the statute, and in many cases the principle by which the limits of the district are to be ascertained, is indicated by such terms as property "contiguous" or "adjacent" to, "in the vicinity" of, or "adjoining" the proposed improvement, under the assumption, it is presumed, that property falling under such description will be necessarily benefited by the improvement.<sup>2</sup>

When the question whether the cost of an improvement is to be borne by the property owners has been settled, and the

and bridging on a public street, and also the grading of other streets in connection therewith, may be so connected as to be properly carried on in common, and be prosecuted as one entire improvement, for which a local assessment may be made by the board of public works on property specially benefited thereby. *State v. Ramsey County Dist. Ct.*, 33 Minn. 295.

1. *Dickson v. Racine*, 61 Wis. 545; *State v. Stewart*, 74 Wis. 620; *Com. v. Woods*, 44 Pa. St. 113; *Matter of Cruger*, 84 N. Y. 619; *Matter of Ward*, 52 N. Y. 395; *Matter of Sackett, etc.*, *Streets*, 74 N. Y. 95; *Powers' Appeal*, 29 Mich. 504; *Raymond v. Cleveland*, 42 Ohio St. 522; *Rogers v. St. Paul*, 22 Minn. 494; *Carpenter v. St. Paul*, 23 Minn. 232; *State v. Board of Public Works*, 27 Minn. 442; *State v. Ramsey County Dist. Ct.*, 29 Minn. 65.

Where the widening of a street is sought to be made in sections instead of for its entire length, the commissioners appointed to assess the benefits of a particular section may properly confine their assessments of benefits to lots situated upon that part of the street embraced in such particular section of the proposed improvement, and their action in this respect is conclusive as to the limits of the property to be specially benefited. *Bigelow v. Chicago*, 90 Ill. 49.

**Review on Certiorari.**—The determination by the assessors as to whether particular property has been benefited by a public improvement cannot be reviewed upon *certiorari*, except for errors of law. *People v. Gilon*, 126 N. Y. 147, *reversing* 58 Hun (N. Y.) 76.

So, objections that the area of assessment is too small, and that the assessors acted on an erroneous principle in making the assessment, are not tenable. These are matters of judgment and are not subject to review by the courts.

*Matter of Cruger*, 84 N. Y. 619; *Matter of Eager*, 46 N. Y. 109; *Matter of Church Street*, 49 Barb. (N. Y.) 455.

And the same is true of the question as to whether or not the property assessed has been benefited. *People v. Brooklyn*, 23 Barb. (N. Y.) 166.

But though considerable discretion must be given to municipal authorities, to fix a taxing district against which the cost of a local improvement shall be assessed, they cannot so exercise such discretion as to confine the taxing district within such small limits as practically to assess the whole cost of the improvement upon one or two persons. *Detroit v. Daly*, 68 Mich. 503.

Commissioners appointed to assess the benefits to be derived from the improvement of a proposed street, will have no power to assess any part of the benefits upon the ground intended for the street. *Leman v. Lake View*, 131 Ill. 388.

2. A special assessment may be made upon property benefited by an improvement, whether it is abutting and contiguous to the improvement or not. The question in every case is, Will the property assessed be specially benefited by the proposed improvement? *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656; *McCormick v. Omaha* (Neb. 1893), 56 N. W. Rep. 626.

The word "contiguous," as used in statutes and municipal charters in reference to property to be assessed, is used in its popular sense, and means in actual or close contact, touching, adjacent, or near. If the improvement is of a street or sidewalk, the contiguous property is such as abuts upon the street or sidewalk, or is bounded by the street. *Adams County v. Quincy*, 130 Ill. 579.

**Property Adjoining the Locality to be Affected.**—"Property adjoining the locality to be affected," is any property



adjoining or near the improvement, which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally. *Little Rock v. Katzenstein*, 52 Ark. 107.

Lots facing a public square were assessed for paving an avenue which approaches from the southwest, stops at the southwest corner, and begins again at the northeast corner. If the south line of the avenue were extended through the square, it would touch the block in which the lots are situate at the northwest corner only. It was held that the lots do not adjoin the avenue within the act of Congress of February, 1871, providing for assessments for improving a street on the property adjoining. *Johnson v. District of Columbia*, 6 Mackey (D. C.) 21.

An act providing for the widening of an avenue and directing the expenses to be assessed upon the adjoining property, only authorizes an assessment upon property contiguous to and abutting on the avenue. *Matter of Ward*, 52 N. Y. 395, citing *Holmes v. Carley*, 31 N. Y. 289; *Rex v. Hodge*, 1 M. & M. 371; *Peeverly v. People*, 3 Park. Cr. Rep. (N. Y.) 59.

Where a charter authorizes assessments for the improvement of an alley, upon lands adjacent to or abutting such alley, or which may be specially benefited by the improvement, and a lot so abutting has been divided so that part of it does not abut on the alley, such part is liable to an assessment in proportion to the benefits received. *Lansing v. Lincoln*, 32 Neb. 457. But the contrary was held in *St. Louis v. Juppier* (Mo. 1887), 8 West. Rep. 245.

**Property in the Vicinity of Improvement.**—The term "vicinity," as used in the *Pennsylvania* Act of April, 1840, authorizing the extension of a street in the city of Pittsburg and an apportionment of the amount of damage occasioned thereby upon lots in the vicinity of the extension which are benefited, does not denote any particular definite distance from the extension of the street. *Extension of Hancock St.*, 18 Pa. St. 26.

The terms "local" or "vicinity," as used in connection with assessment proceedings, indicate no definite limits, but are usually understood to extend to real property sufficiently near, and so related to the improve-

ment as to be found specially benefited in addition to the general benefits accruing to other property as reported by the proper assessors. *State v. Ramsey County Dist. Ct.*, 33 Minn. 295. In this case it was further held that whether a public improvement can be deemed local in its character, does not depend upon its extent or cost, though these elements ought to be considered; but must depend upon the determination of the city council and board of public works, to whose judgment the matter is committed by the legislature to be determined largely as a question of fact. If it be found that property in the vicinity of the improvement, so situated and related to it as to receive special benefits in the enhancement of its value beyond that of property generally, the improvement may, for the purpose of a special assessment, be deemed local, though the property in the city or ward is also generally benefited.

**Property Fronting on the Highway.**—In *Kendig v. Knight*, 60 Iowa 29, it was held that where provision is made for a tax to be assessed upon the land "fronting on the highway" to be improved, only such land can be included as fronts on that part of the highway to be improved. But in *Diggins v. Brown*, 76 Cal. 318, it was held that the whole length of the district ordered to be improved is subject to assessment, and not simply such property as fronts the portion of the street where the work is done, subject to the provision requiring the cost of work done on one side of a street to be assessed on the property on that side.

A lot is not fronting on a street where it is separated from it by a narrow strip of land. *Philadelphia v. Eastwick*, 35 Pa. St. 75. But an owner cannot free his land from liability by conveying a narrow strip fronting on the street. *State v. North Bergen*, 37 N. J. L. 402. See *Fass v. Sheehawer*, 60 Wis. 525; *St. Louis v. Meier*, 77 Mo. 13.

**Street Intersections.**—The expense of improving squares formed at street crossings may be assessed upon the property fronting on the street undergoing improvement. *Creighton v. Scott*, 14 Ohio St. 438; *Motz v. Detroit*, 18 Mich. 495; *Wolf v. Keokuk*, 48 Iowa 132; *Schenley v. Com.*, 36 Pa. St. 29; *Matter of Delaware, etc., Canal Co.* (Albany County Ct.), 8 N. Y. Supp. 352; *Matter of Eager*, 46 N. Y. 100; *State v. Elizabeth*, 30 N. J. L. 365;

district containing the property to be assessed has been defined, the question arises how the assessment is to be apportioned upon the property in the district. As in the case of general taxation, the burden is distributed upon some general rule of equality, so a local assessment should, as nearly as practicable, be imposed equally upon all standing in like relation.<sup>1</sup> And to do this several methods have been employed; viz., according to actual benefits, or according to some "definite standard fixed upon by the legislature itself, and which is applied to estates by a measurement of length, quantity, or value," as frontage, superficial area, etc., the selection of any one of which is entirely within the discretion of the legislature.<sup>2</sup>

*b.* BY BENEFITS.—What seems to be the most equitable and just method of attaining this uniformity and equality in the apportionment of local assessments is that by which each piece of property, after being viewed by assessors or commissioners, or other officers appointed for the purpose, is assessed according to the benefits which, in their judgment, such property will receive from the improvement.<sup>3</sup>

*Powell v. St. Joseph*, 31 Mo. 347; *Walters v. Lake*, 129 Ill. 23.

1. *Allen v. Drew*, 44 Vt. 174; *Stuart v. Palmer*, 74 N. Y. 190.

The constitutional requirement of equality in taxation is applicable with respect to legislation authorizing assessments for local improvement, and limits the power of the legislature; but the legislature may exercise its discretion, within prescribed limitations, in framing enactments as to the manner in which assessments shall be levied so as to secure equality of apportionment. *State v. Hennepin County Dist. Ct.*, 33 Minn. 235.

An assessment for improving streets is a tax, and, therefore, must be levied with equality and uniformity. But if it be so levied under a system which apportions it with reference to the number of feet fronting on the improvement, or by any other standard which will approximate equality and uniformity, it is not void. *Whiting v. Quackenbush*, 54 Cal. 306. See *People v. Lynch*, 51 Cal. 15; *Jaeger v. Burr*, 36 Ohio St. 164; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 160; *Chicago v. Larned*, 34 Ill. 203.

"These local assessments are a species of taxation, and while the principle underlying them is somewhat different from that upon which general taxation for revenue is based, still it is the money of the citizen that the public demands; and whether in those cases

the assessment is made on frontage, valuation benefits, or by acres, the burden should be equally borne by all upon whom it is imposed." *White v. Saginaw*, 67 Mich. 41.

2. It rests within the discretion of the legislature to say upon what principle the assessment on lots fronting on a street to pay for improvements to such street shall be apportioned among the lots. *Emery v. San Francisco Gas Co.*, 28 Cal. 346; *King v. Portland*, 2 Oregon 146; *People v. Brooklyn*, 4 N. Y. 419; *People v. Lawrence*, 41 N. Y. 140; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; *Daily v. Swope*, 47 Miss. 367; *People v. Nearring*, 27 N. Y. 308.

It has been held that a statute delegating the power to make local assessments should prescribe a rule for their apportionment; otherwise the statute is unconstitutional and confers no authority to make such assessments at all. *Barnes v. Dyer*, 56 Vt. 469; *State v. Hudson County*, 37 N. J. L. 12; *State v. Newark*, 37 N. J. L. 415; *State v. New Brunswick*, 38 N. J. L. 190.

3. *Assessment According to Benefits.*—To the effect that the expenses of local improvements are properly apportioned upon property according to the benefits it receives therefrom, see the following cases: *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Burnett v. Sacramento*, 12 Cal. 76; *Nichols v. Bridgeport*, 23 Conn. 189; *Cone v. Hartford*,

28 Conn. 363; *Hungerford v. Hartford*, 39 Conn. 279; *Bradley v. McAtee*, 7 Bush (Ky.) 667; *Howell v. Bristol*, 8 Bush (Ky.) 493; *Lafayette v. Fowler*, 34 Ind. 140; *Chicago v. Larned*, 34 Ill. 203; *Ottawa v. Spencer*, 40 Ill. 211; *Chicago v. Baer*, 41 Ill. 306; *Hundley v. Lincoln Park Com'rs*, 67 Ill. 559; *Morrison v. Hershire*, 32 Iowa 271; *Dyar v. Farmington*, 70 Me. 515; *Alexander v. Baltimore*, 5 Gill (Md.) 383; *Moale v. Baltimore*, 5 Md. 314; *Baltimore v. Greenmount Cemetery*, 7 Md. 517; *Howard v. First Independent Church*, 18 Md. 451; *Garrett v. St. Louis*, 25 Mo. 505; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *St. Louis v. Clemens*, 36 Mo. 467; *St. Louis v. Armstrong*, 38 Mo. 29; *Uhrig v. St. Louis*, 44 Mo. 458; *Hoyt v. East Saginaw*, 19 Mich. 39; *Steckert v. East Saginaw*, 22 Mich. 104; *Brevoort v. Detroit*, 24 Mich. 322; *State v. Ramsey County Dist. Ct.*, 29 Minn. 62; *Carpenter v. St. Paul*, 23 Minn. 232; *Jones v. Boston*, 104 Mass. 461; *Brewer v. Springfield*, 97 Mass. 152; *Wright v. Boston*, 9 Cush. (Mass.) 233; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Hanscom v. Omaha*, 11 Neb. 37; *State v. Newark*, 27 N. J. L. 185; *State v. Fuller*, 34 N. J. L. 227; *In re Drainage of Lands*, 35 N. J. L. 497; *State v. Newark*, 37 N. J. L. 415; *State v. Reed*, 43 N. J. L. 186; *State v. West Hoboken*, 51 N. J. L. 267; *Tide-water Co. v. Coster*, 18 N. J. Eq. 519; *State v. Hotaling*, 44 N. J. L. 347; *Passaic v. State*, 37 N. J. L. 538; *State v. Passaic*, 38 N. J. L. 57; *State v. Guttenberg*, 38 N. J. L. 419; *Livingston v. New York*, 8 Wend. (N. Y.) 86; *Matter of Twenty-Sixth St.*, 12 Wend. (N. Y.) 203; *Owners of Ground v. Albany*, 15 Wend. (N. Y.) 374; *Matter of Furman St.*, 17 Wend. (N. Y.) 649; *Matter of DeGraw St.*, 18 Wend. (N. Y.) 568; *People v. Brooklyn*, 4 N. Y. 419; *Reed v. Toledo*, 18 Ohio 161; *Scoville v. Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 Ohio St. 243; *Marion v. Epler*, 5 Ohio St. 250; *Reeves v. Wood County*, 8 Ohio St. 333; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Kelly v. Cleveland*, 34 Ohio St. 468; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Com. v. Woods*, 44 Pa. St. 113; *Wolf v. Philadelphia*, 105 Pa. St. 25; *McMasters v. Com.*, 3 Watts (Pa.) 292; *Fenelon's Petition*, 7 Pa. St. 173; *Extension of Hancock St.*, 18 Pa. St. 26; *Schenley v. Com.*, 36 Pa. St. 29; *Wray v. Pittsburgh*, 46 Pa. St. 365; *Greensburg v. Young*, 53 Pa. St. 280; *Allentown v. Henry*, 73 Pa. St. 404; *Weber*

*v. Reinhard*, 73 Pa. St. 373; *In re Dorrance Street*, 4 R. I. 230; *Holton v. Milwaukee*, 31 Wis. 27.

In *St. John v. East St. Louis*, 50 Ill. 92, it was said: "Where an ordinance requires the entire cost of an improvement to be put upon the property fronting thereon, or which directs that such improvements shall be made at the expense of the owners or holders of the real estate benefited, without regard to the actual benefit conferred upon it by the improvement, such ordinance is in violation of the constitutional rule of equality of taxation. The correct rule is to assess each lot for the special benefits it will derive from the improvement, and the residue of the cost should be paid by uniform and equal taxation." See *Lee v. Ruggles*, 62 Ill. 427.

In *Peoria v. Kidder*, 26 Ill. 358, Walker, J., said: "Where an improvement of this character is made, the adjacent real estate is thereby enhanced in value, unless it be portions through or over which the street passes, which may sustain injury for which the owners must be compensated. There can, it seems to us, be no more just and reasonable mode of making this compensation than that which the legislature has adopted by assessing it upon those who have received the direct benefit from the improvement in the enhanced value of their real estate over and above any injury they may thereby sustain. And to ascertain and fix the amount that each person deriving benefit by the improvement shall contribute to compensate for the loss sustained by those who are injured, a disinterested tribunal is required to appoint competent and disinterested persons, who, under oath, ascertain and report both the amount of the injury sustained and the benefit derived by each person."

Where the statute providing for the opening of a street in a city declares that to pay the damage of expenses incurred thereby, an assessment shall be levied on the lots benefited "according to the enhanced value of the respective parcels of land as fixed in a report of the board of public works," the assessment must be limited to the increase in value of each lot, caused by the improvement. *People v. Austin*, 47 Cal. 353.

If it is proposed to assess the whole cost of an improvement on the property benefited, where this rule is in vogue, the record should show that such cost does not exceed the benefits

c. ACCORDING TO FRONTAGE.—By this method of apportionment each lot is assessed according to the ratio which its frontage bears to the whole frontage of property benefited by the improvement, and, under some circumstances, as where all lots on a certain street are of the same character and have the same depth, it seems that no method employed could be more reasonable, but in many instances undoubted hardships will arise.<sup>1</sup>

to the whole property included in the taxing district. *Adams v. Bay City*, 78 Mich. 211, citing *Warren v. Grand Haven*, 30 Mich. 24, 30; *White v. Saginaw*, 67 Mich. 40. To the same effect is *Passaic v. State*, 37 N. J. L. 538.

But a legislative determination of benefits and the property to be assessed is usually regarded as final. See *supra*, this title, *Apportionment—In General*.

**English Rule.**—In *England*, assessments have generally been laid in proportion to benefits received, estimated according to the yearly value of the lands within the district. *Rooke's Case*, 5 Rep. 100; *Masters v. Scroggs*, 3 M. & S. 447; *Netherton v. Ward*, 3 B. & Ald. 21; 5 E. C. L. 219; *Stafford v. Hamston*, 2 B. & B. 691; *Soady v. Wilson*, 3 Ad. & El. 248; 30 E. C. L. 89; *Metropolitan Board of Works v. Vauxhall Bridge Co.*, 7 El. & Bl. 964; 90 E. C. L. 964.

#### 1. Assessments According to Frontage.

—Decisions sustaining this method of assessment are numerous, and have been made in many of the states. *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Oakland Pav. Co. v. Rier*, 52 Cal. 270; *Whiting v. Townsend*, 57 Cal. 515; *Chambers v. Satterlee*, 40 Cal. 497; *Whiting v. Quackenbush*, 54 Cal. 306; *Jennings v. Le Breton*, 80 Cal. 8; *Denver v. Knowles*, 17 Colo. 204; *Pueblo v. Robinson*, 12 Colo. 593; *Bacon v. Savannah* (Ga. 1893), 17 S. E. Rep. 749; *Hayden v. Atlanta*, 70 Ga. 817; 7 Am. & Eng. Corp. Cas. 228; *Palmer v. Stumph*, 29 Ind. 339; *Walker v. Aurora*, 140 Ill. 402; *White v. People*, 94 Ill. 604; *Amery v. Keokuk*, 72 Iowa 701; *Burnes v. Atchison*, 2 Kan. 455; *Parker v. Challiss*, 9 Kan. 155; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251; *Joyes v. Shadburn* (Ky. 1890), 13 S. W. Rep. 361; *Covington v. Boyle*, 6 Bush (Ky.) 204; *Howell v. Bristol*, 8 Bush (Ky.) 493; *Covington v. Worthington*, 88 Ky. 206; *Howard v. Church*, 18 Md. 451; *Moale v. Baltimore*, 61 Md. 224; 4 Am. & Eng. Corp. Cas. 544; *Williams v. Detroit*, 2 Mich.

560; *Motz v. Detroit*, 18 Mich. 495; *Sheley v. Detroit*, 45 Mich. 431; *Fairbanks v. Fitchburg*, 132 Mass. 42; *State v. Reis*, 38 Minn. 371; 20 Am. & Eng. Corp. Cas. 473; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Powell v. St. Joseph*, 31 Mo. 347; *Fowler v. St. Joseph*, 37 Mo. 228; *Neenan v. Smith*, 50 Mo. 525; *Farrar v. St. Louis*, 80 Mo. 394; *Kiley v. Cranor*, 51 Mo. 541; *Weber v. Schergeus*, 59 Mo. 390; *Rutherford v. Hamilton*, 97 Mo. 543; *St. Louis v. Clemens*, 49 Mo. 552; *St. Joseph v. Anthony*, 30 Mo. 538; *Palmyra v. Morton*, 25 Mo. 594; *Raleigh v. Peace*, 110 N. Car. 32; *State v. Elizabeth*, 31 N. J. L. 547; *State v. Elizabeth*, 30 N. J. L. 365; *State v. Fuller*, 34 N. J. L. 227; *O'Reilly v. Kingston*, 114 N. Y. 439; *Stebbins v. Kay*, 51 Hun (N. Y.) 589; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159; *Ernst v. Kunkle*, 5 Ohio St. 520; *Creighton v. Scott*, 14 Ohio St. 438; *Upington v. Oviatt*, 24 Ohio St. 232; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Haviland v. Columbus* (Ohio, 1893), 34 N. E. Rep. 679; *Cherington v. Columbus* (Ohio, 1893), 34 N. E. Rep. 680; *King v. Portland*, 2 Oregon 146; *Spring Garden v. Wistar*, 18 Pa. St. 195; *McGonigle v. Allegheny*, 44 Pa. St. 118; *McGee v. Com.*, 46 Pa. St. 358; *Pennock v. Hoover*, 5 Rawle (Pa.) 291; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Wray v. Pittsburgh*, 46 Pa. St. 365; *Michener v. Philadelphia*, 118 Pa. St. 535; *Chester v. Black*, 132 Pa. St. 570; *Harrisburg v. McCormick*, 129 Pa. St. 213; *Hand v. Fellows*, 148 Pa. St. 456; *Cleveland v. Tripp*, 13 R. I. 50; *Winona, etc., R. Co. v. Watertown*, 1 S. Dak. 46; *Davis v. Lynchburgh*, 84 Va. 861; *Norfolk v. Ellis*, 26 Gratt. (Va.) 224; *Allen v. Drew*, 44 Vt. 174; *State v. Portage*, 12 Wis. 562; *Meggett v. Eau Claire*, 81 Wis. 326; *Norfolk v. Chamberlain*, 89 Va. 196.

Assessments against abutting lots according to frontage, for a street improvement, are not rendered void for inequality by the mere fact that the lands assessed differ somewhat in depth and value, nor because in a compactly

In one state a species of frontage assessment has been upheld by which the entire expense of work opposite a lot is assessed upon such lot alone without any apportionment whatever,<sup>1</sup> but the weight of authority is against such an arbitrary system; and in other jurisdictions it is sustained only in the case of sidewalk improvements, which are made as a rule under the police power.<sup>2</sup>

built part of the city, there are vacant lots upon the street, which do not receive so much benefit from the improvement as those lots in actual use. *Beaumont v. Wilkesbarre*, 142 Pa. St. 198.

Under the *Pennsylvania* acts relating to the grading and paving of streets in the city of Allegheny, a lot owner on an avenue opposite a public common is liable for the costs of grading and paving the whole of the street in front of his lot, and not the half of its width only. *McGonigle v. Allegheny*, 44 Pa. St. 118.

Under a charter authorizing assessors to assess the expense of a street improvement upon the property which they shall deem more immediately benefited by the improvement, which borders on, or touches the street, an assessment according to the number of feet front owned by each individual is within their discretion. *O'Reilly v. Kingston*, 114 N. Y. 439. So in *Raleigh v. Peace*, 110 N. Car. 32; 37 Am. & Eng. Corp. Cas. 360, it was held that though the charter of a city is silent as to the method of apportioning the cost of street improvements on abutting property owners, yet, where a statute provides that the aldermen may cause necessary improvements to be made, and "apportion them equally among the inhabitants by assessments," the city, authorized by its charter to charge abutting owners with the cost of improvements, may apportion them according to the front-foot rule.

**Narrow Strip of Land Fronting on Street.**—A lot consisting of a long, narrow strip, with a front of several hundred feet upon the street and only 31 feet deep at one end and narrowing to the other, is subject to assessment according to the front-foot rule for the cost of improving the street, although the amount of the assessment is greater than the value of the lot. *Harrisburg v. McCormick*, 129 Pa. St. 213. See *Terry v. Hartford*, 39 Conn. 286.

And where the assessment is made by the front-foot rule, evidence tending to show that the result is unequal

and unfair on the basis of other rules of assessment is wholly immaterial. *Green v. Springfield*, 130 Ill. 515.

**Corner Lots.**—A corner lot fronts on two streets and may be assessed for improvements on both. *Des Moines v. Dorr*, 31 Iowa 89; *Wolf v. Keokuk*, 48 Iowa 129; *People v. Adams* (B'klyn City Ct.), 18 N. Y. Supp. 443; *Sands v. Richmond*, 31 Gratt. (Va.) 571; *Allen v. Krenning*, 23 Mo. App. 561; *Springfield v. Green*, 120 Ill. 269; *Wilbur v. Springfield*, 123 Ill. 400.

In *State v. Passaic*, 42 N. J. L. 524, an assessment according to the front-foot rule was set aside, it appearing that the plaintiff's property was assessed one-third of the entire expense of a sidewalk, while he had himself done nearly all the work in front of his own premises.

And where the statute authorizing such assessments directs that they be made according to the quantity of land benefited and the benefits received, the front-foot rule will not be sustained. *Clapp v. Hartford*, 35 Conn. 77.

**Rural Lands.**—The frontage rule is sustained in cities and large towns, on the ground that it is a reasonably accurate method of ascertaining benefits; but, when applied to rural lots or farm lands, it is too unfair and extortionate to be sustained. *Seely v. Pittsburgh*, 82 Pa. St. 360; *Kaiser v. Weise*, 85 Pa. St. 366; *Craig v. Philadelphia*, 89 Pa. St. 265; *Philadelphia v. Rule*, 93 Pa. St. 15; *Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445; *Cleveland v. Tripp*, 13 R. I. 61.

The question as to whether the lands attempted to be assessed are rural or urban, depends upon the conditions existing at the time the improvement is made, not at the time when the ordinance authorizing it was enacted. *Keith v. Philadelphia*, 126 Pa. St. 575.

1. In *Warren v. Henly*, 31 Iowa 31, the court admitted, however, that the reasoning of the case was not sustained by the authority at hand. See also *Muscatine v. Chicago, etc., R. Co.* (Iowa, 1893), 55 N. W. Rep. 100.

2. *Williams v. Detroit*, 2 Mich. 560;

d. ACCORDING TO AREA.—The practice of basing assessments upon real estate according to its superficial area or to the number of acres it contains, is confined chiefly to cases of levee and drainage assessments,<sup>1</sup> though the principle has been applied occasionally to street improvements in cities and towns, as a reasonable standard of apportionment.<sup>2</sup>

e. ACCORDING TO VALUE.—Another method of apportionment is to assess against each lot benefited by an improvement a sum which bears the same ratio to the whole amount to be assessed that the value of such lot bears to the aggregate value of all the property to be assessed.<sup>3</sup> In employing this method of apportionment it is proper to exclude from the valuation of the property the worth of any improvements that may be on it.<sup>4</sup>

Woodbridge v. Detroit, 8 Mich. 274; Motz v. Detroit, 18 Mich. 495; Parker v. Challiss, 9 Kan. 107; Lawrence v. Killam, 11 Kan. 499; Weller v. St. Paul, 5 Minn. 95; Lexington v. McQuillan, 9 Dana (Ky.) 513; St. Louis v. Clemens, 49 Mo. 552; Neenan v. Smith, 50 Mo. 525; State v. Portage, 12 Wis. 562.

"It is now almost universally denied that an owner can be compelled to pay the whole cost of the improvement of the street in front of his lot. In such case his tax would neither be increased nor diminished by the assessment upon his neighbors, and each particular lot would arbitrarily be made a taxing district, and charged with the whole expenditure thereon." Thomas, J., in Independence v. Gates, 110 Mo. 374.

As to the exception in the case of sidewalks, see *supra*, this title, *Sidewalks*.

1. Assessments According to Area.—McGehee v. Mathis, 21 Ark. 40; Daily v. Swope, 47 Miss. 367; Alcorn v. Hamer, 38 Miss. 652; Williams v. Cammack, 27 Miss. 209; Wallace v. Shelton, 14 La. Ann. 503; Egyptian Levee Co. v. Hardin, 27 Mo. 497; St. Louis v. Oeters, 36 Mo. 456; Crowley v. Copley, 2 La. Ann. 329; Yeatman v. Crandall, 11 La. Ann. 220; Bishop v. Marks, 15 La. Ann. 147; Richardson v. Morgan, 16 La. Ann. 429; Munson v. Atchafalaya Basin Levee Dist., 43 La. Ann. 15; Ellis v. Pontchartrain Levee Dist., 43 La. Ann. 33.

2. Keese v. Denver, 10 Colo. 112; Preston v. Roberts, 12 Bush (Ky.) 570; Broadway Baptist Church v. McAtee, 8 Bush (Ky.) 508; Grimmell v. Des Moines, 57 Iowa 144; Hines v. Leavenworth, 3 Kan. 186; Gillett v. Denver, 21 Fed. Rep. 822; St. Joseph v. Farrell,

106 Mo. 437; Johnson v. Duer, 115 Mo. 366; Swain v. Fulmer (Ind. 1893), 34 N. E. Rep. 639. See Strowbridge v. Portland, 8 Oregon 671; Clapp v. Hartford, 35 Conn. 66; State v. Portage, 12 Wis. 562; Cleveland v. Tripp, 13 R. I. 50.

It has been held that an assessment by the area of lots, irrespective of proportionate benefits, is unconstitutional and void. Thomas v. Gain, 35 Mich. 155.

Under the charter of the city of Louisville, improvements may be made "at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of square feet owned by them respectively, except that corner lots shall pay twenty-five per cent. more than others." Bradley v. McAtee, 7 Bush (Ky.) 667.

3. Assessments According to Value.—Downer v. Boston, 7 Cush. (Mass.) 277 (per Shaw, C. J., *distinguishing* Boston v. Shaw, 1 Met. (Mass.) 130); Wright v. Boston, 9 Cush. (Mass.) 233; Dorgan v. Boston, 12 Allen (Mass.) 223; Springfield v. Gay, 12 Allen (Mass.) 612; Brewer v. Springfield, 97 Mass. 152; Workman v. Worcester, 118 Mass. 168; Snow v. Fitchburg, 136 Mass. 183; Burnett v. Sacramento, 12 Cal. 84; Houston v. McKenna, 22 Cal. 550; People v. Whyler, 41 Cal. 351; Lockwood v. St. Louis, 24 Mo. 22; Gilmore v. Hentig, 33 Kan. 156; Seattle v. Yesler, 1 Wash. Terr. 571. See also Williams v. Cammack, 27 Miss. 209; Creighton v. Scott, 14 Ohio St. 438.

4. Brewer v. Springfield, 47 Mass. 152; Springfield v. Gay, 12 Allen (Mass.) 612; Downer v. Boston, 7 Cush. (Mass.) 277; Boston v. Shaw, 1 Met. (Mass.) 138; Gilmore v. Hentig, 33 Kan. 156.

**6. Property Assessable—*a.* IN GENERAL.**—The principle upon which depends the right to levy local assessments is that of benefits received; accordingly the statutes generally provide for assessing all property to be benefited by the improvement contemplated, without regard to its ownership, whether of individuals or private corporations, or to the purpose or use for which it is held, or to which it is devoted; the ordinary rule relating to exemption from taxation generally not being applicable to local assessments.<sup>1</sup> Such property must be real and not personal;<sup>2</sup> and where the legislature by special enactment, or by the terms of a city charter, designates particularly the property to be assessed, only such property is liable, the municipal authorities having no jurisdiction to assess any other, in pursuance of the general rule that statutes in regard to local assessments must be strictly construed.<sup>3</sup>

***b.* PUBLIC PROPERTY.**—As a rule, public property used for governmental purposes is not subject to assessment for local improvements unless made so by statute, either expressly, or by necessary implication.<sup>4</sup>

The assessment upon an estate for the construction of a sewer by a city, is to be made according to the value of the land exclusive of buildings; and, in determining the amount of such assessment, the relative benefit which each estate on the line of the sewer may receive is immaterial. *Snow v. Fitchburg*, 136 Mass. 183.

1. See *supra*, this title, *Principle of the Imposition*; *Atlanta v. First Presbyterian Church*, 86 Ga. 730.

As to the rule that exemption of property of churches, cemeteries, charitable institutions, and the like, from taxation, generally does not include local assessments, see *supra*, this title, *Exemptions*.

In *Maryland*, it has been held that the legislature has the constitutional power to authorize benefits to be assessed and levied by the mayor and city council, upon property adjacent to, as well as within, the limits of a city. *Brooks v. Baltimore*, 48 Md. 265.

In *Wright v. Boston*, 9 Cush. (Mass.) 233, it was held that vacant lots on a street in which a common sewer has been laid in pursuance of the by-laws of the city, are properly assessed for their proportion of the cost thereof, as well as lots that are built upon.

An incorporated company who owns a lot in the vicinity of a public improvement, are not liable to assessments for benefit, if, by the terms of the grant whereby the lot is held, it can be appropriated only to a specific pur-

pose, which by possibility cannot be rendered more advantageous by the opening of a street in its neighborhood; but the company may be assessed for benefit to adjoining grounds not thus restricted. *Owners of Ground v. Albany*, 15 Wend. (N. Y.) 375.

2. See *infra*, this title, *Personal Liability*.

3. *Balfe v. Lammers*, 109 Ind. 347.

Thus, where a statute authorizes cities to levy an assessment upon ground abutting on the improvement, to a distance of fifty feet back from the front line, no more can be affected. *Niklaus v. Conkling*, 118 Ind. 289. See *supra*, this title, *Construction of Statutes*.

**4. Public Property.**—*Worcester County v. Worcester*, 116 Mass. 193; *State v. Hartford*, 50 Conn. 89; *State v. Hotaling*, 44 N. J. L. 347; *Peck County Sav. Bank v. State*, 69 Iowa 24; *Abercrombie v. Ely*, 60 Mo. 23; *Clinton v. Henry County*, 115 Mo. 557.

In *People v. Austin*, 47 Cal. 353, an assessment was attacked because certain lots belonging to the *United States*, the state of *California*, and the city of *San Francisco*, respectively, were within the assessment district, but not assessed. It was held that the objection was untenable.

In *Hassan v. Rochester*, 67 N. Y. 528, it was held that the city was authorized by statute to assess the property of the state, and, having failed to do so, the enforcement of an assessment

c. PROPERTY OF RAILROADS.—As a rule, real estate owned by railroad companies and used as sites for stations and for other like purposes, is assessable for local improvements, since it generally receives direct benefits from such improvements.<sup>1</sup> But whether the roadbed or right of way may be assessed depends upon whether it will be especially benefited by the improvement, considering always the purposes for which such property is, or may

was enjoined at the suit of other property owners.

In *Illinois*, the court puts the exemption of the property of counties, cities, etc., from taxation, in the same class with statutory exemptions, and denies in either case the applicability of the rule to local assessments. Thus, it has been held that a county courthouse is not exempt from local assessments, unless expressly made so by statute. *McLean County v. Bloomington*, 103 Ill. 209; *Adams County v. Quincy*, 130 Ill. 566.

So the real estate of a city should be assessed. *Scammon v. Chicago*, 42 Ill. 192. But it may not be advertised and sold like the property of individuals. The amount of the assessment should be paid out of the general fund. *Taylor v. People*, 66 Ill. 322.

The property of the *United States* used for a custom-house and post office, may not be assessed. *Fagan v. Chicago*, 84 Ill. 227.

As to whether such property as public-school buildings, public hospitals, etc., are used for governmental purposes within the meaning of the rule, there is a conflict of authority. It has been held that public-school property is exempt from such assessments. *Hartford v. West Middle Dist.*, 45 Conn. 462; *Toledo v. Board of Education*, 48 Ohio St. 83; *Board of Improvements v. School Dist.* (Ark. 1892), 19 S. W. Rep. 969; *Abercrombie v. Ely*, 60 Mo. 23, where it appeared that the title to the schoolhouse was in the state board of education.

So congressional township lands for the use of public schools may not be assessed for the construction of public drains or ditches. *Edgerton v. Huntington School Tp.*, 126 Ind. 261; *People v. School Trustees*, 118 Ill. 52. But in *St. Louis Public Schools v. St. Louis*, 26 Mo. 468; *Sioux City v. Independent School Dist.*, 55 Iowa 150, it was held that school property is subject to assessment.

In *Baltimore County v. Maryland Hospital*, 62 Md. 127, it was held that

the property on which the state hospital for the insane was situated was exempt from local assessments.

But in *Cook County v. Chicago*, 103 Ill. 646, it was held that a county hospital was not exempt.

A public park owned by a city should bear a *pro rata* assessment for public improvements. *Matter of Church St.*, 49 Barb. (N. Y.) 455; *Scammon v. Chicago*, 42 Ill. 192.

1. **Railroad Property.**—*Mt. Pleasant v. Baltimore, etc., R. Co.*, 138 Pa. St. 365; *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112; *Chicago, etc., R. Co. v. Chicago* (Ill. 1891), 27 N. E. Rep. 926; *State v. Newark*, 27 N. J. L. 185; *Ludlow v. Cincinnati Southern R. Co.*, 78 Ky. 357.

Such property may be assessed for park or boulevard purposes. *Chicago, etc., R. Co. v. People*, 120 Ill. 104.

In assessing the depot grounds of a company, which are by statute exempt from taxation, it is improper to consider the probable increase of business in consequence of increased facilities of access to the depot. Such an assessment would be a tax on the business of the company, in violation of the exemption. *State v. Jersey City*, 36 N. J. L. 56.

But all real property of a railroad company, of a character to be benefited by local improvements, is subject to assessments therefor. And such assessments are not in violation of a statutory exemption from taxation, when they are made on a basis of benefits to the property for the purposes for which it is used. *State v. Jersey City*, 42 N. J. L. 97.

In *New York, etc., R. Co. v. New Haven*, 42 Conn. 279, it was held that a railroad company in front of whose passenger station and along whose track a street had been paved by the city, was not liable to be assessed for the expense, either on the ground that access to the station was made more easy, or because of the increased value of the land occupied by the railroad for building or other business purposes.



lawfully be used. And upon the determination of the question of benefits, the authorities are not in harmony.<sup>1</sup>

But land owned by a railroad company in fee, with no restriction upon its use, and which is occupied only as a place for running off and leaving freight cars, but which is well situated for mechanical and manufacturing purposes, is liable to a city assessment for public improvements. *New York, etc., R. Co. v. New Britain*, 49 Conn. 40.

1. To the effect that a roadbed is liable to assessments for local improvements, see *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 164; *Chicago v. Barr*, 41 Ill. 306; *Peru, etc., R. Co. v. Hanna*, 68 Ind. 562; *Kuehner v. Freeport*, 143 Ill. 92; *New York, etc., R. Co. v. Dunkirk*, 65 Hun (N. Y.) 494.

In *New Jersey*, this is true whether the company owns the roadbed in fee, or has only an easement therein. *State v. Elizabeth*, 37 N. J. L. 330; *State v. Jersey City*, 42 N. J. L. 97; *State v. Passaic*, 54 N. J. L. 340.

But where an assessment for local improvements is made upon the railroad company itself, and not upon its roadbed, it is a violation of a statutory exemption from taxation. *State v. Newark*, 27 N. J. L. 185.

A mere license to run trains over the tracks of another company, is not such an interest in the right of way as will render the licensee liable to local assessments thereon. *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656.

Where the railroad crosses a street, the right of way may be assessed on both sides of the street, for the cost of improving the same. *Illinois Cent. R. Co. v. Mattoon*, 141 Ill. 32; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159. But it may not thus be compelled to bear the whole expense of building a new bridge across a street which is widened for public convenience. *Bloomington v. Chicago, etc., R. Co.*, 134 Ill. 451.

In assessing the benefits to a right of way, regard should be had to all the purposes for which the property may lawfully be used, and to those purposes only. *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 509.

**Drainage Assessments.**—The right of way of a railroad company may be assessed for the benefits conferred upon it by the draining of a district through which the track runs. *Illinois Cent. R. Co. v. East Lake Drainage Dist.*, 129 Ill. 417.

But in *Pennsylvania*, it is held that, as a matter of law, such property is not benefited by the improvement of the street. *Allegheny City v. Western Pa. R. Co.*, 138 Pa. St. 375. And it matters not that the company owns the roadbed in fee. *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424; *Philadelphia v. Philadelphia, etc., R. Co.*, 33 Pa. St. 41. See also *New York, etc., R. Co. v. New Haven*, 42 Conn. 279; *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255; *Matter of Public Park Com'rs*, 47 Hun (N. Y.) 304; *Muscantine v. Chicago, etc., R. Co.* (Iowa, 1893), 55 N. W. Rep. 100.

Where an act of the legislature authorizes assessments only upon contiguous property abutting on the street to be improved, a roadbed in such street does not abut upon the street and may not be assessed. *South Park Com'rs v. Chicago, etc., R. Co.*, 107 Ill. 105; *O'Reilly v. Kingston*, 114 N. Y. 439; *Koons v. Lucas*, 52 Iowa 177.

In *England*, it has been held that, where the railroad line runs through a deep cutting, over which the street runs upon a bridge, the company is not liable, as the owner of abutting property, to assessments for the improvement of the street. *London, etc., R. Co. v. St. Giles, L. R.*, 4 Exch. Div. 239. But where a railroad crosses a street above grade upon buttresses, and a small space of ground remains around each buttress on either side of the highway, this is subject to assessment for the improvement of the highway as abutting land. *Higgins v. Harding, L. R.*, 8 Q. B. 7. Where a railway runs alongside of a street, but in a cutting, and is separated from it by a stone wall, it is held to be abutting property and liable to assessment for improvement of the highway. *London, etc., R. Co. v. St. Pancras*, 17 L. T. N. S. 654. A railroad, crossing a street by a deep cutting, over which the street is carried by a bridge, has been held not to be an abutting owner so as to be liable to an assessment for paving the street. *Great Eastern R. Co. v. Hackney Board of Works*, 8 App. Cas. 687; 13 Am. & Eng. R. Cas. 404, reversing 9 Q. B. D. 412.

It has been held that street railways may be assessed for paving streets upon which their tracks are laid. Appeal of

North Beach, etc., R. Co., 32 Cal. 499; New Haven v. Fairhaven, etc., R. Co., 38 Conn. 422.

In *Mobile v. Royal St. R. Co.*, 45 Ala. 322, an assessment against a street railway was held void as in violation of the provision of the state constitution requiring uniformity of taxation. But this case was overruled in *Birmingham v. Klein*, 89 Ala. 461.

A failure to assess a portion of the cost of a street improvement upon a street railway, the tracks of which run over the street improved, is not erroneous, in the absence of evidence that the real estate of the company is peculiarly benefited. Benefits to the franchise should not be considered. *State v. Duryea*, 45 N. J. L. 258; *Davis v. Newark*, 54 N. J. L. 144.

Where a street railway company is required to pave and keep in repair the portion of the street on which its tracks are laid, and after notice fails to do so, and permits the public authorities, without objection, to make the improvement, it will be estopped to contest an assessment laid upon its roadbed for its proportionate amount of the expense, and the same may be recovered in an action of *assumpsit*. *New Haven v. Fairhaven, etc.*, R. Co., 38 Conn. 422; *Schmidt v. Market St., etc.*, R. Co., 90 Cal. 37; *District of Columbia v. Washington, etc.*, R. Co., 1 Mackey (D. C.) 361; *Columbus v. Street R. Co.*, 45 Ohio St. 98.

But in such case it has been held that if the city does not rely upon the railway company's contract to pave and repair the street, but proceeds under its charter power to make an assessment upon the road, such assessment must be made in accordance with the benefits conferred. The actual cost of the work is not conclusive, in such proceedings, of the amount to be assessed. *Farmers' L. & T. Co. v. Ansonia*, 61 Conn. 76. But if the charter of the company so provides, the cost of the work may be collected in the manner provided for the collection of other street assessments. *Schmidt v. Market St., etc.*, R. Co., 90 Cal. 37.

A street railway company which is required to pave and keep in repair that part of the street which it uses, is not liable to special assessments for improving the rest of the street. *Chicago, etc.*, R. Co. v. *Chicago* (Ill. 1891), 27 N. E. Rep. 926; *Parmelee v. Chicago*, 60 Ill. 267; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50.

But the obligation to pave and keep

in repair, does not extend to a repaving with new and more costly material. And a failure to assess a street railway for such repaving, will not invalidate an assessment upon abutting property for the cost thereof. *Baltimore v. Scharf*, 54 Md. 499.

And a charter which authorizes the common council of a city to require street railway companies to repave the portions of the street occupied by their roads, is merely directory, and gives the owners of private property no vested right or claim *de jure* to compel a company to repave or bear the expense of repaving any portion of the street, when it is not required to do so, by the city council. *Gilmore v. Utica*, 121 N. Y. 561; 131 N. Y. 26.

In *People v. Gilon*, 58 Hun (N. Y.) 76, it appeared that the board of assessors of the city of New York failed to assess a street railway for the paving between the tracks, and reported that there was no special benefit to the road. Upon *certiorari*, the supreme court reversed the proceedings, holding that as a matter of law the road was benefited. This decision was in turn reversed by the court of appeals, where it was held that the question of benefits was one of fact to be determined by the board of assessors, whose decision might not be disturbed on *certiorari*. *People v. Gilon*, 126 N. Y. 147, reversing 58 Hun (N. Y.) 76; *People v. Gilon*, 126 N. Y. 640, reversing 58 Hun (N. Y.) 603.

In *Minnesota*, it has been held that under the charter of a railroad company, which exempts its property from all assessments and taxes whatever by the state, or by any county, town, village, or other municipal authority, the property held by it for purposes of its road is not subject to assessment for local improvements. *First Division St. Paul, etc.*, R. Co. v. *St. Paul*, 21 Minn. 526; *St. Paul v. St. Paul, etc.*, R. Co., 23 Minn. 469.

And it has there been held that the track of a street railway company in a public street, is not real estate within the meaning of a statute conferring the right to levy local assessments upon real estate, and is, therefore, not assessable for the expense of paving a street. *State v. Ramsey County Dist. Ct.*, 31 Minn. 354.

But the correctness of this decision must rest on the peculiar wording of the statute under construction. In *New Haven v. Fairhaven, etc.*, R. Co., 38 Conn. 430, the court said: "The

*d. AGRICULTURAL LANDS IN CITIES.*—Unplatted suburban lands which, although within the city limits, are vacant or are used only for agricultural or other like purposes, may be assessed for any special benefits which they receive from a city improvement;<sup>1</sup> but rules of apportionment which are just and proper in the densely populated portions of the city may result in great hardship in suburban districts, and it has been held that statutes authorizing apportionments of assessments upon such property by the front-foot rule, are unconstitutional and void.<sup>2</sup>

**7. Assessment Proceedings**—*a. COMPLIANCE WITH STATUTORY PROVISIONS.*—These proceedings differ so widely in the several states, and even in the same state under various charters, that it would be impracticable to attempt more than a statement of the general principles. One of these is that there must be a strict compliance with the provisions of the statute authorizing the assessment. While a reasonable compliance with those regulations designed to secure order, system, and dispatch in proceedings is sufficient, a strict compliance with provisions intended to protect the property owner and to prevent a sacrifice of his property is considered a condition precedent to a valid assessment.<sup>3</sup>

defendant's property consists in part of rails, sleepers, ties, and spikes, so laid into and attached to the soil in the street where the improvement was made as to become a part of the realty. That property so situated is real estate, has been repeatedly decided. *Providence Gas Co. v. Thurber*, 2 R. I. 21; *Chicago v. Baer*, 41 Ill. 306; *Appeal of North Beach, etc., R. Co.*, 32 Cal. 499; *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. (N. Y.) 494."

1. *Kalbrier v. Leonard*, 34 Ind. 497; *Taber v. Grafmiller*, 109 Ind. 206. Land undivided into lots and used for farming purposes is subject to assessment for sewers, if it is benefited thereby, *Leitch v. La Grange*, 138 Ill. 291; but farm lands nearly three miles from the improvement, and drained only by surface drainage, may not be assessed for the construction of a city sewer, where no provision is made for the drainage of surface water therefrom into such sewer. *Edwards v. Chicago*, 140 Ill. 440.

Under a charter authorizing assessments upon lots and parcels of land having a frontage upon an improved street, it has been held that only land which has been platted into parcels extending back a uniform distance from the street may be assessed under the frontage rule. *Howell v. Tacoma*, 3 Wash. 711.

2. *In re Washington Avenue*, 69 Pa. St. 352; *Seely v. Pittsburgh*, 82 Pa. St.

360; *Kaiser v. Weise*, 85 Pa. St. 366; *Craig v. Philadelphia*, 89 Pa. St. 268; *Philadelphia v. Rule*, 93 Pa. St. 15; *Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445; *Keith v. Philadelphia*, 126 Pa. St. 575. See also *Cleveland v. Tripp*, 13 R. I. 61.

3. *Lyon v. Alley*, 130 U. S. 177; *French v. Edwards*, 13 Wall. (U. S.) 506; *Himmelmänn v. McCreery*, 51 Cal. 562; *Smith v. Davis*, 30 Cal. 536; *Taylor v. Donner*, 31 Cal. 480; *Hewes v. Rice*, 40 Cal. 255; *Stockton v. Whitmore*, 50 Cal. 554; *Beveridge v. Livingstone*, 54 Cal. 54; *Brady v. Bartlett*, 56 Cal. 350; *Keese v. Denver*, 10 Colo. 113; *Kyle v. Malin*, 8 Ind. 34; *Delphi v. Evans*, 36 Ind. 90; *Nevens, etc., Tp. Draining Co. v. Alkire*, 36 Ind. 189; *Ayer v. Lake*, 11 Ill. App. 566; *People v. Starne*, 35 Ill. 121; *Hager v. Burlington*, 42 Iowa 661; *Wahlgreen v. Kansas City*, 42 Kan. 243; *Sloan v. Beebe*, 24 Kan. 343; *Covington v. Casey*, 3 Bush (Ky.) 698; *Caldwell v. Rupert*, 10 Bush (Ky.) 179; *Steckert v. East Saginaw*, 22 Mich. 10; *Warren v. Grand Haven*, 30 Mich. 24; *Grand Rapids v. Blakely*, 40 Mich. 367; *Whitney v. Hudson*, 69 Mich. 189; *Jones v. Boston*, 104 Mass. 461; *McComb v. Bell*, 2 Minn. 295; *Flint v. Webb*, 25 Minn. 93; *Petition of Astor*, 50 N. Y. 363; *Matter of Cameron*, 50 N. Y. 502; *Petition of Sharp*, 56 N. Y. 257; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Hopkins v.*

b. DETERMINATION OF NECESSITY.—A usual and important provision of municipal charters and legislative enactments in regard to local assessments is that, before the authorities enter upon the making of improvements, for the expense of which private property is to be assessed, the necessity therefor must be considered and determined by them in their official capacity, and the evidence preserved by proper records.<sup>1</sup> It is not generally requisite that the city ordinance or resolution must state that the improvement is necessary, as such ordinance or resolution, having been enacted by the officers whose duty it is to determine the necessity, is in itself deemed a sufficient declaration of the fact,<sup>2</sup> but if the statute expressly requires that the council shall declare its determination that the necessity exists, then such declaration

Mason, 42 How. Pr. (N. Y. Supreme Ct.) 115; *People v. Utica*, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 414; *Knell v. Buffalo*, 54 Hun (N. Y.) 80; *Matter of Blodgett*, 91 N. Y. 117; *Moore v. Albany*, 98 N. Y. 405; *Matter of Pennie*, 108 N. Y. 364; *Danville v. Shelton*, 76 Va. 325; *Norfolk v. Chamberlain*, 89 Va. 196; *Massing v. Ames*, 37 Wis. 645; *Pound v. Chippewa County*, 43 Wis. 63; *Hall v. Chippewa Falls*, 47 Wis. 267; *Flewelling v. Proetzel*, 80 Tex. 191; *State v. Jersey City*, 42 N. J. L. 575; *Robinson v. Logan*, 31 Ohio St. 466.

There must be a fair compliance with all the conditions precedent, whether prescribed by charter or ordinance. *Cole v. Skrainka*, 105 Mo. 308; *Kiley v. Oppenheimer*, 55 Mo. 374; *Leech v. Cargill*, 60 Mo. 316; *Kansas City v. Swope*, 79 Mo. 446; *Williams v. Detroit*, 2 Mich. 560; *Gill v. Dunham* (Cal. 1893), 34 Pac. Rep. 68. See also *Baltimore v. Raymo*, 68 Md. 569; *Collins v. Holyoke*, 146 Mass. 289; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Matter of Metropolitan Gas Light Co.*, 85 N. Y. 526; *Matter of De Pierris*, 82 N. Y. 243.

But the city council may waive compliance with its own rules in such proceedings. *Holt v. Somerville*, 127 Mass. 408.

None of the substantial requirements for the protection of property may be considered as directory only. *Lyon v. Alley*, 130 U. S. 177; *Merritt v. Port Chester*, 71 N. Y. 309; *Grace v. Board of Health*, 135 Mass. 490.

And the city has the burden of showing a performance of the conditions precedent. *Leefkin v. Galveston*, 56 Tex. 522.

1. *White v. Saginaw*, 67 Mich. 33;

17 Am. & Eng. Corp. Cas. 612; *Hoyt v. East Saginaw*, 19 Mich. 39; 2 Am. Rep. 76; *Power's Appeal*, 29 Mich. 504; *McLauren v. Grand Forks*, 6 Dakota 397; *Whiteford Tp. v. Probate Judge*, 53 Mich. 134.

In *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, it is held that a statute, providing that when municipalities shall deem it necessary to make a street improvement, the council or trustees shall declare by resolution the necessity therefor and give two weeks' publication, telling the time and place where the property owners can object, does not require two separate resolutions, one declaring the necessity for the improvement, and a second for the construction of the improvement, after a hearing of the property owners. The statute is substantially complied with by a notice to the property owners after the passage of the resolution.

In *Minnesota*, it is held that the legislature may direct local improvements of a public nature, to be made, and the expense thereof to be levied upon the particular tax district interested, without any intermediate proceedings to determine the necessity therefor. *Gulder v. Otsego*, 20 Minn. 74; *Hennepin County v. Bartleson*, 37 Minn. 343.

2. *Young v. St. Louis*, 47 Mo. 492. See *Kiley v. Forsee*, 57 Mo. 390; *Bohle v. Stannard*, 7 Mo. App. 51; *Seibert v. Tiffany*, 8 Mo. App. 37; *Newman v. Emporia*, 32 Kan. 456; *Ludlow v. Cincinnati Southern R. Co.*, 78 Ky. 360; *Waln v. Philadelphia*, 99 Pa. St. 337.

An order of the mayor and aldermen of the city of Boston, directing a main drain to be laid, upon a petition setting forth that the safety and convenience of the city require such drain, is a sufficient adjudication of the ne-

of the grounds on which it proceeds must be made before it can order the improvement.<sup>1</sup>

c. PETITION OF PROPERTY OWNERS.—In some cases, statutes conferring the power to make local improvements permit the city council to proceed by the unanimous vote, or by the vote of a designated majority, without the consent of the property owners, or to proceed simply by a majority vote, upon the petition of the owners of a certain proportion of the property assessable for the proposed improvement.<sup>2</sup> Frequently, however, the power to act is made entirely dependent upon such petition. And where this

necessity therefor under the city by-laws. *Wright v. Boston*, 9 Cush. (Mass.) 233.

The necessity for a local improvement, and the assessment of property owners according to the benefits conferred, are implied, whenever such an improvement is undertaken, and the statute or ordinance relative thereto need not state that the contemplated improvement is necessary, or that the benefits are conferred. *Raleigh v. Peace*, 110 N. Car. 32; 32 Am. & Eng. Corp. Cas. 360.

1. *Hoyt v. East Saginaw*, 19 Mich. 39; 2 Am. Rep. 76; *Welker v. Potter*, 18 Ohio St. 85; *White v. Saginaw*, 67 Mich. 33; *McLauren v. Grand Forks*, 6 Dakota 379.

The provision of the Revised Stat. of Ohio, § 2304, that before any improvement is ordered, a resolution declaring its necessity must be passed by the council, is held to apply only to improvements by construction, and not to the appropriation of land for widening a street. *Longworth v. Cincinnati*, 21 Wkly. Law Bull. 100.

**Sufficiency of Resolution Declaring Necessity.**—A resolution adopted and published, declaring it necessary to grade, or otherwise improve a public street, must specifically designate the work declared necessary to be done, and the owners of property abutting upon such street will be liable only for the cost of such improvements as are specifically designated in the resolution so adopted and published in the official paper. *Mason v. Sioux City* (S. Dak. 1892), 51 N. W. Rep. 770.

The declaration of the necessity for a public improvement does not necessarily involve the enumeration of its details, but, although general in its character, covers the doing of whatever is necessary in the course of an improvement of the character designated. *Davies v. Saginaw*, 87 Mich. 439.

**Validity of Statute.**—A statute which confers upon drainage commissioners

the power to decide, after hearing the parties, whether the public health and welfare will be promoted by the intended work, is not invalid, although no right of appeal from the decision of the commissioners as to the necessity of the improvement, is provided, the legislature being vested with power to determine the necessity of the improvement, or to delegate the exercise of that power to officers or corporations. *State v. Stewart*, 74 Wis. 620.

2. *Delphi v. Evans*, 36 Ind. 90; *Indianapolis v. Imberry*, 17 Ind. 175; *Baker v. Tobin*, 40 Ind. 310; *Fayssoux v. De Chaurand*, 36 La. Ann. 547; *Covington v. Casey*, 3 Bush (Ky.) 698.

The board of town trustees being authorized to make assessments for street improvements on a petition of two-thirds of the owners of adjoining lots, or without a petition, by a two-thirds vote of the board, the fact that there was an insufficient petition will not avoid assessments made by a two-thirds vote. *McEneney v. Sullivan*, 125 Ind. 407.

Under a statute authorizing local improvements to be made upon the petition of property holders, or by a unanimous vote of the council, where it is averred that the ordinance was passed by a unanimous vote, it is not necessary to allege that there was a petition therefor. *Wren v. Indianapolis*, 96 Ind. 206.

In *Indianapolis v. Mansur*, 15 Ind. 112, a petition for the improvement of a certain street in the city of Indianapolis was presented to the common council, and the work ordered to be done, two-thirds of the members voting affirmatively. In defending against an assessment, a lot owner alleged that as the proceedings were commenced by a petition from property holders, and a sufficient number of them had not joined in the petition to meet the requirements of the statute, a two-thirds vote of the common council would not make that

is the case, it is necessary to give the council jurisdiction, and any proceeding had by it without the petition is void.<sup>1</sup>

valid which would otherwise have been invalid. But the court held that two-thirds of the council having voted for the ordinance, it was binding, although the proceedings on the petition may not have conformed to the provisions of the statute. See also *Lafayette v. Fowler*, 34 Ind. 140.

1. *Burnett v. Sacramento*, 12 Cal. 76; *Mulligan v. Smith*, 59 Cal. 206; *Gately v. Livingston*, 63 Cal. 365; *Dyer v. Miller*, 58 Cal. 585; *Dyer v. North*, 44 Cal. 157; *Kahn v. San Francisco*, 79 Cal. 388; *Dougherty v. Harrison*, 54 Cal. 428; *Steuart v. Baltimore*, 7 Md. 500; *Henderson v. Baltimore*, 8 Md. 352; *Holland v. Baltimore*, 11 Md. 186; *Bouldin v. Baltimore*, 15 Md. 18; *Howard v. First Presbyterian Church*, 18 Md. 451; *Dashiell v. Baltimore*, 45 Md. 615; *Baltimore v. Eschbach*, 18 Md. 276; *Howard v. Bristol*, 8 Bush (Ky.) 493; *Hager v. Burlington*, 42 Iowa 661; *Delphi v. Evans*, 36 Ind. 90; *Moberry v. Jeffersonville*, 38 Ind. 198; *Case v. Johnson*, 91 Ind. 477; *St. Louis v. Clemens*, 36 Mo. 467; *Miller v. Mobile*, 47 Ala. 163; *Board of Directors v. Houston*, 71 Ill. 318; *Updike v. Wright*, 81 Ill. 49; *Sleeper v. Bullen*, 6 Kan. 300; *Carron v. Martin*, 26 N. J. L. 594; *Camden v. Mulford*, 26 N. J. L. 49; *State v. Elizabeth*, 31 N. J. L. 176; *State v. Newark*, 37 N. J. L. 415; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *People v. Brooklyn*, 71 N. Y. 495; *Boyle v. Brooklyn*, 71 N. Y. 1; *Litchfield v. Vernon*, 41 N. Y. 129; *Wells v. Burnham*, 20 Wis. 112; *Fass v. See-hawer*, 60 Wis. 525; *Pittsburgh v. Walter*, 69 Pa. St. 365; *Jennings v. Moss*, 4 Tex. 452; *State v. Birkhauser* (Neb. 1893), 56 N. W. Rep. 303.

In making an assessment for an improvement which includes two classes of work, for only one of which a petition is necessary, the record should show that the petition was signed by the requisite number of property owners affected by that part of the work for which such petition is necessary. *Lathrop v. Buffalo*, 3 Abb. App. Dec. (N. Y.) 30.

In *Holland v. Baltimore*, 11 Md. 186, the city was authorized to pave streets when the proprietors of the majority of the feet of ground fronting on any street, should apply in writing therefor. Supposing that a majority of the pro-

prietors had united in the application, but which afterwards turned out not to be true, in consequence of one of the signers not being, in law, a proprietor the city paved a certain street, and, among others, paved in front of the plaintiff's lot, he not having signed the application. After the work had been done, the city sought to enforce the collection of the amount. Plaintiff applied for an injunction to restrain the sale of his lot to pay the assessment. The court of appeals held: First, that if the requisite majority of owners did not apply, the whole proceeding was null and void; second, that a non-assenting owner might (notwithstanding he did not apply for the writ until after the work was done) have an injunction to prevent the sale of his property to pay the unauthorized assessment.

Under a charter requiring local improvements to be petitioned for by a majority of those whose names appear upon the assessment roll, it is competent for the owners of a part of the land benefited, to petition for the improvement, and consent that the whole expense be assessed on their lands. *Baldwin v. Oswego*, 1 Abb. App. Dec. (N. Y.) 62.

Where it appeared that two or more blocks on each side of a street in San Francisco, had been graded, and that the work of further grading upon the same street had been recommended by the superintendent of streets, and the resolution of intention of the supervisors to do the work had been duly passed and published, it was not necessary that there should be a petition by the land-owners. *Spaulding v. Wesson*, 84 Cal. 141.

When a charter requires a petition to be signed by persons owning at least one-third of the property to be assessed, before an ordinance providing for a local improvement can be passed, and two petitions were presented, each asking for a main sewer, and one asking for branch sewers also, it was held that as the petitions were united in asking for the construction of the main sewer, a valid ordinance providing therefor could be passed. *Works v. Lockport*, 28 Hun (N. Y.) 9.

In *Fass v. Sheehawer*, 60 Wis. 525, it was held that where a petition by residents on a street, is required as a condition precedent to imposing a tax upon

The petition, where it is prescribed by statute, must comply fully with all requirements as to form, number of petitioners,<sup>1</sup> etc., and the fact that it has been made must be proved in the man-

property abutting on the line of the street, for improving it, if there are no residents thereon, the same purpose is answered by a petition from the community at large, for whose manifest advantage the improvement would be.

**Estoppel.**—Where the owner of land which has already been dedicated by him for public use as a street, has united with others in a petition for its adoption as such, he will not be allowed to question the validity of an ordinance levying an assessment for the purpose of operating it. *State v. Hudson*, 34 N. J. L. 25; *Johnson v. Allen*, 62 Ind. 57; *Burlington v. Gilbert*, 31 Iowa 356; 7 Am. Rep. 143; *Motz v. Detroit*, 18 Mich. 495. See *contra*, *Petition of Sharp*, 56 N. Y. 257.

In *Quinn v. Paterson*, 27 N. J. L. 35, it was held that a petition to city authorities, to curb and pave a street, will not estop a petitioner from showing, in an action of trespass, that such curbing and paving was done outside of the boundaries of the street.

While petitioners to the city council will be estopped in equity to deny the power to grant their petition, yet they will not be estopped to object that the proceedings upon their petition have been conducted in disregard of the law. *Steckett v. East Saginaw*, 22 Mich. 103. See *McLauren v. Grand Forks*, 6 Dakota 397; *Howell v. Tacoma* (Wash. 1892), 29 Pac. Rep. 447.

Persons who have signed a petition for the construction of a drain, who have given a release for the right of way, and who have assented to all the proceedings in laying out, establishing, and constructing the drain, cannot question the validity of the commissioner's proceedings for that purpose. But where the commissioner has failed to give the statutory notices of the time and place of letting contracts, and of the time when the assessment of benefits would be made, such parties are not, by their acts, estopped from objecting to the validity of the assessment, because of failure to give such notice. *Cook v. Covert*, 71 Mich. 249.

1. **Petition.**—A petition is sufficiently definite which states the termini of a sewer, its connections, the mode of finishing the lateral sewers, and which asks that the whole may be done according

to the general plan of sewerage, a general plan having been previously adopted by the city. *State v. Jersey City*, 30 N. J. L. 148.

Where, under a statute providing for the construction of a gravel road, a petition states that it is for a gravel road, that is a sufficient description of the kind of improvement prayed for; no other specification being required until the board of commissioners come to order the improvement to be made. *Stoddard v. Johnson*, 75 Ind. 20.

A petition for the establishment of a ditch, which, after describing certain lands belonging to the petitioner, which would be benefited by drainage, recites that such drainage "cannot, however, be accomplished in the best and cheapest manner without affecting the lands of others," and which avers that the petitioner "believes that such drainage can be best had and effected by a ditch commencing," etc., is sufficient compliance with the requirements of an act which provides that such petition shall state, generally, the method by which it is believed the proposed drainage can be accomplished in the cheapest and best manner. *Heick v. Voight*, 110 Ind. 279.

A petition by property owners, which asks for the improvement of "Oak street, between Willow and Schofield streets, being a distance of one square," is sufficient to warrant an ordinance or resolution for the improvement of "that portion of Oak street, and sidewalks thereto, lying between Schofield and Willow streets." *Wiles v. Hoss*, 114 Ind. 371.

A petition for the grading and paving of a street, is valid, though it does not contain a request for grading and paving the intersections. *Wahlgreen v. Kansas City*, 42 Kan. 243.

There is no substantial difference between the absence of a petition, and a petition lacking the substantial averments required by statute. *Turrill v. Grattan*, 52 Cal. 97.

**Number of Petitioners.**—The majority of owners is construed to be the owner or owners of a majority of running feet of property fronting on the street, or portion of the street, to be paved. *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251.

In a municipal corporation, three-fourths in interest, represented by the feet front of the owners of property abutting upon a street, petitioned for the improvement of the street by paving the same with wood and stone. Two petitions were presented to the city government; one, signed by a majority in such interest of the petitioning owners, asked, that the street should be "paved with eight feet of stone on each side, and twenty-four feet of wood between the stone;" and one, signed by a minority in such interest of the petitioning owners, asked, that the street should be "paved with not less than thirty-two feet of wood center, treated with the Thilmany process, and balance stone." The street was paved with stone and wood treated with the designated process, but not in the proportions of material asked by the minority petition. It was held that three-fourths in interest of the owners of property abutting upon the street, petitioned for the improvement. *Wamelink v. Cleveland*, 40 Ohio St. 381.

Where the statute required that two-thirds of the property holders, representing two-thirds of the whole number of feet on each side of the street, should petition for the improvement, but the statute was amended so that a majority of the owners were empowered to petition, it was held that the amendment went directly to the number of petitioners, and did not effect the provision touching the number of feet. *Kyle v. Malin*, 8 Ind. 34.

**Alteration of Petition.**—In *Graves v. Otis*, 2 Hill (N. Y.) 466, it was held that if, after some signatures have been obtained, an alteration of the petition is made, it avoids the proceedings if the requisite majority do not sign after the making of the alteration.

**Signature by Agent.**—Where a statute required the written consent of the owners of a majority of the lots fronting on the street to be improved, and the commissioners offered, in evidence, a paper purporting to be such consent, some of the signatures to which appeared to be affixed by agents, and there was no proof of the genuineness of most of the signatures, nor of the authority of those assuming to be agents, it was held that the paper was not, in itself, proof of the required consent, as against the objectors who had not signed, though it had been accepted and acted on by the commissioners. *Thorn v. West Chicago Park Com'rs*, 130 Ill. 594.

So where one name to a petition was signed "*per H., Atty.*," and it appeared that the attorney had not seen his principal, but acted under a written power of attorney which was not proved, and which was received from a third person, it was held that such name could not be counted. *State v. Bayonne*, 54 N. J. L. 293.

**Majority of Owners—Who May Sign.**—In *Auditor Gen'l v. Fisher*, 84 Mich. 128, it was held that the determination of a township board, that a majority of the owners of property abutting upon a street have signed a petition for the grading of such street, is not conclusive; and that, in the absence of statutory provisions to the contrary, the question may be investigated in a collateral proceeding. In the same case it was held that, under a statute providing for "a petition of a majority of the property owners," where one petition was laid upon the table, and a new one presented for the same improvement, the names appearing upon the first, but not upon the second, could not be counted towards making up the necessary majority of the property holders. Also, that the administrator of an estate, lands of which are assessable for improvements to a street, cannot sign a petition as one of the property holders; and that where husband and wife hold land as joint tenants, the husband's signature alone, to such petition, will not entitle him to be counted towards the requisite majority. See *McEneny v. Sullivan*, 125 Ind. 407.

In *Holland v. Baltimore*, 11 Md. 186, it was held that the lessee for ninety-nine years, or for ninety-nine years renewable for ever, and not the owner of the fee, is the owner or "proprietor" to assent to the paving of unpaved streets.

Under a statute providing for a petition by a majority of "property owners" within the district, neither a stockholder of a company having property therein, nor an administrator of an estate, part of the property of which is in such district, are such property holders as may sign the petition to make up a majority. *Rector v. Board of Improvement*, 50 Ark. 116. See *Mulligan v. Smith*, 59 Cal. 206.

An alderman who was one of the petitioners, may vote for the improvement. *Steckert v. East Saginaw*, 22 Mich. 104.

In *California*, it is provided by statute that, on petition to the mayor, by the owners of a majority in frontage "as



ner called for, or, if the statute is silent as to the proof, by competent common-law evidence.<sup>1</sup>

*d. ORDINANCES, RESOLUTIONS, ETC.—(1) Necessity of.*—Where a city charter expressly requires the proceedings to be founded upon an ordinance, proceedings attempted to be authorized by resolution are invalid.<sup>2</sup> But if the charter is silent on the subject, a resolution will be sufficient.<sup>3</sup> Some action of the council, whether by ordinance or resolution, is the foundation of the proceedings and is indispensable.<sup>4</sup>

*(2) Enactment.*—The ordinance, order, or resolution, as the

said owners are or shall be named in the last preceding annual assessment roll for the state, city and county taxes," the board shall proceed. It was held that the signatures to the petition, of persons other than those to whom the property was assessed on the last preceding assessment roll, could not be counted in order to make up the owners of a majority of the frontage. *Kahn v. San Francisco*, 79 Cal. 388.

1. In *Litchfield v. Vernon*, 41 N. Y. 129, it was further held, that neither the application of the common council to the court, for the appointment of commissioners, nor the affidavit of the mayor accompanying such application, is evidence that a majority of the land-owners petitioned the council. See also *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Matter of Kiernan*, 62 N. Y. 457.

**Burden of Proving Assent by Property Owners.**—In such cases, the written consent of the requisite number of property owners being a jurisdictional matter, the burden of proving its proper execution is upon those who seek to enforce the assessment. *Thorn v. West Chicago Park Com'rs*, 130 Ill. 594. See *Henderson v. Baltimore*, 8 Md. 352; *Dashiell v. Baltimore*, 45 Md. 615.

In the absence of a provision for notice to the property owners, and a hearing on the sufficiency of the petition, neither the certificate of the mayor that the petition is sufficient, nor the judgment of the county court confirming the report of the board of public works, is conclusive of such sufficiency. *Mulligan v. Smith*, 59 Cal. 206; *Kahn v. San Francisco*, 79 Cal. 388.

But where the statute provides for publication of notice, and a hearing on the sufficiency of the petition, at the instance of any interested party aggrieved, the petition will be presumed to be sufficient, since the authorities must pass on the question in an orderly way before proceeding with the work. *Spaulding*

*v. North San Francisco, etc., R. Assoc.*, 87 Cal. 40.

The common council have a right to believe that every property owner petitioning for the improvement, does so in good faith, and not under a contract by which he is to be relieved of the whole, or any part, of his share of the cost of the improvement. Any agreement or combination among parties petitioning, by which a few individuals desirous of causing the improvement to be made, procure the signature of others to the petition, by paying or agreeing to pay a consideration therefor, is a fraud on the law, and contrary to public policy. *Maguire v. Smock*, 42 Ind. 1.

2. *Barron v. Krebs*, 41 Kan. 338; *State v. Bayonne*, 35 N. J. L. 335; *State v. Bergen*, 33 N. J. L. 72; *Cross v. Morristown*, 18 N. J. Eq. 305; *State v. Barnet*, 46 N. J. L. 62; *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281; *State v. Bayonne*, 54 N. J. L. 293.

3. *State v. Jersey City*, 27 N. J. L. 493; *Emery v. San Francisco Gas Co.*, 28 Cal. 375; *Creighton v. Manson*, 27 Cal. 613; *Deady v. Townsend*, 57 Cal. 298; *Harney v. Heller*, 47 Cal. 15; *Indianapolis v. Imberry*, 17 Ind. 175; *Mobery v. Jeffersonville*, 38 Ind. 198; *Delphi v. Evans*, 36 Ind. 90; *Terre Haute v. Turner*, 36 Ind. 522; *Merrill v. Abbott*, 62 Ind. 549; *Morrison v. Hershire*, 32 Iowa 271; *Waln v. Philadelphia*, 99 Pa. St. 330.

4. An act authorizing the streets of a city to be improved, which provides that the council shall have full power to improve in such way as it may deem proper, does not dispense with the necessity of the passage of a resolution and its publication, before an improvement can be made. *Oakland Pav. Co. v. Rier*, 52 Cal. 270. See also as to the necessity of an order, resolution, or ordinance, *Baltimore v. Porter*, 18 Md. 284; *Merrill v. Abbott*, 62 Ind. 549; *Delphi v. Evans*, 36 Ind. 90; *Indianapolis v. Mil-*

case may be, must be enacted in the manner prescribed by statute, and the provisions relating to the number of votes necessary to pass, and to the notice, signing, recording, etc., must be strictly pursued.<sup>1</sup>

ler, 27 Ind. 394; *Ruggles v. Collier*, 43 Mo. 353; *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562; *Huidekoper v. Meadville*, 83 Pa. St. 156; *Welker v. Potter*, 18 Ohio St. 85; *Matter of Schreiber*, 3 Abb. N. Cas. (N. Y. Supreme Ct.) 68; *State v. Jersey City*, 35 N. J. L. 404; *St. John v. East St. Louis*, 136 Ill. 207; *Lindsay v. Chicago*, 115 Ill. 122; *Fayssoux v. De Chaurand*, 36 La. Ann. 547; *Partridge v. Lucas* (Cal. 1893), 33 Pac. Rep. 1082.

A statute authorizing cities to make local improvements by special assessment, or otherwise, "as they shall by ordinance prescribe," must be strictly followed, and the city cannot first make an improvement without an ordinance, and afterwards levy a special assessment to pay for it. *Carlyle v. Clinton County*, 140 Ill. 512; *Michigan Cent. R. Co. v. Huehn*, 59 Fed. Rep. 335.

An ordinance was held to be unnecessary, where the statute fully provided for the improvement, and the proceedings conformed to the statute, except in regard to the time within which they were directed to be instituted. *Stevenson v. New York*, 1 Hun (N. Y.) 51.

By the charter, the members of the common council of Bridgeport have power to make a valid assessment for benefits accruing from the pavement of a street; and the vote of the council to adopt the apportionment recommended by a committee, although such report may be nothing more than an expression of opinion by individuals without authority, constitutes an order or decree fixing the amount assessed; whether that which went before was valid or void, is of no moment. The assessment came into existence by virtue of the creative power of the vote adopting the apportionment. *Bartram v. Bridgeport*, 55 Conn. 122.

The common council of a city is authorized to change the grade of the streets, avenues, and alleys, subject to the provisions of the law; but such change of grade, materially enhancing the cost of grading such street, avenue, or alley, cannot be made after the resolution declaring the necessity for grading the street, avenue, or alley, has been adopted and published, the time for filing a protest by property holders has

expired, and the contract for grading executed, without adopting a new resolution and publishing the same, etc., as provided by law. *Mason v. Sioux Falls* (S. Dak. 1892), 51 N. W. Rep. 770.

Although one part of an ordinance for street improvements may be void under the statute, the other portion directing the work to be done, and contract to be let, may be sustained. *State v. Portage*, 12 Wis. 562.

1. *Merrill v. Abbott*, 62 Ind. 549; *In re De Pierris*, 82 N. Y. 243; *Matter of Little*, 60 N. Y. 343. See ORDINANCES, vol. 17, p. 237 *et seq.*

In *Delphi v. Evans*, 36 Ind. 90, it was said that an improvement of this character must be made under an ordinance, a motion, or a resolution, but whatever mode may be adopted, it must comply with the requirements of the charter. It must be in writing, and where there is a petition for the improvement, it must be passed by a vote of the majority of the council, or by a two-thirds vote where there is no petition. The order made must be entered of record, together with the vote on its passage showing that it was adopted by the requisite vote. See *Waln v. Philadelphia*, 99 Pa. St. 330.

A single entry by the clerk upon the records of the city council, that ordinances for the improvement of several streets, naming them, were passed, does not show that all were voted upon at one time, but the presumption is that they were voted upon separately, as required by the charter. *Nevin v. Roach*, 86 Ky. 492.

Where a city charter provided that the yeas and nays should be called and published, whenever the vote of the common council was taken on any proposed improvement involving a tax or assessment, the provision was held to be directory only; the essential requisite being the determination of the corporation, and not the mere form of expressing it. *Striker v. Kelly*, 7 Hill (N. Y.) 9. See *contra*, *Steckert v. East Saginaw*, 22 Mich. 104; *Reynolds v. Schweinkuss*, 1 Cinc. Super. Ct. 215; *Rich v. Chicago*, 59 Ill. 286.

It is no objection to the validity of an assessment, that the ordinance levying it did not receive from the city council

two several readings, as required by the rules of the city council. *Holt v. Somerville*, 127 Mass. 408.

In *Jones v. Boston*, 104 Mass. 461, it was held that the omission of the board of aldermen to allege in the order altering a street, that such alteration was made under the statute authorizing it, is no ground for quashing the proceedings on *certiorari*, as not being conducted under that statute, if the order was passed while it was in force, and the record shows that they intended to, and did, proceed in conformity therewith.

**Statute Requiring Two-thirds Vote for Resolution.**—Resolutions instructing the assessor to prepare the roll and report a local assessment to the common council, and accepting the roll and declaring it the tax roll, and directing the necessary warrant for the collection of the assessment to be affixed to the roll, are resolutions ordering taxes and assessments within the meaning of a provision in a charter requiring a two-thirds vote to pass resolutions of that nature; and in such case, if the common council has adopted no rule regulating the practice upon motions for reconsideration, it will require a two-thirds vote of the council to reconsider such action. *Whitney v. Hudson*, 69 Mich. 189.

Where simply a majority vote is required, a majority of a legal quorum is sufficient. *Rushville, etc., Gas Co. v. Rushville*, 121 Ind. 206.

Where a statute provided that an improvement might be made upon a petition of the majority of the property holders, or upon a two-thirds vote of the common council, without such petition, the transcript must show affirmatively that the improvement was ordered by a two-thirds vote of all the members of the council, in case no petition is presented. *Moberry v. Jeffersonville*, 38 Ind. 198.

But where a charter provides that the ordinance "shall be passed with the unanimous consent of the mayor and councilmen in council," it was held that an ordinance purporting to be passed by the mayor and councilmen, will be presumed to have been passed in the mode prescribed by charter. *Lexington v. Headley*, 5 Bush (Ky.) 508. See also *Covington v. Casey*, 3 Bush (Ky.) 698.

**Notice.**—Where a charter provides that public notice shall be given of the introduction of all ordinances for im-

provements to streets, an ordinance introduced without notice is void, and will be set aside; and the notice must state correctly the substance of the proposed ordinance. *State v. Long Branch Com'rs*, 54 N. J. L. 484.

**Signature.**—In order for such a resolution or order to be of any effect, it must be signed by the mayor or other presiding officer of the council. *Waln v. Philadelphia*, 99 Pa. St. 330; *Kinsella v. Auburn* (Supreme Ct.), 7 N. Y. Supp. 317. But under *California* Act, 1862, section 3, it is held that the mayor is not bound to sign a resolution of the board of supervisors declaring their intention to improve a public street. *Taylor v. Palmer*, 31 Cal. 240; *Hendrick v. Crowley*, 31 Cal. 471; *Beaudry v. Valdez*, 32 Cal. 269; *Cochran v. Collins*, 29 Cal. 129. See *State v. Jersey City*, 30 N. J. L. 148; *Blanchard v. Bissell*, 11 Ohio St. 96; *Martindale v. Palmer*, 52 Ind. 411.

Under the charter of the city of South St. Paul, resolutions of the common council, in proceeding to assess real estate for street improvements, if not approved and signed by the mayor, and it not appearing that they were ever presented to him, are of no effect. His approval cannot be attested in any other way than by his signature. *State v. Dakota County Dist. Ct.*, 41 Minn. 518.

In *Twiss v. Port Huron*, 63 Mich. 528, it appeared that the city charter provided that the resolutions of the city council should be submitted to the mayor for his approval, before going into effect. An assessment for public improvements was undertaken in accordance with the provisions of a resolution which was not so submitted, and it was held that it was invalid and could not be enforced. See *Creighton v. Manson*, 27 Cal. 613.

Where a resolution providing for an improvement was passed, and publication made as required by statute, but at the time of publication the resolution had been approved by the mayor's clerk, and not by the mayor, and the plaintiff, a taxpayer, had actual notice of the publication, and it also appeared that after the roll was completed, it was delivered to the city clerk, who published the required notice that it was on file in his office, it was held that while the mayor could not delegate his authority to sign the resolution, yet publication before approval of the resolution was an irregularity, which the

(3) *Requisites as to Form and Sufficiency.*—The ordinance, resolution, or order must be in writing,<sup>1</sup> and must, in positive and appropriate terms, declare that the improvement shall be made.<sup>2</sup> It must specify the nature, character, and plan of the proposed improvement in such a way as to give at least a general direction as to the letting of the work and execution of the contract contemplated by such order,<sup>3</sup> and must, it seems, fix the amount to

plaintiff had waived by failing to file objections with the city clerk. *Lyth v. Buffalo*, 48 Hun (N. Y.) 175.

**Recording.**—In the absence of a charter provision requiring it, it is not necessary that an ordinance for a street improvement, or the contract and apportionment made pursuant thereto, should be spread in full upon the records of the city council. *Nevin v. Roach*, 86 Ky. 492.

**Rescission of Ordinance.**—Under a charter which provides that, whenever an assessment shall be invalid by reason of any irregularity, the council may order a new assessment, a majority of the council has the power to rescind the ordinance or resolution ordering the assessment, nor is this power affected by the fact that a greater number of the council voted for the resolution than to rescind it. *Townsend v. Manistee*, 88 Mich. 408.

1. *Delphi v. Evans*, 36 Ind. 90; *Powers's Appeal*, 29 Mich. 504.

2. In *Dougherty v. Hitchcock*, 35 Cal. 512; *Merrill v. Abbott*, 62 Ind. 549, it was held that resolutions "that, in the opinion of this council, the present condition of Main street from," etc., "to," etc., is not only a public nuisance, but detrimental to the interests of the city, and "that the city engineer be and is hereby instructed to advertise for bids for grading and graveling the said Main street from," etc., "to," etc., "including sidewalks; said work to be done at the several property holders' expense on the line of said work; bids to be read at our next regular meeting," do not constitute a proper order for the improvement of such street.

So in *Mason v. Sioux Falls* (S. Dak. 1892), 51 N. W. Rep. 770, it was held that the cost of curbing a certain avenue, contracted for by the city under the following resolutions: "Resolved, that it is necessary that Prairie avenue, between Fourth and Twelfth streets, in said city of Sioux Falls, be graded and worked to the established grade," cannot be imposed upon the property abutting upon said improvement. The cost

of the grading, however, if it can be ascertained, independently of the curbing, may be enforced against the abutting property.

**Construction of Ordinance.**—If an ordinance providing for the opening or improving of a street, declares in terms that the improvement is for the general public benefit or convenience, without anything more, the presumption is that the ordinance was made with exclusive reference to the general public convenience, and with no reference whatever to local benefits, and, therefore, the costs of the improvement are to be borne exclusively by the public treasury. *Burns v. Baltimore*, 48 Md. 198. But if the ordinance is silent upon the subject of the interests or benefits to be subserved, the presumption is that it contemplated local benefits as well as the general public convenience, and, therefore, the owners of adjoining property must be assessed for the expense. *Baltimore v. Hanson*, 61 Md. 462; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1. See *Moale v. Baltimore*, 61 Md. 224.

3. *Merrill v. Abbott*, 62 Ind. 549; *Hays v. Vincennes*, 82 Ind. 178; *Smith v. Duncan*, 77 Ind. 92; *Woods v. Chicago*, 135 Ill. 582; *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562; *Sterling v. Galt*, 117 Ill. 11; *Brady v. King*, 53 Cal. 44; *Haegele v. Mallinckrodt*, 46 Mo. 577; *St. John v. East St. Louis*, 136 Ill. 207; *Hyde Park v. Spencer*, 118 Ill. 446; *Kankakee v. Potter*, 119 Ill. 324; *Ogden v. Lake View*, 121 Ill. 422; *Levy v. Chicago*, 113 Ill. 650. See *Butts v. Rochester*, 1 Hun (N. Y.) 598.

A resolution of intention to have a street macadamized, gives no authority to include in the contract a provision for rock gutter ways. *Partridge v. Lucas* (Cal. 1893), 33 Pac. Rep. 1082.

An ordinance which provides for the construction of a box drain two miles long, but which makes no provisions for any opening except at the ends, and which does not in any way designate the territory to be drained, does not

comply with a statute which requires that ordinances for improvement, to be paid for by local assessments, shall specify the "nature, character, locality, and description" of such improvement. *Hyde Park v. Carton*, 132 Ill. 100.

An ordinance for paving a street, which provides that "the brick to be used in said pavements shall be of the best quality," that the roadbed be excavated ten inches, the space filled with five inches of gravel, and the remaining five inches with paving brick, placed upon the gravel after it has been well packed, sufficiently describes the nature and character of the paving. *Kimble v. Peoria*, 140 Ill. 157.

An ordinance for the construction of a sewer, which names three several curves between two given points without giving the radius, as, for instance, after naming a point, saying "thence curve until it intersects with a point" named, where the curves are for very short distances and adapted to the purposes of the sewer, and can be properly located only in one way from the whole ordinance taken together, is not void for uncertainty. *Hyde Park v. Borden*, 94 Ill. 26.

Under a statute which provides that an ordinance for a local improvement shall describe the improvement, either by setting forth the description in the ordinance itself, or by referring to maps, plats, plans, profiles, or specifications on file in the office of the proper clerk, a reference in a village ordinance to the plan on file in the office of the village clerk, is sufficient. *Steele v. River Forest*, 141 Ill. 302. See *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656.

It is sufficient if the resolution refers by number to certain ordinances, for the manner of performing the work. It need not recite the provisions of the ordinances. *Williams v. Bisagno* (Cal. 1893), 34 Pac. Rep. 640.

Where it was objected that the common council did not declare their determination to pave the street with stone, it was held that this determination was sufficiently declared by the order directing the contract to have it so paved. *Williams v. Detroit*, 2 Mich. 560.

Under an ordinance which provides for the improvement of certain streets and alleys, and directs the levy and collection of a special tax upon property "in proportion to the frontage thereof upon the streets or parts of streets" or-

dered to be paved, and omits the word "alleys," the property owners cannot complain if only the expense of paving the streets upon which the lots abutted, was assessed against them, and there was no assessment for paving the alley. *Wilbur v. Springfield*, 123 Ill. 395.

**Location of Man-holes.**—An ordinance which provides for the construction of a sewer "with necessary man-holes," but which does not specify the location of the man-holes, is not invalid under a statute which requires that ordinances providing for local improvements to be paid by special assessment, must set forth the nature, character, locality, and description of such improvement. *Springfield v. Sale*, 127 Ill. 359; *Springfield v. Mathus*, 124 Ill. 88; 22 Am. & Eng. Corp. Cas. 347.

An ordinance which directed an improvement to be made by establishing a system of drainage by means of sewers, well and pumping works, provided that the man-holes mentioned therein should be "furnished with iron covers, of the size and weight of those now in use on the man-holes in the sewer in Garfield Boulevard from South Park avenue to State street;" that certain boilers and arches should be "furnished with a cast-iron boiler front, of a pattern similar to the one now in use at the Hyde Park water-works;" that upon certain beds of concrete described in the ordinance "brick masonry, of suitable shape to support the pumping engines herein provided for" shall be constructed; and that "said sewers extending along the line of Sixty-third street shall be provided with house connection slants, of four inches internal diameter, opposite every lot fronting said Sixty-third street, on both sides of said street." It was held that the ordinance sufficiently specified the nature, character, locality, and description of the proposed improvement as required by statute, and that it was not necessary that it should specify the size, weight, and other details of the man-hole covers, the dimensions, pattern, and weight of the cast iron boiler fronts, and the exact number of the house connection slants. *Pearce v. Hyde Park*, 126 Ill. 287.

**Fixing Grade.**—It is the duty of a city council to fix the grade of a street proposed to be made, and to specify the improvements to be made. If the council fails to do this, a person whose property it is proposed to tax for such improvement, may allege such failure in his answer, which will present a valid

be raised by special assessment.<sup>1</sup> The location of the improvement must be definitely set out, and an ordinance which declares only that a street shall be improved "where necessary" is not sufficient;<sup>2</sup> nor can more than one improvement be included in a single resolution or ordinance.<sup>3</sup> The resolution or ordinance

defense. *Joyes v. Shadburn* (Ky. 1890), 13 S. W. Rep. 361.

1. *Sterling v. Galt*, 117 Ill. 11.

A municipal ordinance which fixes the tax to be levied for carrying out a local improvement, viz.: the total cost of the improvement, not including the cost of paving street intersections and the right of way of railroad companies; and provides for its assessment upon the abutting property in proportion to the frontage, sufficiently fixes the amount to be raised by special taxation. *Green v. Springfield*, 130 Ill. 515.

But where an ordinance provides that the entire cost of an improvement, except street and alley intersections, shall be raised by special tax levied upon contiguous property, and that the cost of the improvement of the street and alley intersections shall be paid by general taxation, it is not necessary that the ordinance shall state the amounts to be raised by special tax and by general taxation, since the data by which the several amounts may be fixed is sufficiently given. *Kimble v. Peoria*, 140 Ill. 157. See *Sterling v. Galt*, 117 Ill. 11.

In *Hosmer v. Hunt Drainage Dist.*, 135 Ill. 51, it was held that an order approving an estimate of the amount needed for a certain improvement, and directing the commissioners to assess the benefits of such improvement, does not compel the commissioners to assess the amount named in the estimate, regardless of the benefits received.

2. *People v. Ladd*, 47 Cal. 603; *Randolph v. Gawley*, 47 Cal. 458; *Richardson v. Heydenfeldt*, 46 Cal. 68; *People v. Clark*, 47 Cal. 456.

A resolution sufficiently locates the work to be done if it declares that the street will be graded and macadamized from one designated point to another. *Emery v. San Francisco Gas Co.*, 28 Cal. 346.

A resolution describing the work to be done, is not rendered uncertain by the provision excepting "that portion (of the street) required by law to be kept in order by the railroad company." *Whiting v. Townsend*, 57 Cal. 515. See *Wilder v. Cincinnati*, 26 Ohio St. 284.

In *State v. Newark*, 48 N. J. L. 101, it appeared that money was raised by general taxation of the property of the city, for the repaving of streets, but the ordinance providing therefor did not definitely describe the improvements to be made, although it stated that property benefited by the proposed improvements should be assessed. It was held that the property owners could not defeat the assessment on account of such irregularity, as it occurred in the proceedings for levying the general tax, and the objection came too late when the property owners had permitted the money thus raised to be expended for their benefit.

3. *Dyer v. Chase*, 52 Cal. 440; *Himmelmann v. Satterlee*, 50 Cal. 62. See *Beaudry v. Valdez*, 32 Cal. 270; *Mendenhall v. Clugish*, 84 Ind. 94; *Dickinson v. Worcester*, 138 Mass. 555; *People v. Yonkers*, 39 Barb. (N. Y.) 266; *Adams County v. Quincy*, 130 Ill. 566.

But an ordinance for laying a water-pipe to commence on one street, and, after some distance, to proceed by a right angle along another street, is not void as providing for two improvements. *Ricketts v. Hyde Park*, 85 Ill. 110.

Nor is an ordinance invalid by reason of the fact that it directs the paving of several streets, one of which is wider than the others. *Adams County v. Quincy*, 130 Ill. 566; *State v. Ramsey County Dist. Ct.*, 47 Minn. 406.

So a resolution of the board of supervisors, declaring an intention to improve a street, may include a declaration to grade and macadamize. *Emery v. San Francisco Gas Co.*, 28 Cal. 346.

A street may be improved for a greater distance than one square or block, under one order. *LaFayette v. Fowler*, 34 Ind. 140.

Where a charter provided that the "cost of grading any street shall be charged as a special tax on all property on both sides of the street graded," and the contract for grading a certain street provided that the earth taken from that street was to be deposited on another street, until a certain portion thereof was brought to grade, it was held that the contract and tax bills

however, need not enter into all the minor details of the improvement contemplated,<sup>1</sup> and to leave such details to other agencies of the municipality is not in violation of the rule that the common council or other local body on whom the power is conferred shall not delegate its authority.<sup>2</sup>

were void, as the performance of the contract would bring both streets to grade, at the expense of one. *Kansas City Grading Co. v. Holden*, 32 Mo. App. 490.

In *State v. Hudson*, 29 N. J. L. 104, it appeared that several ordinances had been passed for the improvement of different parts of a certain avenue, in response to as many petitions of property owners. Without any new petition, the council repealed these ordinances, and passed one ordinance for the regulation and improvement of the whole avenue, and it was held that the general ordinance was valid, and authorized the improvements which it provided for.

An ordinance for the paving of several streets and alleys, and parts of streets, with the same materials and in the same way, is not obnoxious to the objection that it embraces more than one improvement, even though there may be a difference of a few feet in the width of some of the streets, and the cost of paving certain railway tracks is excluded. *Fagan v. Chicago*, 84 Ill. 228.

1. *Taber v. Grafmiller*, 109 Ind. 206; *Taber v. Ferguson*, 109 Ind. 227; *Sheehan v. Gleeson*, 46 Mo. 100; *Pearce v. Hyde Park*, 126 Ill. 287; *People v. Clark*, 47 Cal. 456; *Himmelmann v. McCreery*, 51 Cal. 562; *Andrews v. Chicago*, 57 Ill. 239.

Although the statute authorizing a municipality to make improvements by special assessment, requires an ordinance to be passed specifying the nature, locality, and description of the improvement, the ordinance need not specify the width of the street to be paved. *Adams County v. Quincy*, 130 Ill. 566; *Woods v. Chicago*, 135 Ill. 582.

A resolution passed by the board of supervisors, declaring their intention to improve a street, need not contain the complete plan and specifications of the proposed improvement. The resolution need not describe the work with any more exactness than it is described in the law itself. *Harney v. Heller*, 47 Cal. 15.

In *Galbreath v. Newton*, 30 Mo. App. 380, it was held under the charter of the

city of Sedalia, which empowers the mayor and aldermen "to grade, pave, macadamize, or otherwise improve" a street, by ordinance only, that it was not necessary for the ordinance to provide for the mode, material, or character of the work, and that it was sufficient if specifications were in the hands of the city engineer, and adopted as part of the ordinance.

**Illegal Assessment by Calling a "Sewer" a "Street."**—A city council has not the power, by calling, in its ordinance, a "sewer" a "street," to construct the one under the pretense of repairing the other, so as to lay a burden of taxation which should have been borne by the public at large, upon a few adjacent property holders. *Clay v. Grand Rapids*, 60 Mich. 451.

**Variance Between Resolution and Contract.**—A resolution declaring an intention to improve a street in San Francisco, is not vitiated because it states an intention to grade and macadamize between two certain streets, while the contract, executed under the resolution, calls for grading and macadamizing that portion of the street except where done. *Emery v. San Francisco Gas Co.*, 28 Cal. 345.

Where the specifications for paving a street with granite, called for blocks ranging from seven to eight inches in depth, and the ordinance providing for the work called for eight-inch blocks, it was held that the variance between the contract and the ordinance, did not invalidate tax bills issued in payment for work done under the contract. *Cole v. Skrainka*, 105 Mo. 303.

Where it is not shown that injury resulted to the property owners, by reason of a variance between the resolution and contract, an assessment will not be set aside. *Voght v. Buffalo*, 133 N. Y. 463.

2. *Taber v. New Bedford*, 135 Mass. 162; *State v. New Brunswick*, 30 N. J. L. 395; *St. Joseph v. Owen*, 110 Mo. 445. See *supra*, this title, *Local Assessments—Power to Make*.

Thus, the fact that an ordinance for the construction of a carriage-way in a street, merely defines the width of the

(4) *Publication*.—It is often provided that the publication of the primary resolution of intention to make an improvement, or the ordinance authorizing it, is the only notice which need be given to the parties interested.<sup>1</sup> But even where this is not the case, the general rule is that such resolution or ordinance must be published for the time and in the mode described by law, else the assessment made thereunder will be of no effect.<sup>2</sup>

way, and leaves it to the engineer to locate the way, will not enable the owners of abutting property to escape the burden for the cost of the improvement, although the engineer may not have located the way in the center of the street, so as to leave equal spaces on either side of the carriage-way for sidewalks, the property owner not being entitled, as a matter of right, to have a certain space assigned him for making a sidewalk. *Nevin v. Roach*, 86 Ky. 492.

In *Cuming v. Grand Rapids*, 46 Mich. 150, it was held that a resolution of a common council, declaring the necessity of a street improvement, is not invalidated by including "the necessary bridges, etc.," without specifying what is necessary, especially if it does not appear that anything is necessary beyond the improvement of the street. The resolution does not delegate authority to decide upon the necessity, as details may afterwards be settled by the council.

A general ordinance provided that whenever a majority of the property holders, in any locality, should present a petition to the council asking for a street improvement, to be paid for by local assessment, it should be granted, and the mayor should be authorized to publish an order that such improvement should be made within sixty days. It also provided that the order of the mayor "shall specify briefly, but plainly, the time of the improvement ordered, the locality to which it is limited," etc. It was held that in authorizing publication of such an order, it was not necessary that the council should prescribe the dimensions of the improvement, nor the material of which it should be made, as that duty is to be performed by the mayor. *Main v. Fort Smith*, 49 Ark. 480.

An ordinance directing the paving of a street, at a specified cost, but leaving to subordinates the measurement of the work done, and the apportionment of the cost among the adjoining property holders, is not a delegation of legislative authority. *Walker v. District of*

Columbia, 6 Mackey (D. C.) 352; *Burlington v. Quick*, 47 Iowa 222.

An ordinance provided for paving the street, and required the pavement to be what is known as Bloomington Brick Pavement, and the foundation thereof to be laid of cinders and gravel, or other materials equally suitable, at least six inches deep; it was held that the ordinance was not obnoxious to the objection of uncertainty as to the materials to be used for the foundation. Nor was such an ordinance rendered invalid by a provision which required all the work done, and the materials used, to be subject to the approval of the city engineer, and in accordance with the plans and specifications to be furnished by the council, as such provision does not give him power to determine the kind of materials to be used, but only the right to see that those required are used, and that the work is done as directed by the ordinance. *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562.

An ordinance which provided that a street shall be "improved by graveling in street, brick sidewalks and paved gutters," according to specifications to be prepared by the city engineer, is not void for uncertainty, but is sufficient to authorize the letting of a contract for work. *Ross v. Stackhouse*, 114 Ind. 200.

But in *Smith v. Duncan*, 77 Ind. 92, it was held that an order which does not specify of what wood paving blocks should be made, how they shall be laid, and under what grade, but leaves this and similar matters to the city engineer, is insufficient, and will not warrant a precept for the enforcement of an assessment. Such delegation of the city council to the engineer is not permissible.

1. See *infra*, this title, *Notice*.

2. *Dubuque v. Wooton*, 28 Iowa 571; *Eno v. Mayor*, 53 How. Pr. (N. Y. Supreme Ct.) 382; *Matter of Anderson*, 60 N. Y. 457; *Dougherty v. Miller*, 36 Cal. 83; *Brady v. Burke*, 90 Cal. 1.

A resolution must be published in the paper designated by the council



*e. NOTICE*—(1) *Necessity*.—As has been seen, in those cases where the determination of the amounts to be assessed upon the several properties is a matter of judgment and discretion, a local assessment made and apportioned without notice to the owners of property affected is open to the serious constitutional objection of depriving the owners of their property without due process of law;<sup>1</sup> and in such cases it is held that notice of some sort is essential to the validity of an assessment, independently of any requirement therefor in the city charter.<sup>2</sup> In cases, however, where the only act necessary to ascertain the amount of an assessment upon property is a plain mathematical calculation, as where the apportionment is made by the front-foot rule or according to

for that purpose. *Petition of Astor*, 50 N. Y. 363; *Matter of Douglass*, 46 N. Y. 42; *Matter of Conway*, 62 N. Y. 504.

In *California*, Sundays may be included in the ten days required for the publication of the resolution of intention. *Taylor v. Palmer*, 31 Cal. 241; *Miles v. McDermott*, 31 Cal. 271.

Where the resolution directed publication for ten days from and after a particular date, and the publication was not in fact commenced until two days after the time fixed in the resolution, and was then made for the legal period of ten days, it was held to be a substantial compliance with the law. *Chambers v. Satterlee*, 40 Cal. 497.

In *New York*, it has been held that a single publication of a resolution authorizing a local improvement, two days before its adoption, is a sufficient compliance with the provision of a charter providing for at least two days' notice by publication. *Matter of Bassford*, 50 N. Y. 509.

An ordinance, *res ipsa*, though it may have no binding effect until after publication, is a different thing from its publication, and the court cannot infer that it was properly published because it was passed. *Napa v. Easterby*, 61 Cal. 509.

An allegation in the complaint, that, after the resolution of intention had been passed by the board of trustees for the grading and graveling of two blocks upon the same street, the street commissioners "caused to be conspicuously posted along said contemplated work, more than three notices of resolution, at less than three hundred feet in distance apart," shows a sufficient compliance with the statute in regard to the posting of the notices; and the fact that the work included a street

crossing, does not render it necessary that notice be also posted in front of each quarter block liable to be assessed. *Miller v. Mayo*, 88 Cal. 568.

In *Elkhart v. Wickwire*, 121 Ind. 331, it was held that the fact that ordinances for the construction of a sewer were never published, does not relieve a property owner from liability on the assessment, as the statute for the incorporation of cities in *Indiana*, makes no provision for the publication of any but penal ordinances.

1. See *supra*, this title, *Constitutionality*.

2. *State v. Jersey City*, 24 N. J. L. 662; *State v. Newark*, 25 N. J. L. 411; *State v. Trenton*, 36 N. J. L. 504; *State v. Plainfield*, 38 N. J. L. 95; *State v. Elizabeth*, 40 N. J. L. 278; *State v. Road Com'rs*, 41 N. J. L. 83; *Brewster v. Newark*, 11 N. J. Eq. 114; *Grace v. Board of Health*, 135 Mass. 490; *Powder's Appeal*, 29 Mich. 504; *Paul v. Detroit*, 32 Mich. 108; *Thomas v. Gain*, 35 Mich. 155; *Williams v. Detroit*, 2 Mich. 560; *Brown v. Denver*, 7 Colo. 305; *Gilmore v. Hentig*, 33 Kan. 156; *Jordan v. Hyatt*, 3 Barb. (N. Y.) 275; *Miller v. Graham*, 17 Ohio St. 1; *Baltimore, etc., R. Co. v. Wagner*, 43 Ohio St. 75; *Gatch v. Des Moines*, 63 Iowa 718; *Lyman v. Plummer*, 75 Iowa 353; *Ford v. North Des Moines* (Iowa, 1890), 45 N. W. Rep. 1031; *Strowbridge v. Portland*, 8 Oregon 467; *Scott v. Toledo*, 36 Fed. Rep. 385; *Murdock v. Cincinnati*, 39 Fed. Rep. 891; *Paulsen v. Portland*, 149 U. S. 38.

In *Scott v. Toledo*, 36 Fed. Rep. 385, it was held that notice of the adoption of the preliminary resolution declaring the necessity for an improvement, is not sufficient to warrant a local assessment therefor without further notice, unless the collection thereof is required to be

area, and no discretion is left to the officers, it has been held that a notice is not essential to the validity of the assessment and levy;<sup>1</sup> but in all cases the property owner must have notice, either actual or constructive, and an opportunity to be heard, before the lien is foreclosed and his property taken to pay the assessment.<sup>2</sup>

(2) *Requisites*.—The time and manner of giving notice are matters of legislative discretion, and it has been held accordingly

enforced by legal proceedings, in which all defenses as to its validity and amount may be raised.

In *Beaumont v. Wilkes-Barre*, 142 Pa. St. 198, it appeared that lot owners had notice of the proposition to improve the street, and an opportunity to appear before the council and be heard, but they had no notice of the subsequent proceedings to measure, value, map, and schedule the properties liable to assessment. It was held that such notice was sufficient, as the validity of the apportionment might be tested on the trial of the *scire facias* for the collection of the assessment. Citing *Pittsburg v. Coursin*, 74 Pa. St. 400; *White v. McKeesport*, 101 Pa. St. 394.

In *Chamberlain v. Cleveland*, 34 Ohio St. 551, it was held that where property owners have notice that an assessment has been made, and is on file in the office of the clerk, for the inspection and examination of persons interested therein, they have their opportunity to be heard, and, from this point, are bound to take notice of the proceedings, which must be regarded as pending. See also *Works v. Lockport*, 28 Hun (N. Y.) 9.

Where a property owner not only petitions for an improvement, but also agrees to pay his own assessment and any deficiency there may be after assessing the property of others, he thereby waives his right to notice, and an opportunity to be heard before the assessments are levied. *Murdock v. Cincinnati*, 44 Fed. Rep. 726.

1. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Gillette v. Denver*, 21 Fed. Rep. 822; *Clapp v. Hartford*, 35 Conn. 66; *Amery v. Keokuk*, 72 Iowa 701; *Cleveland v. Tripp*, 13 R. I. 50; *Davis v. Lynchburg*, 84 Va. 861; *Galveston v. Heard*, 54 Tex. 420; *Adams v. Fisher*, 63 Tex. 651; *Ray v. Jeffersonville*, 90 Ind. 567; *Beaumont v. Wilkes-Barre*, 142 Pa. St. 216; *Finnell v. Kates*, 19 Ohio St. 405. See also *Allen v. Charlestown*, 111 Mass. 123;

*Butler v. Worcester*, 112 Mass. 541; *Holt v. Somerville*, 127 Mass. 408; *Collins v. Holyoke*, 146 Mass. 307.

In *Gillette v. Denver*, 21 Fed. Rep. 822, *Brewer, J.*, said: "Now in this case, the tax is levied by the area; no question of value; no matter of judgment; a mere mathematical calculation; and of what earthly profit could it be for a taxpayer to have notice of that calculation? He can make it himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be. In the proceedings to assess this tax and to do the work, there are three steps: First, there is the making of the contract for the building of the sewer; second, there is the building of the sewer, the performance of the work; and third, the mere mathematical calculation, the apportionment of the cost. As to the latter, no notice can be required because notice would be of no avail."

2. *Allen v. Charlestown*, 111 Mass. 123; *Butler v. Worcester*, 112 Mass. 541; *Holt v. Somerville*, 127 Mass. 408; *Collins v. Holyoke*, 146 Mass. 298; *Gavin v. Wells County*, 104 Ind. 201; *Newman v. Emporia*, 41 Kan. 583; *Com'rs of Highways v. Drainage Com'rs*, 127 Ill. 581; *Townsend v. Manistee*, 88 Mich. 408; *Ulman v. Baltimore*, 72 Md. 587, *overruling* *Baltimore v. Scharf*, 56 Md. 50; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Moale v. Baltimore*, 61 Md. 224; *Alberger v. Baltimore*, 64 Md. 1; and *approving* *Baltimore v. Scharf*, 54 Md. 499.

Where the lien of the assessment can be enforced only by judicial proceedings in which the property owner has a right to a notice of sale, and an opportunity to question the validity of the assessment proceedings, no other notice is essential to the validity thereof. *Garvin v. Daussman*, 114 Ind. 429; *Law v. Johnson*, 118 Ind. 261; *Davidson v. New Orleans*, 96 U. S. 97; *Nevin v. Roach*, 86 Ky. 492; *Yeomans v. Riddle*, 84 Iowa 147; *Allen v. Arm-*

that the legislature may dispense with personal notice and may provide for notice by publication only.<sup>1</sup>

As a general rule, the form of notice, and the time and manner of its service, are prescribed by statute, and such provisions must be strictly complied with in all essential particulars.<sup>2</sup> The notice should be a reasonable one, and should be of such certainty as

strong, 16 Iowa 508; *Stewart v. Polk County*, 30 Iowa 28; *Nichols v. Bridgeport*, 23 Conn. 189. See also *supra*, this title, *Constitutionality*.

1. *State v. Plainfield*, 38 N. J. L. 95; *State v. Jersey City*, 24 N. J. L. 662; *State v. Road Com'rs*, 41 N. J. L. 83; *State v. Elizabeth*, 42 N. J. L. 56; *Matter of Depeyster*, 80 N. Y. 565; *Stuart v. Palmer*, 74 N. Y. 183; *Voght v. Buffalo*, 133 N. Y. 463; *Pooley v. Buffalo*, 122 N. Y. 599; *Remsen v. Wheeler*, 105 N. Y. 579; *Spencer v. Merchant*, 100 N. Y. 585; *People v. Turner*, 117 N. Y. 227; *Matter of Amsterdam*, 126 N. Y. 158; *Macklot v. Davenport*, 17 Iowa 379; *Dubuque v. Wooton*, 28 Iowa 571; *Henkle v. Keota*, 68 Iowa 334; *Lyman v. Plummer*, 75 Iowa 355; *Evans v. People*, 139 Ill. 552; *Brown v. Chicago*, 62 Ill. 106; *Armstrong v. Chicago*, 61 Ill. 352; *Ricketts v. Hyde Park*, 85 Ill. 110; *Andrews v. People*, 84 Ill. 28; *Gilmore v. Hentig*, 33 Kan. 156; *Chesapeake, etc., R. Co. v. Mullins* (Ky. 1893), 22 S. W. Rep. 558; *Brewer v. Springfield*, 97 Mass. 152; *Meggett v. Eau Claire*, 81 Wis. 326; *Lent v. Tillson*, 140 U. S. 316; *Paulsen v. Portland*, 149 U. S. 30.

It has been held that where the city charter contains no provision as to the mode of giving notice, it is competent for the city council to provide for notice by publication. *Lyman v. Plummer*, 75 Iowa 353.

2. *Wilson v. Trenton*, 53 N. J. L. 645; *State v. Orange*, 54 N. J. L. 111; *Simmons v. Gardiner*, 6 R. I. 225; *Matter of Burmeister*, 56 How. Pr. (N. Y. Ct. App.) 416; *Evans v. People*, 139 Ill. 552; *Williams v. Detroit*, 2 Mich. 560; *Hildreth v. Lowell*, 11 Gray (Mass.) 345; *Risley v. St. Louis*, 34 Mo. 404; *Clapton v. Taylor*, 49 Mo. App. 117; *Adams v. Fisher*, 63 Tex. 652; *Hawthorne v. East Portland*, 13 Oregon 270; *Ladd v. Spencer* (Oregon, 1892), 31 Pac. Rep. 474.

An immaterial departure from the statute, in giving notice, will not be fatal. *Matter of Lowden*, 89 N. Y. 548.

Where personal service is required, it must in all cases, be made. *Wilson v.*

*Trenton*, 53 N. J. L. 645; *Simmons v. Gardiner*, 6 R. I. 255; *Green v. Cincinnati*, 7 Ohio Cir. Ct. Rep. 233; *McGee v. Avondale*, 7 Ohio Cir. Ct. Rep. 246.

And where the statute requires notice, without prescribing the method of service, personal notice is presumed and should be given. *Sedalia v. Gallie*, 49 Mo. App. 392.

A requirement that the notice be served personally, or left at the residence of the landowner, is not complied with by leaving it on the table in his business office. *Mills v. Detroit*, 95 Mich. 422.

If the notice of the time and place of assessing benefits is published for the period required by statute, it is immaterial that two days intervened between the expiration of such period and the time of hearing. *Fairchild v. St. Paul*, 46 Minn. 540.

Where notice is required to be published for two successive weeks, it is sufficient to make two publications thereof one week apart in a weekly newspaper. *Ricketts v. Hyde Park*, 85 Ill. 110.

And where the notice was required to be published three times for three successive weeks, it was held that publications made on Friday and Saturday of the first week, each day of the next week, and on Monday and Tuesday of the third week, constituted a substantial compliance with the statute, notwithstanding three full weeks had not expired. *Andrews v. People*, 84 Ill. 28.

Where the first publication of the assessment roll was made on the same day that the resolution ordering it was approved by the mayor, but before it was approved, it was held that the publication was valid, following the general rule that fractions of a day are not regarded in law. *Pooley v. Buffalo*, 122 N. Y. 592.

A requirement that the notice be published for five successive days in the official city paper, is not violated by the omission of the publication from the Sunday edition of the paper. *Voght v. Buffalo*, 133 N. Y. 463. But there must

to inform the owners of property of the real character of the improvement intended and whether they will be affected thereby.<sup>1</sup> And this rule applies also where the statute is silent on the subject.<sup>2</sup>

(3) *Purpose of Notice—Right to be Heard.*—The purpose of the notice is to afford the property owners an opportunity to present whatever objections they may have to the levy of the assessment, and to be heard thereon,<sup>3</sup> at some time before it becomes final, by a tribunal clothed with authority to hear such objections,

be the required number of days' notice exclusive of Sunday. *Sewall v. St. Paul*, 20 Minn. 511.

And it has been held that where notice is required to be published for a specified number of days consecutively, Sunday should not be included. *Scammon v. Chicago*, 40 Ill. 146; *Jenks v. Chicago*, 48 Ill. 296.

But in *Clapton v. Taylor*, 49 Mo. App. 47, it was held to be immaterial that the last day of publication was on Sunday.

The common council should choose the paper in which to publish the notice. *Powers' Appeal*, 29 Mich. 504.

But in the absence of a requirement to the contrary, a paper printed in the English language must be selected. *Cincinnati v. Bickett*, 26 Ohio St. 49.

**Proof of Notice.**—Where an affidavit states that notice has been given to property owners as required, it need not set out the names of those to whom notice was sent. *Linck v. Litchfield*, 141 Ill. 469.

A certificate of publication which states that notice has been published five times in a daily newspaper, and gives the dates of the first and last publications, is insufficient to show compliance with a statute which required the notice to be published on five successive days, since two or more of the publications may have been made on the same day in different editions of the paper. *Evans v. People*, 139 Ill. 552. But it is necessary that the date of the last publication be given. *Brown v. Chicago*, 62 Ill. 106; *Butler v. Chicago*, 56 Ill. 341; *Beygeh v. Chicago*, 65 Ill. 189.

A certificate of publication should be given by the person who was publisher of the paper at the time the publication was made. *Armstrong v. Chicago*, 61 Ill. 352.

1. *Matter of Central Park Com'rs*, 51 Barb. (N. Y.) 277; *People v. Rochester*, 5 Lans. (N. Y.) 11; *Matter of*

*Orange St.*, 50 How. Pr. (N. Y. Supreme Ct.) 244; *Havermans v. Troy*, 50 How. Pr. (N. Y. Supreme Ct.) 510; *Schmidt v. Market St.*, etc., R. Co., 90 Cal. 37; *Hemingway v. Chicago*, 60 Ill. 324; *Baltimore v. Bouldin*, 23 Md. 328; *State v. Jersey City*, 27 N. J. L. 536; *State v. Bayonne*, 52 N. J. L. 503; *Tufts v. Charlestown*, 98 Mass. 583; *Hawthorne v. East Portland*, 13 Oregon 271; *Ladd v. Spencer* (Oregon, 1892), 31 Pac. Rep. 474; *Simmons v. Gardiner*, 6 R. I. 255.

It is not necessary, however, that all matters of detail be stated in the notice with technical precision. *Baltimore v. Bouldin*, 23 Md. 328.

The notice, in the case of the construction of a sewer, need not state its depth beneath the surface of the street. *People v. Rochester*, 5 Lans. (N. Y.) 11.

A notice for repaving will not support an assessment for paving. *State v. Jersey City*, 27 N. J. L. 536.

2. *State v. Elizabeth*, 32 N. J. L. 357; *State v. Jersey City*, 35 N. J. L. 404; *Garvin v. Daussman*, 114 Ind. 429.

3. *Stuart v. Palmer*, 74 N. Y. 183; *Ireland v. Rochester*, 51 Barb. (N. Y.) 414; *Matter of Amsterdam*, 126 N. Y. 158; *Thomas v. Gain*, 35 Mich. 155; *Brown v. Denver*, 7 Colo. 305; *City Council v. Pinckney*, 3 Brev. (S. Car.) 217.

A statute which provides for a hearing on notice to all parties interested, before the court to which the commissioners are to report, cannot be declared void, on the ground that such parties were not in the first instance given a hearing before such commissioners. *Wilson v. State*, 42 N. J. L. 612.

It was objected to the validity of a special assessment that those assessed had no opportunity to be heard. It appeared that the charter provided that after the assessment roll should be completed, the board of assessors should give notice of that fact, and that it should remain in their office twelve days for

which may be the board of commissioners or assessors themselves, or some court or board of review.<sup>1</sup> In some states it is provided that, after notice, a remonstrance or protest may be filed by a specified proportion of the property owners to be assessed, the effect of which will be to prevent the council from proceeding with the assessment until the parties filing it are heard.<sup>2</sup> Such

inspection. Where the requisite notice was given and the plaintiff, through his counsel, appeared before the board, it was held that he had had a sufficient opportunity to be heard. *Beecher v. Detroit*, 92 Mich. 268.

Where the assessment is to be made by the rule of benefits, it is ground for an avoidance thereof, if the taxing district is defined before the hearing. *State v. Otis* (Minn. 1893), 55 N. W. Rep. 143.

Where commissioners, after making their estimate and assessment, are required to give notice of the time and place when and where parties can be heard, and after a hearing, to complete their report, they exceed their jurisdiction, if they give a notice requiring all objections presented to be in writing. *Merritt v. Port Chester*, 71 N. Y. 309; *Hopkins v. Mason*, 42 How. Pr. (N. Y. Supreme Ct.) 115.

And where a charter directs that persons interested shall be heard before the council, it is an excess of authority for the council to limit the right to objections made in writing. *State v. Jersey City*, 25 N. J. L. 309.

But property owners may waive this objection by a failure to appear and object, or by voluntarily submitting their objections in writing. *State v. Jersey City*, 28 N. J. L. 500.

The council may not devolve the duty of hearing objections upon the clerk. *State v. Jersey City*, 25 N. J. L. 309.

But under an *Indiana* statute, it has been held that a notice to file objections with the clerk is sufficient. *Quill v. Indianapolis*, 124 Ind. 292.

1. The time for hearing objections depends upon the statute, and may be fixed after all the proceedings are had and the assessment is ready for confirmation, or there may be several opportunities to be heard at various stages of the proceedings. *State v. Jersey City*, 27 N. J. L. 536; *Wilson v. State*, 42 N. J. L. 612. Thus, where the act provides that when execution is issued for the amount of the assessment, the property owner may file an affidavit denying the whole or any part thereof, which affi-

davit is made returnable to the superior court, the issue thereon to be tried as in case of illegality, and that at such hearing he may show fraud or mistake, error or excess in the amount of the execution, want of authority to support the assessment, or failure to comply with the provisions of the statute and the ordinance in pursuance thereof, such property owner is not thereby deprived of his property without due process of law. *Speer v. Athens*, 85 Ga. 49. See *St. Louis v. Richeson*, 76 Mo. 470.

Where the council fixes a time for hearing objections, and does not meet at the time fixed, the assessment cannot be enforced. *Nashville v. Weiser*, 54 Ill. 245.

2. **Remonstrance or Protest.**—In *Burnett v. Sacramento*, 12 Cal. 76, it was held that the *California* statute only inhibits the council from proceeding with the improvement in case of protest, and it is competent for them to pass an ordinance in advance of the time, provided they do not try to enforce it.

The provision of the *New York* Laws 1882, § 990, ch. 410, requiring the discontinuance of proceedings for a street opening, when, upon a hearing to confirm the report of the commissioners, a majority of the persons interested appear and object to further proceedings, does not apply to proceedings for the opening of streets of the first class. *Matter of Board of Street Opening*, 133 N. Y. 436.

Where it is made the duty of the board of supervisors to pass upon a remonstrance, one who fails to join in such remonstrance is concluded by their decision, and may not attack it by way of defense to proceedings to collect an assessment against his property. *Spaulding v. North San Francisco, etc., Assoc.*, 87 Cal. 40.

Parties who do not remonstrate may not claim the benefit of a remonstrance by others. *Harney v. Heller*, 47 Cal. 15.

If the board orders the work to be done without passing directly upon the remonstrance, it is practically a passing

protest must be filed within the time fixed by law, and must be signed by the requisite number.<sup>1</sup>

(4) *Waiver*.—The notice itself, or any defects therein, may, in the case of local assessments, as in other cases involving personal rights, be waived by the parties entitled to it.<sup>2</sup>

upon and a decision against the remonstrance. *Harney v. Heller*, 47 Cal. 15.

1. *Burnett v. Sacramento*, 12 Cal. 70.

The question whether the signers constitute a majority of the owners affected by the improvement, is one of fact to be determined by the trustees. *Betts v. Williamsburgh*, 15 Barb. (N. Y.) 255.

The jurisdiction of the city to proceed with the work, will not be restored by a subsequent withdrawal of names of property holders reducing the number of signers below that required. *State v. Jersey City*, 44 N. J. L. 626; *Jersey City Brewing Co. v. Jersey City*, 42 N. J. L. 575.

The protest provided for by the *Kansas* act relating to cities of the first class, to be available must be of "two-thirds of the owners of the property resident in the city liable to taxation" for the street improvements, and not merely of "two-thirds of the property owners liable for the tax to be paid for said street improvements," without regard to residence. *Marshall v. Leavenworth*, 44 Kan. 459.

A remonstrance against proceedings of assessment for a local improvement, will not be regarded, if signatures necessary to make out the majority are not made by the parties whose names are used, and are not duly authenticated. *Matter of Tompkins Square*, 17 Abb. Pr. (N. Y.) 324, note.

Where it was provided by statute that where the owners of the greater part of the property remonstrate against an improvement, the unanimous approval of all the members of the board of public improvements is required to adopt the contemplated improvement, and that if a majority of such property owners fail to remonstrate, the improvement can be adopted by a majority vote of the board, it was held that a finding by the board that a remonstrance was not signed by a majority of property owners is not conclusive. And it was further held that the remonstrance need not be signed by any property owner in person, but that the signature of his authorized agent is sufficient.

*Fruin-Bambrick Constr. Co. v. Geist*, 37 Mo. App. 509.

2. *Waiver of Notice*.—*Quick v. River Forest*, 130 Ill. 323; *Waters v. Lake*, 129 Ill. 23; *Murphy v. Peoria*, 119 Ill. 509; *State v. Jersey City*, 26 N. J. L. 444; *State v. Jersey City*, 41 N. J. L. 489; *Walker v. Aurora*, 140 Ill. 402.

Where the board of public works of the city of St. Paul makes an assessment of benefits and damages to property resulting from a change of grade of a street, finding the benefits greater than the damages, and the property owner voluntarily pays the balance or difference collectible from him, he thereby acquiesces in the assessment, and waives the omission to publish the notices of the completion and confirmation of the assessment, and cannot interpose such omission as an objection to an assessment subsequently made against his property for grading the street in accordance with the changed grade. *State v. Ramsey County Dist. Ct.*, 40 Minn. 5.

Property owners who had actual notice of a proposition to pave a street, and who have objected to the assessment therefor on other grounds, are estopped from asserting, in a suit brought by them for an injunction, that the formal notice served upon them was too remote in point of time. *Beaumont v. Wilkes-Barre*, 142 Pa. St. 198.

Where an ordinance provided for a local assessment, but required no notice in pursuance of the statute under which it was passed, it was held that, however fatal the objection as to the manner of notice might have been, if properly taken and acted upon, it could not be allowed to prevail after considerable delay, under circumstances rendering it probable that the parties were aware of the inception and progress of the work, and especially after the improvement had been completed and paid for by the city. *State v. Paterson*, 36 N. J. L. 159.

A taxpayer, by appearing in court, and resisting the entering of a judgment against his property, will not be deemed to have waived his right to object that he has been afforded no proper

*f. THE ASSESSMENT—(1) Time of Assessment.*—Whether the assessment should be made before or after the completion of the work, is a matter of legislative discretion. In some cases, an estimate and assessment may be made before the work is begun, in order to provide funds for carrying it on;<sup>1</sup> in others, the city is authorized to make the improvement at its own expense, and, after it is done, to assess the cost thereof on the lands benefited.<sup>2</sup> Again, it may be left to the discretion of the municipal authorities to adopt one or the other of the foregoing plans.<sup>3</sup>

opportunity to be heard respecting the fairness of the assessment. He may urge the want of such opportunity, as a reason why the judgment should not be entered. *Nashville v. Weiser*, 54 Ill. 245.

1. *The Assessment.*—*Henderson v. Baltimore*, 8 Md. 352; *Scovill v. Cleveland*, 1 Ohio St. 126; *Thomason v. Rugles*, 69 Cal. 465; *Oakland Pav. Co. v. Hilton*, 69 Cal. 479; *Kingman v. Metropolitan Sewerage Com'rs*, 153 Mass. 566.

In *Goodrich v. Omaha*, 10 Neb. 98, it was held that damages paid to property owners, by reason of a change of the established grade of a street, could not be reimbursed to the city by means of a special assessment on abutting property, as it would be useless to pay out money in one proceeding, only to recover it back in another form, from the persons to whom it was paid. See also *Folz v. Cincinnati*, 2 Handy (Ohio) 261; *Freeman v. Hunter*, 7 Ohio Cir. Ct. Rep. 117; *Davis v. Newark*, 54 N. J. L. 595, where it is said that the adjudication that the property is damaged, concludes both parties while it stands.

But an award of damages for the taking of a portion of a piece of land, is no bar to a subsequent assessment against the remainder, for benefits. *School Furniture Co. v. Grand Rapids*, 92 Mich. 564.

Where more has been collected than is necessary to meet the expense of the improvement, the surplus should be refunded to the owners of property assessed, in the proportion of the amounts paid by them respectively; and, if it is not so repaid, *assumpsit* will lie to recover the same. *Thayer v. Grand Rapids*, 82 Mich. 298.

2. *Lincoln v. Worcester*, 122 Mass. 119; *Prince v. Boston*, 111 Mass. 230; *Jones v. Boston*, 104 Mass. 465; *Chase v. Springfield*, 119 Mass. 563; *Sheehan v. Owen*, 82 Mo. 458; *Bradley v. West Duluth*, 45 Minn. 4; *Elkhart v. Wickwire*, 121 Ind. 331.

But in such cases, it is not necessary that the sidewalks be laid before making the assessment for laying out and grading a street. *Whiting v. Boston*, 106 Mass. 89.

Neither is the mere want of railings or barriers for the protection and safety of the public, such a lack of completion as will prevent an assessment. *Chase v. Springfield*, 119 Mass. 563.

Where a period of limitation is prescribed by the legislature, within which assessments are to be made, assessing boards must act within such period or not at all. *Hitchcock v. Springfield*, 121 Mass. 382. But where no period of limitation is prescribed, it is within the discretion of assessment boards when assessments shall be made. *Fairbanks v. Fitchburg*, 132 Mass. 48; *Himmelman v. Cofran*, 36 Cal. 411; *Matter of Brown*, 14 Daly (N. Y.) 103; *Bradley v. Greenwich Board of Works*, 3 Q. B. Div. 384.

Nevertheless, it is proper to make the assessments promptly, upon the completion of the work. *Boston v. Shaw*, 1 Met. (Mass.) 136; *Wright v. Boston*, 9 Cush. (Mass.) 233; *Fairbanks v. Fitchburg*, 132 Mass. 48.

There is no reason why an assessment may not be made for work already done in good faith by the corporate authority. *Ricketts v. Hyde Park*, 85 Ill. 112; *Creote v. Chicago*, 56 Ill. 423; *Goodrich v. Minonk*, 62 Ill. 121; *Howell v. Buffalo*, 37 N. Y. 267.

But a city has no right to include in an assessment for one improvement, the cost of another made three years before, for which no assessment was made. *Brown v. Fitchburg*, 128 Mass. 282.

Neither may an assessment be made for work which has been done by private individuals on their own responsibility. *Pease v. Chicago*, 21 Ill. 500; *Peck v. Chicago*, 22 Ill. 578.

3. *Manice v. New York*, 8 N. Y. 120; *Matter of Roberts*, 81 N. Y. 62; *Doughty v. Hope*, 3 Den. (N. Y.) 249.

It has been held that an assessment should not be made until the city acquires title to or an easement in the land upon which the improvement is to be made.<sup>1</sup> But, on the other hand, it has been held that the assessment may be made in advance of the acquisition of such title or easement.<sup>2</sup> And there is no reason, in the nature of things, why the condemnation and assessment proceedings should not occur at the same time.<sup>3</sup>

(2) *Plans and Estimates of Expenses*—(a) *In General*—By Whom Made.—It is sometimes made a condition precedent to the levying of a local assessment that a plan and an estimate of the cost of the proposed work be made and filed for the inspection of the parties interested.<sup>4</sup> The question as to who shall do this depends on statutory provisions which devolve the duty on various municipal officers, in some cases on certain boards, such as a board of public works or street commissioners, and sometimes on a single officer, as the city engineer or surveyor.<sup>5</sup>

1. *Baltimore v. Hook*, 62 Md. 371; *Matter of Rhinelander*, 68 N. Y. 105; *People v. Haines*, 49 N. Y. 587; *Leavenworth v. Laing*, 6 Kan. 274.

2. *Holmes v. Hyde Park*, 121 Ill. 128; *Hyde Park v. Borden*, 94 Ill. 26; *Hun-erberg v. Hyde Park*, 130 Ill. 156; *Leman v. Lake View*, 131 Ill. 388; *Maywood County v. Maywood*, 140 Ill. 216.

3. And the same commissioners who assessed the damages in one proceeding may be authorized to assess the benefits in another. *McKusick v. Stillwater*, 44 Minn. 372; *State v. Passaic*, 41 N. J. L. 90.

4. *Plans and Estimates*.—*Workman v. Chicago*, 61 Ill. 463; *Gilmore v. Hentig*, 33 Kan. 156; *Kelly v. Cleveland*, 34 Ohio St. 468; *Frosh v. Galveston*, 73 Tex. 401; *Olson v. Topeka* (Kan. 1889), 21 Pac. Rep. 219. See *State v. Passaic*, 44 N. J. L. 580; *Thomason v. Ruggles*, 69 Cal. 465.

Where a city charter provided that whenever the commissioners shall determine to make any public improvement, they shall cause an estimate of the expense to be made and filed with the comptroller, for the inspection of the parties interested, the omission to make and file such estimate was held to vitiate the assessment. *Weller v. St. Paul*, 5 Minn. 95; *Myrick v. La Crosse*, 17 Wis. 442. See *Nash v. St. Paul*, 8 Minn. 172, where it is said that the want of such an estimate might result in the setting aside of the particular assessment, if objected to on that ground, but would not vitiate the contract for the performance of the work.

The estimate of an examiner, which

gives only the probable cost of the improvement, without giving the details, is insufficient. *Friedenwald v. Shipley*, 74 Md. 220. So where the engineer's estimate consisted only of two items, giving the amount of surface to be "paved with stone," and the amount to be "paved with asphaltum," such estimate was held to be insufficient. *Erie v. Brady* (Pa. 1892), 24 Atl. Rep. 641.

*Plans and Specifications*.—Where the making and filing of plans and specifications of work to be done are conditions precedent to the power of commissioners to advertise for proposals and award contracts, the due filing of full specifications of the work will not render such contracts and assessments for the improvements valid, if the plans have not been made and filed as required by the statute. *Kneeland v. Milwaukee*, 18 Wis. 411; *Wells v. Burnham*, 20 Wis. 112. See also *State v. St. Louis*, 56 Mo. 277; *Gilmore v. Utica*, 131 N. Y. 26. But see *Becker v. McCloud*, 4 Ohio Cir. Ct. Rep. 305.

An assessment will not be vitiated by the fact that the specifications require work not mentioned in the resolution of intention, if such additional work is not mentioned in the contract, and it does not appear that it was done, or that any charge was made for it. *Oakland Pav. Co. v. Ries*, 52 Cal. 270.

5. Thus, in *Illinois*, a town charter required that the amount to be assessed for public improvements as special benefits upon property, should be determined by the board of trustees. *Crawford v. People*, 82 Ill. 557.



(b) **What To Be Included.**—The estimate properly includes only the fair and reasonable cost necessary to complete the whole work.<sup>1</sup> If a street is to be opened, the money required to compensate the owners of the land taken for the opening is a necessary item of the costs.<sup>2</sup> The estimate may also include amongst the incidental expenses that of engineering and surveying,<sup>3</sup> except when this is done by an official employed regularly by the city at a fixed salary;<sup>4</sup> also the cost of such printing and advertising as are necessary to the carrying on of the work;<sup>5</sup> the salary of a superin-

In *Kansas*, the city engineer of a city of the first class must make a detailed estimate of the expenses. *Olson v. Topeka* (Kan. 1889), 21 Pac. Rep. 219.

It is sufficient if the board of public works adopts, approves, and reports to the council an estimate made by the city surveyor. *Cuming v. Grand Rapids*, 46 Mich. 150.

1. **What Included.**—The cost of grading a street preparatory to paving it, may be included in the assessment; also the cost of grading that part of the street embraced in the sidewalks, which was necessary for the proper laying and protection of the curbing and guttering included in the work of paving. *Dashiell v. Baltimore*, 45 Md. 615.

In estimating the expense of a proposed improvement under the municipal code of *Ohio*, the expense of building a wall necessary for the protection of the street, which is built partly on the street, and partly on adjoining property, may be included in the estimate. And so of the cost of lateral and cross drain pipes which are necessary to make the improvement in the proper manner. *Longworth v. Cincinnati*, 34 Ohio St. 101.

The expenses incurred by a gas company in removing and relaying its pipes, such removal, etc., being necessitated by reason of grading the street in which they were laid, cannot be included in the expense of such grading. The gas company is not exempted from the risk of their location, and may be required to make, at their own cost, such changes as public convenience or security require. *Matter of Deering*, 93 N. Y. 361.

In estimating the cost of an improvement, it is proper to measure together such continuous work as, from its nature, can be estimated together, and not to take into consideration any outlying fragmentary piece of work, the cost of which, from its nature, cannot be equal-

ized with the continuous work; but such piece of work should form the basis of a separate estimate. *Kemper v. King*, 11 Mo. App. 116.

Where, in making a street improvement, it was necessary to construct a stone and brick culvert, as well as earthwork, and each piece of work was let and done separately by different contractors, the culvert being first completed, accepted, and paid for, it was held, that in making up the estimate of the cost of both pieces of work, the expense of repairs to the culvert, made after it was accepted, could not be included. *Spangler v. Cleveland*, 35 Ohio St. 469.

The cost and expenses of a former commission, whose report has been set aside, but a part of whose work has been adopted by a second commission, may be included. *Matter of Central Park Com'rs*, 63 Barb. (N. Y.) 282.

**Cost of Work Exceeding Estimate.**—The fact that the cost of the work upon a road improvement exceeds the estimate, does not render the assessment to pay for such improvement invalid as to the amount of the estimates. *Loesnitz v. Seelinger*, 127 Ind. 422.

2. *Westwood v. Dater*, 23 Wkly. Law Bull. 291. See *supra*, this title, *Streets*.

Where the fee of land is taken for street purposes, the compensation paid is a part of the cost. *Fairchild v. St. Paul*, 46 Minn. 540.

3. *Dashiell v. Baltimore*, 45 Md. 615; *Cuming v. Grand Rapids*, 46 Mich. 150; *St. Paul v. Mullen*, 27 Minn. 78; *Matter of Lowden*, 25 Hun (N. Y.) 434; *Matter of Merriam*, 84 N. Y. 596; *Westwood v. Dater*, 23 Wkly. Law Bull. 291; *State v. Guttenberg*, 38 N. J. L. 419.

4. *Longworth v. Cincinnati*, 34 Ohio St. 101.

5. *Dashiell v. Baltimore*, 45 Md. 615; *Cuming v. Grand Rapids*, 46 Mich. 150; *Beniteau v. Detroit*, 41 Mich. 116; *St. Paul v. Mullen*, 27 Minn. 78.

tendent, if the services of one are needed; <sup>1</sup> the fees of the commissioners and other like officers; <sup>2</sup> and the reasonable costs of collecting the assessments, including proper attorneys' fees, where a suit has to be brought. <sup>3</sup> And when a municipality is authorized to borrow money to make improvements, interest on money so borrowed and used may be included in the amount of the assessment. <sup>4</sup>

(3) *Determination of Benefits*—(a) *Commissioners, Assessors, etc.*—*Their Appointment, Qualifications, and Oath.*—The legislature may itself designate the officers who shall determine the extent of the special benefits and assess the same, <sup>5</sup> or the appointment of assessors and commissioners of assessment may be delegated to the city council, <sup>6</sup> or to a court of justice. <sup>7</sup> Whatever the method of

1. *Longworth v. Cincinnati*, 34 Ohio St. 101; *Beniteau v. Detroit*, 41 Mich. 116.

2. *Sinton v. Ashbury*, 41 Cal. 525; *Matter of Tappan*, 54 Barb. (N. Y.) 225; *Matter of Knaust* (N. Y. 1881), 11 Rep. 744. See *Thayer v. Grand Rapids*, 82 Mich. 298; *Payne v. Brooklyn*, 52 Hun (N. Y.) 390.

Commissioners appointed by the court to assess special taxes for street improvements, are officers of the court, and not employes of the city, and their fees are part of the cost of levying and collecting the assessment, and are properly included therein. *Kimble v. Peoria*, 140 Ill. 157.

3. *Dashiell v. Baltimore*, 45 Md. 615; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Matter of Eager*, 46 N. Y. 100.

In *Reclamation Dist. No. 108 v. Hagar*, 4 Fed. Rep. 366, it was held that the fact that the statute made it the duty of district attorneys to prosecute such actions, did not prevent the employment of other counsel in proper cases, and the inclusion of their fees in the expenses of collection.

In *Northern Liberties v. St. John's Church*, 13 Pa. St. 104, it was said that costs of collection followed the judgment as a matter of course; but a commission of ten *per cent.* was not authorized.

In *Spangler v. Cleveland*, 35 Ohio St. 469, it was held error to add to the cost of an improvement, an estimated percentage, to pay for collecting an assessment based thereon. See *Jonas v. Cincinnati*, 18 Ohio 318; *Bucknall v. Story*, 36 Cal. 67.

4. *Davis v. Newark*, 54 N. J. L. 144; *State v. Elizabeth*, 37 N. J. L. 142; *State v. Guttenberg*, 38 N. J. L. 419;

*State v. Clinton Tp.*, 39 N. J. L. 656; *Fitzgerald v. Walker*, 55 Ark. 148; *Matter of Deering*, 14 Daly (N. Y.) 89.

But if the money borrowed is, in the meantime, used by the city for other purposes, it is not lawful to include interest during that time in the amount of the assessment. *State v. Elizabeth*, 37 N. J. L. 142.

5. *Crawford v. People*, 82 Ill. 557; *O'Brian v. Baltimore*, 51 Md. 15; *Ray v. Jeffersonville*, 90 Ind. 567; *Kansas City v. Baird*, 98 Mo. 215. See *supra*, this title, *Apportionment*.

6. *Hoyt v. East Saginaw*, 19 Mich. 39; *State v. Passaic*, 44 N. J. L. 171; *Green v. Cape May*, 41 N. J. L. 45; *State v. Passaic*, 41 N. J. L. 90; *Walker v. District of Columbia*, 6 Mackey (D. C.) 352; *Reed v. Toledo*, 18 Ohio 161.

The passage of an ordinance declaring the necessity for an improvement, and a determination to make the same, is a prerequisite to the appointment of assessors by the council. *Scranton v. Barnes* (Pa. 1892), 23 Atl. Rep. 777.

Unless expressly authorized to do so, the common council may not establish a permanent board of commissioners. The commissioners must be appointed for each specific case. *State v. Hudson*, 29 N. J. L. 104.

**Removal.**—In *State v. Passaic*, 42 N. J. L. 524, it was held that the common council had no power to remove commissioners whom they had appointed, although they might fill vacancies resulting from other causes.

But in *People v. New York*, 5 Barb. (N. Y.) 43, the court decided, with some hesitation, that a general power of appointment implies a power of removal.

7. *Matter of Church*, 92 N. Y. 1; *Striker v. Kelly*, 7 Hill (N. Y.) 9; *Mat-*

appointment may be, the apportionment must be made by officers regularly appointed for that purpose as directed by statute.<sup>1</sup> As a rule, these officers should be freeholders residing in the municipality,<sup>2</sup> and should have no interest in the result of the proceedings.<sup>3</sup> They are usually required to take an oath before a proper officer, faithfully and fairly to discharge their duties as prescribed

ter of Opening 14th Ave., 49 How. Pr. (N. Y. Supreme Ct.) 208; *Lake v. Decatur*, 91 Ill. 596; *Kimble v. Peoria*, 140 Ill. 157; *Ferguson v. Stamford*, 60 Conn. 432.

1. *Knowles v. Boston*, 129 Mass. 551; *Bigelow v. Boston*, 123 Mass. 50; *Todd v. Todd*, 5 Thomp. & C. (N. Y.) 531.

When the statute requires local assessments to be made by the board of street commissioners, the city council have no power to make such assessments. *Bigelow v. Boston*, 123 Mass. 50; *Knowles v. Boston*, 129 Mass. 552. But where the mayor and aldermen are authorized to make assessments, it is no objection to an assessment that they called in another person to help them make it. *Collins v. Holyoke*, 146 Mass. 298.

Where an assessment is directed to be made by one of the assessors of the city, it is no objection that it was made and reported by two of such assessors. *Gardner's Appeal*, 41 How. Pr. (N. Y. Supreme Ct.) 255.

It is competent for the legislature to provide that assessments be made by a jury, or by drainage commissioners, when the court so directs. *Hosmer v. Hunt Drainage Dist.*, 135 Ill. 51.

Where the apportionment is made according to area, being a mere mathematical calculation, the fact that it is not made by the city assessor, as required by statute, has been held to be simply an irregularity which can in no way prejudice the taxpayer, and should not defeat the assessment. *Keese v. Denver*, 10 Colo. 123.

2. *State v. Newark*, 36 N. J. L. 170; *State v. Rutherford* (N. J. 1893), 27 Atl. Rep. 172; *State v. Newark*, 25 N. J. L. 399; *State v. Elizabeth*, 32 N. J. L. 357; *Nichols v. Bridgeport*, 23 Conn. 189; *Ferguson v. Stamford*, 60 Conn. 434; *People v. Utica*, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 416; *Dederer v. Voorhies*, 81 N. Y. 153.

Where the commissioners are appointed by the city council, their qualifications should appear of record. *State v. Newark*, 25 N. J. L. 399; *State v. Newark*, 36 N. J. L. 170.

But when they are appointed by the court, they are thereby adjudged to be freeholders, and this is final, unless corrected by a direct proceeding. *Dederer v. Voorhies*, 81 N. Y. 153.

3. *State v. Newark*, 25 N. J. L. 399; *State v. Newark*, 36 N. J. L. 170; *Hunt v. Chicago*, 60 Ill. 183; *Shreve v. Cicero*, 129 Ill. 226.

This qualification should appear on the face of the record. *State v. Newark*, 25 N. J. L. 399; *State v. Newark*, 36 N. J. L. 170; *State v. Passaic*, 38 N. J. L. 171; *Vreeland v. Bayonne*, 54 N. J. L. 488.

A trustee and director of a corporation, whose property is assessed, is not disinterested. *Longley v. Hudson*, 4 Thomp. & C. (N. Y.) 355.

Where there is no defined assessment district, and the excess of damages over benefits in a street improvement must be assessed upon the whole city, it is not practicable to appoint disinterested freeholders resident in the city, and an act so providing cannot be carried into effect, as every property owner in the city necessarily has a direct interest in so charging the benefits as to avoid reaching his own freehold. *Montgomery Ave. Case*, 54 Cal. 579; *Powers' Appeal*, 29 Mich. 511.

The affidavit of a witness that he has examined the abstract books, and that one of the commissioners appears to be the owner of some of the property assessed, is not competent evidence of interest. *Shreve v. Cicero*, 129 Ill. 236.

The fact that park commissioners who are incorporated by act of the legislature, and empowered to make estimates and assessments, own property in the town, does not disqualify them. They are made, by law, the tribunal for the purpose, and the law appointing them qualifies them. *People v. Brislin*, 80 Ill. 433. See also *State v. Rutherford* (N. J. 1893), 27 Atl. Rep. 172.

The section of the *New York Code Civ. Proc.*, which provides that a judge shall not sit in the case if related by consanguinity or affinity to any of the parties, within the sixth degree, refers to judges, justices, and other persons

by law, and an omission of this requirement may invalidate their proceedings.<sup>1</sup>

(b) **Duties of Commissioners in Assessing Benefits.**—The officers appointed to make an assessment must pursue strictly the rules for the governance of their proceedings, whether prescribed by statute or city ordinance.<sup>2</sup> They should act as a body, and all members of the board should participate in the proceedings,<sup>3</sup> although it has been held that the action of a majority is sufficient if all members are notified.<sup>4</sup> They should assess the benefits by the rule of apportionment prescribed by law.<sup>5</sup> And where the rule of actual benefits is prescribed, they should view all the property in the assess-

holding court *eo nomine*, and has no application to assessors. *O'Reilly v. Kingston*, 114 N. Y. 450.

The fact that a commissioner is an employé of the agents of the owners of some of the property assessed, is not a disqualification. *Pearce v. Hyde Park*, 126 Ill. 287.

Neither will the fact that one of the commissioners is a member of the city council, and that part of the property assessed belongs to the city, invalidate the assessment. *Matter of Twenty-sixth Street*, 12 Wend. (N. Y.) 203.

1. *State v. Perth Amboy*, 38 N. J. L. 425; *State v. Jersey City*, 24 N. J. L. 662; *Wheeler v. Chicago*, 57 Ill. 415; *Crawford v. People*, 82 Ill. 557; *Shreve v. Cicero*, 129 Ill. 226; *Clayton v. Lafargue*, 23 Ark. 137; *Merritt v. Port Chester*, 71 N. Y. 309; *Bruecher v. Port Chester*, 101 N. Y. 240.

Where the charter of a town provides that commissioners of assessment may be sworn before the town clerk, commissioners appointed under the general law, as well as those appointed under the charter, may be sworn before such clerk. *Shreve v. Cicero*, 129 Ill. 226.

If the form of the oath is substantially correct, it is sufficient. *State v. Jersey City*, 24 N. J. L. 662.

Where the commissioners are required to take an oath "faithfully and fully to discharge their duties," an oath taken by each one to perform the duties "to the best of his ability," is not sufficient. *Merritt v. Port Chester*, 71 N. Y. 309.

An act requiring viewers to be sworn to perform their duties "impartially and according to the best of their judgment," is not substantially complied with, when they are sworn only "to the faithful discharge of their duties." *In re Cambria St.*, 75 Pa. St. 357.

If the commissioners take the proper oath, the fact that it was administered

before the ordinance authorizing the assessment became a law, will not vitiate their proceedings. *Gurnee v. Chicago*, 40 Ill. 165.

2. The report of the commissioners must show on its face a compliance with all legal rules, the observance of which is necessary to a valid assessment. *State v. New Brunswick*, 38 N. J. L. 190.

If the assessment is not made in conformity with the ordinance authorizing it, it is illegal and void, and a subsequent confirmation of it by the common council, will not cure the illegality. *Hassan v. Rochester*, 67 N. Y. 528; *Matter of Turfler*, 44 Barb. (N. Y.) 46.

3. *People v. Coghill*, 47 Cal. 361; *People v. Hagar*, 49 Cal. 229.

4. *Astor v. New York*, 62 N. Y. 580; *Cuming v. Grand Rapids*, 46 Mich. 150; *Doughty v. Hope*, 3 Den. (N. Y.) 249.

Where one member had resigned, and a successor was appointed, it was held that the assessors had no power to proceed without either his presence or notice to him. *Beekman's Petition*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 449.

5. *State v. New Brunswick*, 38 N. J. L. 190; *State v. Newark*, 25 N. J. L. 399; *State v. Passaic*, 36 N. J. L. 382; *State v. Hudson*, 29 N. J. L. 104; *State v. Jersey City*, 40 N. J. L. 485; *State v. Ramsey County Dist. Ct.*, 29 Minn. 65; *Matter of Roberts*, 81 N. Y. 62; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Hundley v. Lincoln Park Com'rs*, 67 Ill. 559; *Sterling v. Galt*, 117 Ill. 11; *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Zwietusch*, 47 Wis. 513.

When it is required by statute that property be assessed according to benefits, it is not sufficient to make the assessment by the frontage rule, in the absence of a finding that the special

ment district, and, exercising sound judgment and discretion, should determine fairly and impartially the benefits conferred,<sup>1</sup> taking into consideration the condition of the land, its distance from the improvement, the use for which it is or may be employed, and such other circumstances as will tend to render the improvement of more or less benefit to the premises.<sup>2</sup> The assessment is frequently made without reference to the state of the title; the only inquiry being into the amount of benefits conferred upon the property.<sup>3</sup> But there are cases in which other interests besides the ownership of the fee have been held liable to assessments for such benefits, and where this is the rule, the commissioners should take into consideration the amount of benefits conferred upon each separate interest in the property.<sup>4</sup>

benefits are in that proportion. *State v. Hudson*, 29 N. J. L. 104; *State v. Jersey City*, 38 N. J. L. 410; *Springfield v. Sale*, 127 Ill. 359.

But it is not necessarily erroneous in such cases, to make the apportionment by the frontage rule, if, in the judgment of the commissioners, the lots are benefited in that proportion. *Springfield v. Sale*, 127 Ill. 359; *O'Reilly v. Kingston*, 114 N. Y. 448, *citing* *Matter of Cruger*, 84 N. Y. 619; *Matter of Eager*, 46 N. Y. 100. See also *State v. Rutherford* (N. J. 1893), 27 Atl. Rep. 172.

So, also, an apportionment according to area may be a correct measure of the special benefits, but the commissioners should so find, if they make the apportionment on that basis. *State v. New Brunswick*, 38 N. J. L. 195.

Commissioners should assess all the property in the assessment district, and assess it by the same rule of apportionment, unless it is otherwise provided by law. *Elwood v. Rochester*, 122 N. Y. 229; *Hassan v. Rochester*, 65 N. Y. 516; 67 N. Y. 528.

The law in force at the time the improvement ordinance is passed, determines the manner of assessment. *Cincinnati v. Seasongood*, 46 Ohio St. 296; *Griswold v. Pelton*, 34 Ohio St. 482.

1. *Springfield v. Sale*, 127 Ill. 359; *State v. Hudson*, 29 N. J. L. 105; *State v. Jersey City*, 24 N. J. L. 662; *Kansas City v. Baird*, 98 Mo. 215; *Kansas City v. Butterfield*, 89 Mo. 646; *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Zwietusch*, 47 Wis. 513; *Matter of John and Cherry Sts.*, 19 Wend. (N. Y.) 659; *Matter of William and Anthony Sts.*, 19 Wend. (N. Y.) 678; *Cram v. Chicago*, 139 Ill. 265.

Commissioners may receive also, the opinions of disinterested persons as to

the amount of benefits, but they are not bound by such opinions. *Matter of John and Cherry Sts.*, 19 Wend. (N. Y.) 659; *Matter of William and Anthony Sts.*, 19 Wend. (N. Y.) 678; *Kansas City v. Baird*, 98 Mo. 215; *Kansas City v. Hill*, 80 Mo. 523; *Kansas City v. Butterfield*, 89 Mo. 646.

2. *Matter of Degraw St.*, 18 Wend. (N. Y.) 568; *Matter of William and Anthony Sts.*, 19 Wend. (N. Y.) 678; *Clapp v. Hartford*, 35 Conn. 66; *State v. Newark*, 35 N. J. L. 157; *Kankakee Stone, etc., Lime Co. v. Kankakee*, 128 Ill. 173; *Hutt v. Chicago*, 132 Ill. 352; *Kelly v. Chicago* (Ill. 1893), 35 N. E. Rep. 752; *Hoffeld v. Buffalo*, 130 N. Y. 387; *Powers v. Grand Rapids* (Mich. 1894), 57 N. W. Rep. 250.

3. *Reese's Appeal*, 32 Cal. 567; *Wolf v. Baltimore*, 49 Md. 446; *Zion Church v. Baltimore*, 71 Md. 524.

4. *Newark v. State*, 34 N. J. L. 523; *Whyte v. Nashville*, 2 Swan (Tenn.) 263; *Muscatine v. Chicago, etc., R. Co.*, 79 Iowa 645; *Gilbert v. Havemeyer*, 2 Sandf. (N. Y.) 506; *Remsen v. Wheeler*, 121 N. Y. 685; *New London v. Miller*, 60 Conn. 112.

The owner of an estate in dower may be assessed. *Whyte v. Nashville*, 2 Swan (Tenn.) 364. So also the owner of an estate *pur autre vie*. *Remsen v. Wheeler*, 121 N. Y. 685.

Where the assessment was made against the owner of the fee, and the owners of a term which had forty-seven years to run, were not assessed, it was held that the assessment was unjust and a palpable violation of the law. *Newark v. State*, 34 N. J. L. 523.

Where there are separate and distinct interests in the same land, there should be a separate assessment against each of the owners, for the benefit ac-

Each lot or parcel of land should be assessed separately;<sup>1</sup> and all property in the assessment district which is legally liable to local assessments should be assessed; otherwise the assessment will be invalid.<sup>2</sup>

(c) *Report of Commissioners.*—After having made the apportionment, the commissioners should make a written report of their proceedings and file it as directed by law.<sup>3</sup> It should contain a clear

cruing to his interest. *New London v. Miller*, 60 Conn. 112.

The owner of an easement, with the right of perpetual occupancy should pay the assessment. *Muscatine v. Chicago*, etc., R. Co., 79 Iowa 645. See also *supra*, this title, *Property Assessable*.

1. *St. Louis v. Provenchere*, 92 Mo. 66; *St. Louis v. Johansen* (Mo. 1887), 4 S. W. Rep. 417; *Kefferstein v. Holliday*, 3 Mo. App. 569; *Miller v. Anheuser*, 4 Mo. App. 436; *Christian v. Taussig*, 8 Mo. App. 602; *Kemper v. King*, 11 Mo. App. 116; *Nickerson v. Boston*, 131 Mass. 306; *New London v. Miller*, 60 Conn. 112; *State v. Jersey City*, 24 N. J. L. 662; *Matter of Anderson*, 39 How. Pr. (N. Y. Supreme Ct.) 184; *Sharp v. Johnson*, 4 Hill (N. Y.) 92; *Moore v. People*, 106 Ill. 376; *De Koven v. Lake View*, 129 Ill. 399; *Royce v. Aplington* (Iowa, 1894), 57 N. W. Rep. 868.

The *Missouri* cases above cited hold that an assessment in gross may not be made on a number of lots, even when they all belong to the same person, but there are cases in other jurisdictions in which it is held that this may properly be done. *State v. Jersey City*, 24 N. J. L. 662; *Matter of Anderson*, 39 How. Pr. (N. Y. Supreme Ct.) 184; *DeKoven v. Lake View*, 129 Ill. 399.

Commissioners have no right to subdivide parcels of land which have not been subdivided by the owners, *Cram v. Chicago* (Ill. 1892), 139 Ill. 265; and they may not do this when a portion of a lot lies outside of the lines which they have agreed upon as the limit of the district of special benefits. They should make the assessment on the whole lot. *State v. Essex Public Road Board*, 51 N. J. L. 166.

2. *Hassen v. Rochester*, 65 N. Y. 516; 67 N. Y. 528; *Matter of New York Protestant Episcopal School*, 75 N. Y. 324; *Savage v. Buffalo*, 131 N. Y. 568; *Ellwood v. Rochester*, 122 N. Y. 229; *LeRoy v. New York*, 20 Johns. (N. Y.) 430; *People v. Lynch*, 51 Cal. 15; *Levee Dist. v. Huber*, 57 Cal.

41; *Alexander v. Baltimore*, 5 Gill (Md.) 383; *Upington v. Oviatt*, 24 Ohio St. 232; *Weeks v. Milwaukee*, 10 Wis. 242.

In order to overthrow an assessment, upon this ground, it must be made to appear that the property omitted was legally liable to assessment. *Matter of Churchill*, 82 N. Y. 288; *Matter of Voorhis*, 3 Hun (N. Y.) 212; *O'Reilley v. Kingston*, 114 N. Y. 440; *Jones v. Boston*, 104 Mass. 466.

The commissioners have no right to enter into an agreement with the landowners that they shall not be assessed for benefits, on condition that they consent to the opening of a street through their lands, and an omission to assess lands in pursuance of such agreement, renders the assessment invalid. *St. Louis v. Meier*, 77 Mo. 13.

But it has been held that where property is assessed for the exact amount for which it is liable, under the estimate, the owner cannot resist payment of the assessment on the ground of an omission to assess other property for the amount for which it is liable. *Balfe v. Bell*, 40 Ind. 337.

To vitiate the assessment, it should be made to appear that substantial injustice was done. Thus, where two small pieces of property were omitted, but it did not appear to what extent they were benefited, the court refused to disturb the assessment, applying the maxim *de minimis non curat lex*. *Gilbert v. New Haven*, 39 Conn. 467.

So, where a small amount of property was omitted, the court refused an injunction to restrain the collection of the assessment, in the absence of a showing that the plaintiff would have to pay more than would have been his proportion had it not been for the exemption. *Page v. St. Louis*, 20 Mo. 136.

While the omission of property may be fatal to the assessment, it will not of itself warrant an injunction restraining the performance of the work. *Hoke v. Perdue*, 62 Cal. 545.

3. They should make a written report, and affix their signatures. *State v.*

statement of all the matters required by law to be reported, showing on its face whether or not the proceedings of the commissioners were regular.<sup>1</sup> Where such a report is duly made and the proceedings appear to be regular, and the property assessed is legally subject to assessment, it is *prima facie* evidence of the validity of the proceedings, which may be rebutted only by clear and convincing proof of fraud, mistake, or fatal error therein.<sup>2</sup>

In order to the validity and regularity of an assessment, each lot or parcel of land should be described with such certainty that it may be readily identified.<sup>3</sup> And it is generally required that the correct name of the owner shall be given if known,<sup>4</sup> and if not

Hudson, 29 N. J. L. 111; *State v. Jersey City*, 44 N. J. L. 136.

If the report is not filed within the time prescribed by law, the proceedings are invalid. *State v. Bayonne*, 35 N. J. L. 332; *State v. Bergen*, 33 N. J. L. 72.

1. *State v. Jersey City*, 35 N. J. L. 381; *State v. Hudson*, 29 N. J. L. 104; *State v. Jersey City*, 25 N. J. L. 309.

The report will be defective if it does not show that the assessment is not in excess of the benefits. *State v. West Orange*, 39 N. J. L. 453.

Where the report omitted to state, as required by law, that the apportionment and assessment "are contained and stated" in the column designated "assessment for construction," it was held that the omission was fatal to the assessment. *Stebbins v. Kay*, 123 N. Y. 31.

Where the report sets out, in a substantial way, all the matters required, it is immaterial that it does not follow the language of the statute in terms. *Matter of Roberts*, 81 N. Y. 62.

Where the statute provides that the assessment roll shall show damages as well as benefits, and that a balance shall be struck and carried forward on the roll, a failure to do so will render the assessment invalid. *Chicago v. Wright*, 32 Ill. 192.

2. *State v. Rahway*, 39 N. J. L. 646; *State v. Jersey City*, 42 N. J. L. 97; *State v. Passaic*, 44 N. J. L. 171; *State v. Newark*, 48 N. J. L. 101; *State v. Essex Public Road Board*, 51 N. J. L. 166; *State v. Ramsey County Dist. Ct.*, 29 Minn. 62; *Matter of Pearl St.*, 19 Wend. (N. Y.) 651; *Chicago, etc.*, R. Co. v. *Chicago*, 139 Ill. 580; *Green v. Springfield*, 130 Ill. 515; *Walters v. Lake*, 129 Ill. 23; *Lewis v. Laylin*, 46 Ohio St. 663.

Clear proof of great force is required to justify a conclusion that the report

is erroneous. *State v. Rahway*, 39 N. J. L. 646; *State v. Harrison*, 39 N. J. L. 51; *State v. Passaic*, 37 N. J. L. 65.

As to matters not required by statute to be reported, the report is not even *prima facie* evidence. *People v. Hagar*, 49 Cal. 229.

3. *Himmelmahn v. Cahn*, 49 Cal. 285; *People v. Quackenbush*, 53 Cal. 52; *Norton v. Courtney*, 53 Cal. 691; *Hewes v. Reis*, 40 Cal. 255; *Dorland v. McGlynn*, 47 Cal. 47; *Ede v. Knight*, 93 Cal. 159; *Gurnee v. Chicago*, 40 Ill. 165; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 656; *Muscantine v. Chicago, etc., R. Co.*, 79 Iowa 645; *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285; *Scranton v. Jones*, 133 Pa. St. 219; *Sharp v. Johnson*, 4 Hill (N. Y.) 92; *Bennett v. Buffalo*, 17 N. Y. 383; *Matter of John & Cherry Sts.*, 19 Wend. (N. Y.) 659.

A misdescription of some lots, in no way affects the validity of the assessment on other lots. *Gurnee v. Chicago*, 40 Ill. 165.

4. *Taylor v. Donner*, 31 Cal. 480; *Blatner v. Davis*, 32 Cal. 328; *Mayo v. Ah Loy*, 32 Cal. 477; *Dowell v. Portland*, 13 Oregon 248; *Hill v. Warrell*, 87 Mich. 135; *Matter of Tappan*, 54 Barb. (N. Y.) 225; *Chapman v. Brooklyn*, 40 N. Y. 372.

An assessment on "St. Peter's and St. Paul's Cathedral," the roll neither describing the lots nor naming the owners thereof, was held void in *LeFevre v. Detroit*, 2 Mich. 586.

It has been held that an assessment upon the estate of G. S., instead of being upon the owner or occupant, by name, is not valid. *Platt v. Stewart*, 8 Barb. (N. Y.) 493; *Hawthorne v. East Portland*, 13 Oregon 271.

But in *Moale v. Baltimore*, 61 Md. 224, it was held that such an assessment was good, where it did not appear that the property had been divided.

known, that the property shall in terms be assessed to the unknown owner.<sup>1</sup>

*g. CONFIRMATION OF REPORT AND ASSESSMENT.*—It is generally required that the report of the commissioners or assessors shall, upon notice to the parties concerned, be confirmed by a tribunal designated by statute,—usually a court of justice.<sup>2</sup> The report of the commissioners as to matters properly submitted to their determination is viewed with even greater favor than the verdict of a jury,<sup>3</sup> and will not be set aside or sent back for correction, unless it be shown that there has been fraud or mistake, or some error in the principle upon which the commissioners proceeded.<sup>4</sup>

And in *New Orleans v. Ferguson*, 28 La. Ann. 240, it was held that the only reason for giving the name of the owner, was more fully to describe the property, and an assessment was upheld which was made in the name of the owner after her decease.

In *Hamilton v. Fond du Lac*, 25 Wis. 490, it was held that an assessment against a person for a number of lots, part of which were owned by his wife, was void.

Community property may be assessed to the husband alone. *Elma v. Carney*, 4 Wash. 418.

But where the statute is silent on the subject, it has been held that it is immaterial who is described as owner, if the property is otherwise properly described. *Kendig v. Knight*, 60 Iowa 33. See also *Matter of John & Cherry Sts.*, 19 Wend. (N. Y.) 659.

1. *Hewes v. Reis*, 40 Cal. 255; *Chambers v. Satterlee*, 40 Cal. 497; *Taylor v. Donner*, 31 Cal. 480; *Mayo v. Ah Loy*, 32 Cal. 477; *Dowell v. Portland*, 13 Oregon 248; *Matter of William & Anthony Sts.*, 19 Wend. (N. Y.) 678.

If there are doubts as to the ownership of property, it may be assessed to owners unknown. *Himmelmänn v. Steiner*, 38 Cal. 175; *Himmelmänn v. Hoadley*, 44 Cal. 213.

2. *Fisher v. New York*, 67 N. Y. 73; *Matter of Broadway*, 61 Barb. (N. Y.) 483; *Striker v. Kelly*, 7 Hill (N. Y.) 9; *Gurnee v. Chicago*, 40 Ill. 165; *Fagan v. Chicago*, 84 Ill. 227; *People v. Gray*, 105 Ill. 332; *Thorn v. West Chicago Park Com'rs*, 130 Ill. 594; *State v. Newark*, 52 N. J. L. 341. See also other cases cited in the notes immediately following.

It is provided in some statutes, that a jury may be impaneled to hear the evidence, and correct the report of the commissioners. *Fagan v. Chicago*, 84 Ill. 227; *Walters v. Lake*, 129 Ill.

23; *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 509.

Sometimes, the duty of confirming the report is devolved upon the common council. *White v. Saginaw*, 67 Mich. 33; *Granger v. Buffalo*, 6 Abb. N. Cas. (N. Y., Buffalo Super. Ct.) 238. In such event, the council may ratify, reject, or return the report to the commissioners. But if a report which has been returned to the commissioners is again submitted without modification, it may not be confirmed. *Hegeman v. Passaic*, 51 N. J. L. 544; *State v. South Orange*, 46 N. J. L. 317. Or the duty may be devolved upon some board constituted for the purpose. *Matter of Deering*, 14 Daly (N. Y.) 89; *Matter of Lester*, 21 Hun (N. Y.) 130; *Matter of Roberts*, 81 N. Y. 62, *affirming* 17 Hun (N. Y.) 539; *Tone v. New York*, 70 N. Y. 157; *Philadelphia, etc., R. Co. v. Shipley*, 72 Md. 88.

By voluntary appearance for the purpose of objecting to the confirmation of the report, a property owner waives any defect in the notice of application for confirmation. *Walters v. Lake*, 129 Ill. 23.

The notice should be given by all the commissioners, unless a majority are expressly authorized to give it. *McChesney v. People* (Ill. 1893), 35 N. E. Rep. 739.

3. *Matter of 138th St.*, 60 How. Pr. (N. Y. Supreme Ct.) 290; *Matter of Central Park Com'rs*, 35 How. Pr. (N. Y. Supreme Ct.) 255; *Matter of Opening of Eleventh Ave.*, 49 How. Pr. (N. Y. Supreme Ct.) 208; *Matter of John & Cherry Sts.*, 19 Wend. (N. Y.) 659; *Matter of William & Anthony Sts.*, 19 Wend. (N. Y.) 678.

4. See cases cited in last preceding note.

Where the court is satisfied that the property assessed cannot be benefited to the extent of the amount assessed,



Objections to the report must be seasonably presented in order to be heard;<sup>1</sup> and upon the hearing of the application to confirm the report, the inquiry is confined to such matters as are cognizable by the commissioners.<sup>2</sup> As a rule, objections to the proceedings of the commissioners, which are not made in due time to be considered at the hearing of the application to confirm

the report may be sent back for review until the objection is removed, or until the proceedings are discontinued. *Matter of Albany St.*, 11 Wend. (N. Y.) 149.

The order confirming the report may be set aside for irregularity, fraud, or mistake. *Matter of New York*, 49 N. Y. 150, *affirming* 42 How. Pr. (N. Y.) 220.

There must be a clear showing that the report is unjust; otherwise, it will be confirmed. *Matter of Public Park Com'rs*, 47 Hun (N. Y.) 302; *Matter of William & Anthony Sts.*, 19 Wend. (N. Y.) 678; *Matter of Pearl St.*, 19 Wend. (N. Y.) 651; *State v. Passaic*, 51 N. J. L. 109; *Fagan v. Chicago*, 84 Ill. 228; *State v. Ramsey County Dist. Ct.*, 47 Minn. 407; *Powers v. Grand Rapids* (Mich. 1894), 57 N. W. Rep. 250.

And the commissioners are not competent witnesses to impeach their own report. *Quick v. River Forest*, 130 Ill. 323.

Where the court is given power by the charter to revise, correct, amend, or confirm the report, it reviews and revises the assessment, and is not limited to the consideration of whether the board exercised their judgment, and whether there was fraud or demonstrable mistake in the assessment. *State v. Ensign* (Minn. 1893), 56 N. W. Rep. 1006.

1. The objections must be presented within the time, and in the manner, prescribed by statute, in order that they may be heard. *Matter of 138th St.*, 60 How. Pr. (N. Y. Supreme Ct.) 290; *Matter of Opening Eleventh Ave.*, 49 How. Pr. (N. Y. Supreme Ct.) 208; *Matter of William & Anthony Sts.*, 19 Wend. (N. Y.) 678; *Matter of New York*, 16 Johns. (N. Y.) 231.

But it has been held that an act providing that all objections to the confirmation of the report, shall be filed in writing at least three days before the time fixed for the hearing of the application for judgment, is directory, and that the court may in its discretion, for sufficient cause shown, permit objec-

tions to be filed at any time before the hearing. *Thorn v. West Chicago Park Com'rs*, 130 Ill. 594.

A lot owner, who has had due notice, and has failed to appear and make his objections as provided by statute, may not bring an action to declare the assessment void and enjoin its collection. *Mietzsch v. Berkhout* (Cal. 1893), 35 Pac. Rep. 321.

2. *Leitch v. La Grange*, 138 Ill. 291; *Goodwillie v. Lake View*, 137 Ill. 51; *Gage v. Chicago*, 146 Ill. 499; *Wright v. Forrestal*, 65 Wis. 351; *Matter of Southern Boulevard*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 447; *In re Frederick St.*, 155 Pa. St. 623.

The judgment of confirmation is final only as to such matters as are properly submitted to and determined by the commissioners. *Matter of Public Parks Dept.*, 85 N. Y. 459; *Matter of Lange*, 85 N. Y. 307; *Matter of Central Park Com'rs*, 50 N. Y. 493; *Dolan v. New York*, 62 N. Y. 472; *Astor v. New York*, 62 N. Y. 580; *Embury v. Connor*, 3 N. Y. 511; *Matter of Albany St.*, 11 Wend. (N. Y.) 149; *Matter of Livingston St.*, 18 Wend. (N. Y.) 556.

On an application to confirm the report of the commissioners, the court will not review the determination of the local authorities as to the proportion of the cost of an improvement to be borne by the public, *Leitch v. LaGrange*, 138 Ill. 291; nor the motive of such authorities in ordering the improvement made. *In re Frederick St.*, 155 Pa. St. 623. Nor will it hear the objection that one of the commissioners is personally interested; such objection should be made at the hearing of the application for their appointment. *Matter of Southern Boulevard*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 447.

The commissioners of estimate and assessment have no authority to pass on constitutional questions, and the confirmation of their report is not final as to, and does not involve the constitutionality of, the act under which the proceedings are instituted. *Matter of Public Parks Dept.*, 85 N. Y. 459; *Matter of Lange*, 85 N. Y. 307.

their report, will be deemed to have been waived.<sup>1</sup> The confirmation of the report by a tribunal of competent jurisdiction has the legal effect of a judgment, and is not subject to collateral attack upon matters which are properly cognizable in the confirmation proceedings.<sup>2</sup>

*h.* REASSESSMENT.—A municipal corporation may not make a reassessment without authority from the legislature,<sup>3</sup> but it is competent for the legislature to delegate such power to the municipal authorities.<sup>4</sup> And cities are, as a rule, authorized to make reassessments where, through a mistake in the preliminary estimate, the original assessment has proved insufficient to defray the expense of an improvement,<sup>5</sup> or where the original assessment is invalid for some reason not going to the foundation of the authority to make it.<sup>6</sup>

*i.* LEGISLATIVE POWER TO VALIDATE VOID ASSESSMENTS.—In the absence of an express constitutional inhibition of such legislation, the legislature may, by retrospective enactment, cure an irregularity or want of authority in levying an assessment, if it

1. *Moore v. People*, 106 Ill. 376; *Blake v. People*, 109 Ill. 504; *Ottawa v. Chicago*, etc., R. Co., 25 Ill. 43; *Mietzsch v. Berkhout* (Cal. 1893), 35 Pac. Rep. 321.

But where an error which goes to the foundation of the proceedings, appears on the face of the report, it will not be deemed to have been waived by a failure to make an objection to the confirmation of the report, before the common council. *Chicago v. Wright*, 32 Ill. 192.

Questions of fact should be raised before the viewers, but questions of form and of law may be raised without appearance and objection before them. *Travers' Appeal*, 152 Pa. St. 129. And the report of the viewers should show the nature of objections made before them—whether they were based on questions of law or of fact. *Wilson's Appeal*, 152 Pa. St. 136.

2. *Pittsburg v. Cluley*, 74 Pa. St. 262; *State v. Hennepin County Dist. Ct.*, 33 Minn. 235; *Sherwood v. Duluth*, 40 Minn. 22; *Houghton's Appeal*, 42 Cal. 35; *Kilmer v. People*, 106 Ill. 529; *Chicago, etc., R. Co. v. People*, 83 Ill. 467; *People v. Brislin*, 80 Ill. 423.

3. *Dowell v. Portland*, 13 Oregon 248; *Watterson v. Bradley*, 43 Ohio St. 456; *Spangler v. Cleveland*, 35 Ohio St. 469.

4. *Butler v. Toledo*, 5 Ohio St. 225; *Tallman v. Janesville*, 17 Wis. 71; *Cross v. Milwaukee*, 19 Wis. 509; *Dill v. Roberts*, 30 Wis. 178; *Dean v. Borchsenius*,

30 Wis. 236; *May v. Holdridge*, 23 Wis. 93.

5. *Meech v. Buffalo*, 29 N. Y. 198; *Butler v. Toledo*, 5 Ohio St. 225; *Montgomery County v. Fullen*, 118 Ind. 158; *Moore v. People*, 106 Ill. 376; *Partridge v. Hyde Park*, 131 Ill. 537; *Union Building Assoc. v. Chicago*, 61 Ill. 439; *Workman v. Chicago*, 61 Ill. 463; *State v. Trenton*, 43 N. J. L. 166; *Thayer v. Grand Rapids*, 82 Mich. 298.

A second assessment to make up deficiencies in a prior void assessment, is also void. *Union Building Assoc. v. Chicago*, 61 Ill. 439; *Workman v. Chicago*, 61 Ill. 463; *Dean v. Borchsenius*, 30 Wis. 236. Especially if it is imposed for a purpose not within the taxing power. *Dill v. Roberts*, 30 Wis. 178.

6. *People v. Lansing*, 27 Mich. 131; *French v. Lansing*, 30 Mich. 379; *Byram v. Detroit*, 50 Mich. 56; *Brevoort v. Detroit*, 24 Mich. 322; *Townsend v. Manistee*, 88 Mich. 408; *Matter of Van Antwerp*, 56 N. Y. 261; *St. Paul v. Mullen*, 27 Minn. 78; *Parker v. Atchison*, 48 Kan. 574; *Harrison v. Chicago*, 61 Ill. 459; *May v. Holdridge*, 23 Wis. 93; *Dean v. Borchsenius*, 30 Wis. 236; *Emporia v. Bates*, 16 Kan. 495; *Emporia v. Norton*, 13 Kan. 569; 16 Kan. 236; *Tuttle v. Polk*, 84 Iowa 12; *Raymond v. Cleveland*, 42 Ohio St. 522; *Himmelmänn v. Cofran*, 36 Cal. 411; *Wood v. Strother*, 76 Cal. 545; *State v. South Orange*, 46 N. J. L. 317; *Howard Sav. Inst. v. Newark*, 52 N. J. L. 1; *Spencer v. Merchant*, 125 U. S. 345.

has antecedent power to render the objectionable act or omission immaterial.<sup>1</sup> But it cannot so validate an assessment which is so fundamentally defective that it could not stand under the authority of prospective legislation.<sup>2</sup>

Where an assessment which has become a lien on property is set aside, and a reassessment is made, the lien of the new assessment attaches as of the date of the original assessment. *Cadmus v. Fagan*, 47 N. J. L. 549.

Where the first assessment is void, the legislature may itself order a reassessment. *Matter of Van Antwerp*, 56 N. Y. 261; *State v. Newark*, 34 N. J. L. 236.

Where the former proceedings were void, as had under an unconstitutional law, it was held to be the duty of the commissioners, in making a reassessment under a remedial act, to determine the gross amount to be assessed on the basis of the value of the improvement, and not on that of the agreed price under the void contract. *Bingaman v. Pittsburg*, 147 Pa. St. 353; *Travers' Appeal*, 152 Pa. St. 129; *Wilson's Appeal*, 152 Pa. St. 136; *Pittsburg Mfg. Co.'s Appeal* (Pa. 1893), 27 Atl. Rep. 1109; *In re Morewood Ave.* (Pa. 1893), 28 Atl. Rep. 123.

The legislature cannot authorize a second assessment, so long as the first one remains in force. *State v. Essex Public Road Board*, 51 N. J. L. 166.

But if the first assessment is partly void, a reassessment may be authorized, and it will entirely supersede the first one. *Dyer v. Scalmanini*, 69 Cal. 637.

A reassessment under a grant of authority from the legislature, is not a reopening of a judgment by which a former assessment was declared invalid, and proceedings thereunder restrained. *Mills v. Charleaton*, 29 Wis. 400; *Emporia v. Bates*, 16 Kan. 495; *State v. Newark*, 34 N. J. L. 236.

1. *Chester v. Black*, 132 Pa. St. 568; *Schenley v. Com.*, 36 Pa. St. 29; *Com. v. Marshall*, 69 Pa. St. 328; *Hewitt's Appeal*, 88 Pa. St. 55; *Donnelly v. Pittsburgh* (Pa. 1892), 23 Atl. Rep. 304; *O'Brian v. Baltimore County*, 51 Md. 15; *Newman v. Emporia*, 41 Kan. 583; *San Francisco v. Certain Real Estate*, 42 Cal. 513; *Himmelmänn v. Hoadley*, 44 Cal. 213; *People v. Ingham County*, 20 Mich. 95; *Tift v. Buffalo*, 82 N. Y. 204; *People v. McDonald*, 69 N. Y. 362; *Matter of Sackett, etc.*, Sts., 74 N. Y. 95; *Dean v. Charlton*, 23 Wis. 590; *Mills v. Charleaton*, 29 Wis. 400.

See also *Bolton v. Cleveland*, 35 Ohio St. 319.

If the thing which is omitted and which constitutes the defect, be of such a nature that the legislature might by prior statute have dispensed with it, or if something has been done, or done in a particular way which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute. *Cromwell v. MacLean*, 123 N. Y. 490; *Ensign v. Barse*, 107 N. Y. 329.

An act validating a void assessment, if constitutional, makes the assessment valid only from the date of its passage, so that pending suits brought to enforce the tax are not vacated by the act. *Reis v. Graff*, 51 Cal. 86; *People v. O'Neil*, 51 Cal. 91; *People v. Kinsman*, 51 Cal. 92; *People v. McCain*, 51 Cal. 360.

If the state constitution prohibits retrospective legislation, defective assessments may not thus be validated. *St. Louis v. Clemens*, 52 Mo. 133.

The power of ratification rests with the legislature, and the city council may not exercise it. *Meuser v. Risdon*, 36 Cal. 239; *Ruggles v. Collier*, 43 Mo. 353; *Baltimore v. Porter*, 18 Md. 284.

But where the work of an improvement was begun under an invalid ordinance, and during its progress another ordinance was passed curing the defect, and all the work was done in conformity with the latter ordinance, it was held that an assessment made therefor was valid. *St. Louis v. Schoenemann*, 52 Mo. 348.

It has been held that, where the city has no power to improve the streets at the expense of property owners, when an improvement is made, the legislature cannot by subsequent enactment make the cost of such improvement a lien on the property alleged to be benefited. *Bellevue v. Peacock* (Ky. 1890), 12 S. W. Rep. 1042; *Meadville v. Dickinson*, 129 Pa. St. 1.

2. *People v. Lynch*, 51 Cal. 15; *Brady v. King*, 53 Cal. 44; *Schumacker v. Toberman*, 56 Cal. 508; *People v. Saginaw County*, 26 Mich. 22; *Baltimore v. Horn*, 26 Md. 104; *People v. Brooklyn*, 71 N. Y. 495; *Tift v. Buffalo*, 82 N. Y. 204; *Dederer v. Voor-*

8. Collection of Assessments—*a*. DEMAND.—It is a reasonable condition precedent to the institution of proceedings to collect an assessment, that a demand of payment shall be made, in order that the property owners may have notice of the amounts assessed against them respectively, and may have an opportunity to pay the same without further expense.<sup>1</sup>

*b*. PERSONAL LIABILITY.—The validity of statutes making local assessments liens upon the lands assessed is conceded by the authorities; but whether or not such assessments may be made personal charges upon the owners of the lands, is not well settled. There are many cases in which the validity of statutes creating such personal liability has been either expressly declared or tacitly recognized, although no such liability will be implied;<sup>2</sup>

hies, 81 N. Y. 153; Shawnee County *v.* Carter, 2 Kan. 115.

1. Manice *v.* New York, 8 N. Y. 120; Guerin *v.* Reese, 33 Cal. 292; Himmelman *v.* Danos, 35 Cal. 441; Gaffney *v.* Gough, 36 Cal. 104; Himmelman *v.* Reay, 38 Cal. 163; Himmelman *v.* Hoadley, 44 Cal. 213; Himmelman *v.* Woolrich, 45 Cal. 249; Dyer *v.* Chase, 52 Cal. 440; Whiting *v.* Townsend, 57 Cal. 515; Potwin *v.* Johnson, 108 Ill. 73; Gould *v.* Baltimore, 58 Md. 46; 59 Md. 378.

The demand may be made by any person authorized by law to receive payment. Manice *v.* New York, 8 N. Y. 120; Guerin *v.* Reese, 33 Cal. 292.

The agent of the person authorized to collect the assessment, may make the demand. Himmelman *v.* Woolrich, 45 Cal. 249.

So also, may a contractor, who has assigned the contract as security for a loan, since the title remains in him. Foley *v.* Bullard, 97 Cal. 516.

The demand, if possible, should be personal. Manice *v.* New York, 8 N. Y. 120; Guerin *v.* Reese, 33 Cal. 292.

If a personal demand cannot be made, demand should be made of the agent of the person assessed; and if he cannot be found, the demand may be made publicly, upon the premises assessed. Guerin *v.* Reese, 33 Cal. 292; Whiting *v.* Townsend, 57 Cal. 515. In the latter case, the demand should be so made as to be heard by a tenant occupying a house upon the lot assessed. Himmelman *v.* Townsend, 49 Cal. 150.

Where the assessment is to be collected by the contractor, and more than one person is interested therein, a demand by one is sufficient. Gaffney *v.* Gough, 36 Cal. 104.

The demand should be for the exact

amount due, and chargeable to the property. Dyer *v.* Chase, 52 Cal. 440; Schirmer *v.* Hoyt, 54 Cal. 280.

A return should be made showing where, when, and in what manner the demand was made. Guerin *v.* Reese, 33 Cal. 292; Himmelman *v.* Hoadley, 44 Cal. 213; Himmelman *v.* Reay, 38 Cal. 163.

2. Nichols *v.* Bridgeport, 23 Conn. 189; 60 Am. Dec. 636; New London *v.* Miller, 60 Conn. 112; Hazzard *v.* Heacock, 39 Ind. 172; Burlington *v.* Quick, 47 Iowa 222; Kendig *v.* Knight, 60 Iowa 29; Tuttle *v.* Polk, 84 Iowa 12; New Orleans *v.* Wire, 20 La. Ann. 500; Baltimore *v.* Howard, 6 Har. & J. (Md.) 383; Eschbach *v.* Pitts, 6 Md. 71; Clemens *v.* Baltimore, 16 Md. 208; Dashiell *v.* Baltimore, 45 Md. 615; Wolff *v.* Baltimore, 49 Md. 446; Moale *v.* Baltimore, 61 Md. 224; Lowell *v.* Wentworth, 6 Cush. (Mass.) 221; Lowell *v.* French, 6 Cush. (Mass.) 223; Mancie *v.* New York, 8 N. Y. 120; New York *v.* Colgate, 12 N. Y. 141; Bennett *v.* Buffalo, 17 N. Y. 383; Brewster *v.* Syracuse, 19 N. Y. 118; People *v.* Nearing, 27 N. Y. 308; Gilbert *v.* Havemeyer, 2 Sandf. (N. Y.) 508; Gouverneur *v.* New York, 2 Paige (N. Y.) 434; Cumming *v.* Brooklyn, 11 Paige (N. Y.) 596; Sharp *v.* Speir, 4 Hill (N. Y.) 76; Doughty *v.* Hope, 3 Den. (N. Y.) 253; Litchfield *v.* McComber, 42 Barb. (N. Y.) 288; Bleecker *v.* Ballou, 3 Wend. (N. Y.) 263; McCullough *v.* Brooklyn, 23 Wend. (N. Y.) 458; New York, etc., R. Co. *v.* Dunkirk, 65 Hun (N. Y.) 494; Paterson *v.* Society, etc., 24 N. J. L. 385; Lefevre *v.* Detroit, 2 Mich. 586; Northern Liberties *v.* St. John's Church, 13 Pa. St. 104; *In re* Vacation of Center St., 115 Pa. St. 247; Hill *v.* Higdon, 5 Ohio St. 243; 67 Am. Dec. 289; Ernst

the legislative authority therefore must be clearly expressed.<sup>1</sup> And there are cases in which such statutes have been declared unconstitutional on the ground that they authorize the taking of private property for public uses without just compensation.<sup>2</sup>

In jurisdictions where a personal liability exists, *assumpsit* will generally lie to collect assessments.<sup>3</sup> In some jurisdictions collection may be made by distress and sale of personal property under a municipal warrant;<sup>4</sup> but this remedy is cumulative, unless the statute in terms or by necessary implication abolishes *assumpsit*.<sup>5</sup> The payment of local assessments may not be enforced by the imposition of fines and penalties by the municipality.<sup>6</sup>

*v. Kunkle*, 5 Ohio St. 520; *Reeves v. Wood County*, 8 Ohio St. 333; *Creighton v. Scott*, 14 Ohio St. 439; *Gest v. Cincinnati*, 26 Ohio St. 275; *Davidson v. New Orleans*, 96 U. S. 97; *Bermondsey v. Ramsey*, L. R., 6 C. P. 247; *Plumbstead Board of Works v. Ingoldby*, L. R., 8 Exch. 63, 174.

In *Moale v. Baltimore*, 61 Md. 224, the court intimated that the personal liability could not extend beyond the value of property assessed. See also *Taylor v. Palmer*, 31 Cal. 240; *Seattle v. Yesler*, 1 Wash. Ter. 571; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; 8 Am. Rep. 480; *Beaudry v. Valdez*, 32 Cal. 269.

1. *Gillis v. Cleveland*, 87 Cal. 214; *McCrowell v. Bristol* (Va. 1893), 16 S. E. Rep. 867; *Wilson v. Hall*, 6 Ohio Cir. Ct. Rep. 570; *Wolff v. Baltimore*, 49 Md. 446; *Virginia v. Hall*, 96 Ill. 278; *Philadelphia v. Merkle* (Pa. 1894), 28 Atl. Rep. 360.

2. See *supra*, this title, *Constitutionality*.

And, where this is the rule, the collector will be personally liable for damages occasioned by a sale of personal property to pay such assessments. *Higgins v. Ausmuss*, 77 Mo. 351.

3. *Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Eschbach v. Pitts*, 6 Md. 71; *Clemens v. Baltimore*, 16 Md. 208; *Dashiell v. Baltimore*, 45 Md. 615; *Wolff v. Baltimore*, 49 Md. 446; *Lowell v. Wentworth*, 6 Cush. (Mass.) 221; *Lowell v. French*, 6 Cush. (Mass.) 223; *New York v. Colgate*, 12 N. Y. 140; *Litchfield v. McComber*, 42 Barb. (N. Y.) 288; *New York, etc., R. Co. v. Dunkirk*, 65 Hun (N. Y.) 494; *Pater-son v. Society, etc.*, 24 N. J. L. 385; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Hill v. Higdon*, 5 Ohio St. 243; 67 Am. Dec. 289; *Ernst v. Kunkle*, 5 Ohio St. 520; *Gest v. Cincin-*

*nati*, 26 Ohio St. 275; *Harrisburg v. Segelbaum*, 151 Pa. St. 172.

The action must be brought against the person who owned the property when the assessment was made. *Wolff v. Baltimore*, 49 Md. 446.

A valid assessment is necessary to give the court jurisdiction. *Assumpsit* will not lie to collect from a property owner his share of the expense of an improvement, after an assessment therefor has been set aside as illegal and void, unless a valid reassessment has been made. *Manistee v. Harley*, 79 Mich. 238.

4. *Hazzard v. Heacock*, 39 Ind. 172; *Baltimore v. Howard*, 6 Har. & J. (Md.) 383; *Manice v. New York*, 8 N. Y. 120; *Bennett v. Buffalo*, 17 N. Y. 383; *Gilbert v. Havemeyer*, 2 Sandf. (N. Y.) 506; *Stebbins v. Kay*, 51 Hun (N. Y.) 589; *Gouverneur v. New York*, 2 Paige (N. Y.) 434; *Doughty v. Hope*, 3 Den. (N. Y.) 253; *McCullough v. Brooklyn*, 23 Wend. (N. Y.) 459; *Tompkins v. Johnson*, 75 Mich. 181.

Only the property of the owner or occupant at the time the assessment was made, can be sold under the warrant. The property of a subsequent occupant cannot be sold, although he is bound by a covenant with the owner, to pay the assessment. *Gouverneur v. New York*, 2 Paige (N. Y.) 434.

But an act authorizing the collecting officer to distrain for taxes and levies due the city generally, will not authorize him to distrain for special assessment for street improvements. *Green v. Ward*, 82 Va. 324.

5. *Baltimore v. Howard*, 6 Har. & J. (Md.) 383.

6. *Gridley v. Bloomington*, 88 Ill. 554; 30 Am. Rep. 566.

Nor do statutes providing penalties for the non-payment of taxes, apply to local assessments, *Hosmer v. Hunt*

c. LIEN ON PROPERTY—(1) *In General*.—Statutes delegating the power to make local assessments almost invariably make them liens upon the property assessed, or authorize the municipal authorities to do so by appropriate legislation. But, in the absence of legislative authority, no such lien can be created;<sup>1</sup> and when it is authorized, it exists and attaches only in accordance with such terms and conditions as are prescribed by the statute creating it.<sup>2</sup> The time at which the lien attaches is dependent upon the statute authorizing it, and there is no uniform rule in this regard.<sup>3</sup> In many jurisdictions, such liens afford the only means of enforcing the payment of assessments.<sup>4</sup> And where the property owners are made personally liable for the amounts assessed against them respectively, such amounts may nevertheless be made liens on their property.<sup>5</sup> The lien may be created for the benefit of the contractor who performs the work, when he looks to the assessment for his pay.<sup>6</sup>

It is competent for the legislature, by prospective enactment, to give such liens precedence to prior mortgages and other incumbrances,<sup>7</sup> but such precedence will not be implied when the stat-

Drainage Dist., 134 Ill. 317; unless such statutes are expressly made applicable thereto. *Bothwell v. Millikan*, 104 Ind. 162; *Maple v. Beltzhoover* (Pa. 1889), 18 Atl. Rep. 650; *Smith v. Kingston*, 120 Pa. St. 357.

1. *Philadelphia v. Greble*, 38 Pa. St. 339; *Allegheny City's Appeal*, 41 Pa. St. 60; *Mauch Chunk v. Shortz*, 61 Pa. St. 399; *McKeesport v. Fidler*, 147 Pa. St. 538; *Meadville v. Dickson*, 129 Pa. St. 1; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655.

2. *Lyon v. Alley*, 130 U. S. 177; *Mix v. Ross*, 57 Ill. 121; *Hershberger v. Pittsburgh*, 115 Pa. St. 78; *Philadelphia v. Tryon*, 35 Pa. St. 400; *Hawthorne v. East Portland*, 13 Oregon 271; *Creighton v. Manson*, 27 Cal. 613.

3. The lien may attach at the date of the filing of the report of the commissioners, *State v. Ætna L. Ins. Co.*, 117 Ind. 251; or at the date of the confirmation of such report, *Dowdney v. New York*, 54 N. Y. 186; or upon the filing of the assessment, diagram, warrant, and sworn return of demand of payment with the superintendent of streets, *Himmelman v. Danos*, 35 Cal. 441. And in such case, it matters not that the property, or a portion of it, is disposed of between the letting of the contract and the attaching of the lien. *Dougherty v. Miller*, 36 Cal. 83; *Chaney v. State*, 118 Ind. 494. It may attach when the assessment is made, *Douglass v. Cincinnati*, 29 Ohio St. 165;

or when the estimate is made, *Jones v. Schulmeyer*, 39 Ind. 119; *Langsdale v. Nicklaus*, 38 Ind. 289. And it may even relate back to the date of the order for the improvement, *Blackie v. Hudson*, 117 Mass. 181; or to the date of the petition for the improvement. *Chaney v. State*, 118 Ind. 494.

4. *Carlin v. Cavender*, 56 Mo. 286; *St. Louis v. Bressler*, 56 Mo. 350; *Seibert v. Copp*, 62 Mo. 183; *Louisiana v. Miller*, 66 Mo. 467; *Higgins v. Ausmuss*, 77 Mo. 351; *Clinton v. Henry County*, 113 Mo. 557; *State v. Ætna L. Ins. Co.*, 117 Ind. 251; *Illinois Cent. R. Co. v. Drainage Com'rs*, 129 Ill. 417. See also *supra*, this title, *Constitutionality*.

5. *Burlington v. Quick*, 47 Iowa 226; *Kendig v. Knight*, 60 Iowa 29; *Muscatine v. Chicago, etc., R. Co.*, 79 Iowa 645; *New London v. Miller*, 60 Conn. 112; *Eschbach v. Pitts*, 6 Md. 71; *Moale v. Baltimore*, 61 Md. 224; *Douglass v. Cincinnati*, 29 Ohio St. 165.

6. *Emery v. Bradford*, 29 Cal. 75; *Himmelman v. Carpentier*, 47 Cal. 42; *Dorland v. McGlynn*, 47 Cal. 50.

But he may lose his right to a lien, by not performing the work according to the terms of the contract. *Brady v. Burke*, 90 Cal. 1.

7. *Provident Sav. Ins. v. Jersey City*, 113 U. S. 506; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *Trustees of Public Schools v. Trenton*, 30 N. J. Eq. 667; *Trustees of Public*

ute gives a lien but is silent as to priorities.<sup>1</sup> Nor will it be construed to apply to mortgages or other incumbrances in favor of the state, unless such is plainly the intent of the legislature.<sup>2</sup>

(2) *Enforcement*.—Notwithstanding the existence of the lien, a municipal corporation may not without suit sell the land to pay the assessment, unless authority to do so is delegated by statute,<sup>3</sup> and a delegation of power to sell land for the payment of general taxes does not confer authority to sell it to pay local assessments.<sup>4</sup> Nor is such power to be inferred from a provision in the charter that collection shall be enforced as the city may, by ordinance, provide.<sup>5</sup> But where a lien exists and there is no mode of collecting assessments provided by statute, the power to collect may be exercised by foreclosure proceedings in a court of equity.<sup>6</sup> If the lot is owned by two or more persons, the decree of foreclosure should be against the interests of all;<sup>7</sup> and if the assessment is upon several lots, a decree should state the amount of the lien upon each lot, and should order the sale of each, or of so much thereof as is necessary to satisfy the charge against it. It is error to charge one of the lots with the aggregate of the assessment.<sup>8</sup> Proceedings to create and enforce such liens must be in strict accord with the statutory provisions on the subject, otherwise they will be invalid.<sup>9</sup>

d. WHO MAY COLLECT.—Public improvements may be made by municipalities at their own expense, and in such cases assess-

*Schools v. Shotwell*, 45 N. J. Eq. 106; *Matter of Drainage Dist.*, 28 La. Ann. 513; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Allegheny City's Appeal*, 41 Pa. St. 60; *Wabash, etc., R. Co. v. Drainage Com'rs*, 134 Ill. 384; *Keating v. Craig*, 73 Mo. 507.

1. *State v. Aetna L. Ins. Co.*, 117 Ind. 251.

2. *Trustees of Public Schools v. Trenton*, 30 N. J. Eq. 667; *Matter of Drainage Dist.*, 28 La. Ann. 513. In the latter case, it was also held that general taxes due a city are entitled to the same rank as incumbrances in favor of the state.

3. *Paine v. Spratley*, 5 Kan. 525; *Leavenworth v. Laing*, 6 Kan. 274; *Merriam v. Moody*, 25 Iowa 163; *McInerny v. Reed*, 23 Iowa 410; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Allen v. Galveston*, 51 Tex. 302.

4. *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Allen v. Galveston*, 51 Tex. 302.

5. *Merriam v. Moody*, 25 Iowa 163; *Paine v. Spratley*, 5 Kan. 525.

6. *McInerny v. Reed*, 23 Iowa 410; *Merriam v. Moody*, 25 Iowa 163; *New York v. Colgate*, 12 N. Y. 140; *Paine v. Spratley*, 5 Kan. 525; *Allen v. Galveston*, 51 Tex. 302.

Sometimes it is provided by statute that the lien shall be foreclosed in the same manner as if it were a mortgage. *Norwich v. Hubbard*, 22 Conn. 588; *New Haven v. Fair Haven, etc., R. Co.*, 38 Conn. 422; 9 Am. Rep. 399; *Waterbury v. Schmitz*, 58 Conn. 522.

7. *Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Cal. 525.

8. *Brady v. Kelly*, 52 Cal. 371; *Corry v. Folz*, 29 Ohio St. 320; *Brockschmidt v. Cavender*, 3 Mo. App. 568.

Upon the foreclosure of a lien for a drainage assessment upon a railroad, it is proper to decree a sale of that portion of the road within the drainage district. *Wabash, etc., R. Co. v. Drainage Com'rs*, 134 Ill. 384.

Where the property assessed belongs to the public, payment should be enforced by *mandamus* to the public authorities, after judgment, and not by sale of the property. *Com'rs of Highways v. Drainage Com'rs*, 127 Ill. 581.

9. *Creighton v. Manson*, 27 Cal. 613; *People v. Reay*, 52 Cal. 423; *Staples v. Fairchild*, 3 N. Y. 41; *Scott v. Brackett*, 89 Ind. 413; *Chicago v. Wright*, 32 Ill. 192; *Reilly v. Philadelphia*, 60 Pa. St. 467; *Lyon v. Alley*, 130 U. S. 177.

ments are made and collected by them for their own benefit.<sup>1</sup> But it is frequently provided that the contractor shall look only to assessments on the property benefited for his compensation.<sup>2</sup> Where this method is adopted, it is customary to issue special tax bills against the property assessed and deliver them to the contractor in payment for the work. The contractor is in many cases authorized to collect such assessments by suit in his own name;<sup>3</sup> in others, the action may be brought in the name of the city for the use of the contractor,<sup>4</sup> and, under some charters, the action may be brought either in the name of the city or of any person to whom payment has been directed.<sup>5</sup>

1. See *supra*, this title, *Time of Assessment*.

2. In such cases, if the city authorities act in good faith, the contractor has no remedy against the city for a failure of the assessment or a deficiency therein, *New Albany v. Sweeney*, 13 Ind. 245; *Chicago v. People*, 48 Ill. 416; *Ruppert v. Baltimore*, 23 Md. 184; *Whalen v. La Crosse*, 16 Wis. 271; *Finney v. Oshkosh*, 18 Wis. 209; *Fletcher v. Oshkosh*, 18 Wis. 232; *Kearney v. Covington*, 1 Metc. (Ky.) 339; *Goodrich v. Detroit*, 12 Mich. 279; *Second Nat. Bank v. Lansing*, 25 Mich. 207; *Hunt v. Utica*, 18 N. Y. 442; *Swift v. Williamsburgh*, 24 Barb. (N. Y.) 427; *Creighton v. Toledo*, 18 Ohio St. 447; but if, through the fault of the city, the contractor loses his remedy against the lot owners, the city will be liable to him, *Kearney v. Covington*, 1 Metc. (Ky.) 339; *Leavenworth v. Mills*, 6 Kan. 288; *Morgan v. Dubuque*, 28 Iowa 575; *Beard v. Brooklyn*, 31 Barb. (N. Y.) 142; *Newcomb v. Police Jury*, 4 Rob. (La.) 233; *O'Brien v. Police Jury*, 2 La. Ann. 355; *Michel v. Police Jury*, 3 La. Ann. 123; *Michel v. Police Jury*, 9 La. Ann. 67; unless the city is prohibited by charter from incurring such liability. *Craycraft v. Selvage*, 10 Bush (Ky.) 696. So, also, if it collects the assessments and misappropriates the proceeds. *Chaffee v. Granger*, 6 Mich. 651; *Lansing v. VanGorder*, 24 Mich. 456.

If the portion of the cost of an improvement which is assessed upon property, is in excess of the maximum which may, by law, be so assessed, the city will be liable to the contractor for such excess, *Cincinnati v. Diekmeyer*, 31 Ohio St. 242; unless the contractor expressly agrees to look to the assessment for his compensation at his own risk. *Welker v. Toledo*, 18 Ohio St. 452; *Creighton v. Toledo*, 18 Ohio St. 447.

If the city has no authority to make assessments upon property, it will be liable to the contractor, *Maier v. Chicago*, 38 Ill. 266; *Louisville v. Nevin*, 10 Bush (Ky.) 549; 19 Am. Rep. 78; *Craycraft v. Selvage*, 10 Bush (Ky.) 696; or if the city exempts property which would otherwise be liable to assessment, it will be liable to the contractor for any deficiency arising by reason of such exemption. *Chicago v. People*, 56 Ill. 327.

Where, in such case, property is sold for the collection of delinquent assessments, and is bid in by the city, it does not thereby become liable to the contractor for the amount due on the tax bill, but holds the bill as a trustee for his benefit, and is liable only in case it should sell the tax bill or collect the amount due on it from the owner of the lot. *Finney v. Oshkosh*, 18 Wis. 209; *Lovell v. St. Paul*, 10 Minn. 290.

3. *Hill v. Higdon*, 5 Ohio St. 243; 67 Am. Dec. 289; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159; *Creighton v. Scott*, 14 Ohio St. 438; *Van Sickle v. Belknap*, 129 Ind. 558; *Sims v. Hines* (Ind. 1890), 23 N. E. Rep. 515; *Taylor v. Palmer*, 31 Cal. 240; *Hendrick v. Crowley*, 31 Cal. 471; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Chambers v. Satterlee*, 40 Cal. 497; *Dyer v. North*, 44 Cal. 157; *Bennett v. Seibert* (Ind. 1893), 35 N. E. Rep. 35. The action may also be brought by the assignee of the contract. *Ernst v. Kunkle*, 5 Ohio St. 520.

4. *New Orleans v. Wire*, 20 La. Ann. 500; *Gest v. Cincinnati*, 26 Ohio St. 275; *St. Louis v. Clemens*, 36 Mo. 468; *St. Louis v. DeNoue*, 44 Mo. 136; *Kansas City v. Rice*, 89 Mo. 685; *Philadelphia v. Meighan* (Pa. 1894), 28 Atl. Rep. 304; *Philadelphia v. Wistar*, 35 Pa. St. 427; *Reilly v. Philadelphia*, 60 Pa. St. 467.

5. *Burlington v. Quick*, 47 Iowa 222;



Whatever may be the rule as to parties plaintiff in suits to collect such assessments, it is necessary to make all the owners of property against which it is sought to enforce a lien parties defendant, as the decree will not bind owners who are not in court.<sup>1</sup>

*e.* PLEADINGS.—In proceedings to enforce an assessment, the assessment ordinance should be pleaded, together with all the preliminary matters necessary to render such ordinance valid.<sup>2</sup> All matters and acts made essential to the validity of the assessment by the legislature, should be alleged in the pleadings and proved if denied.<sup>3</sup>

*f.* EVIDENCE.—In proceedings to collect an assessment, the assessment roll introduced in evidence establishes a *prima facie* case for the plaintiff.<sup>4</sup> So, also, the assessment warrant and diagram with an affidavit of demand and non-payment have been declared to constitute *prima facie* evidence of the plaintiff's right

Tuttle *v.* Polk, 84 Iowa 12; Gest *v.* Cincinnati, 26 Ohio St. 275.

1. Hancock *v.* Bowman, 49 Cal. 413; Clark *v.* Porter, 53 Cal. 409; Diggins *v.* Reay, 54 Cal. 525; Harney *v.* Applegate, 57 Cal. 205; Robinson *v.* Merrill, 87 Cal. 11; Mayo *v.* Ah Loy, 32 Cal. 477; 91 Am. Dec. 595; St. Louis *v.* DeNoue, 44 Mo. 136.

When a lot owner dies after the passage of the resolution of intention to improve the street, it is not necessary to make his personal representatives parties defendant in an action brought to foreclose the lien of an assessment upon property belonging to the estate pending settlement thereof; the heirs and devisees are the only necessary parties. Phelan *v.* Dunne, 72 Cal. 229.

Neither is a trustee a necessary party; if the beneficiary be made a party, it will be sufficient. Keating *v.* Craig, 73 Mo. 501.

2. Ormsby *v.* Louisville, 79 Ky. 197; Johnson *v.* Ferrell (Ky. 1886), 1 S. W. Rep. 412, 541; Sands *v.* Hatfield (Ind. 1893), 34 N. E. Rep. 654.

This is true, notwithstanding a statute directing the courts to take judicial notice of the ordinances of the city. Johnson *v.* Ferrell (Ky. 1886), 1 S. W. Rep. 412, 541. But it is sufficient to allege the substance of the ordinance and that it was duly passed. The fact that the ordinance was passed is not a conclusion of law. Heman *v.* Payne, 27 Mo. App. 481; Eyerman *v.* Payne, 28 Mo. App. 72; Johnson *v.* Ferrell (Ky. 1886), 1 S. W. Rep. 541.

The matter of pleading, in such cases, is a subject for legislative regulation.

Whiting *v.* Townsend, 57 Cal. 515; Richardson *v.* Tobin, 45 Cal. 30.

But it is doubtful if the legislature has power to dispense with the pleading of facts, the absence of which would render the assessment null and void. Louisville *v.* Cochran, 82 Ky. 15.

If a two-thirds vote of the aldermen is required, it should be alleged that the ordinance was passed by such vote. Wood *v.* Galveston, 76 Tex. 126.

3. Himmelman *v.* Danos, 35 Cal. 441; People *v.* Clark, 47 Cal. 456; San Francisco *v.* Eaton, 46 Cal. 100; Himmelman *v.* Townsend, 49 Cal. 150; Miller *v.* Mayo, 88 Cal. 568; Van Sickle *v.* Belknap, 129 Ind. 558; Johnson *v.* Ferrell (Ky. 1886), 1 S. W. Rep. 412, 541; Wood *v.* Galveston, 76 Tex. 126.

The defendant's ownership of the property upon which the lien is sought to be foreclosed, should be alleged and proved as alleged. Santa Barbara *v.* Huse, 51 Cal. 217; People *v.* Doe, 48 Cal. 560; Himmelman *v.* Spanagel, 39 Cal. 389; New London *v.* Miller, 60 Conn. 112.

It is sufficient to plead all the acts done by the municipal officers, and all the facts necessary to show their authority. Their proceedings need not be set forth in detail. Van Sickle *v.* Belknap, 129 Ind. 558; Waterbury *v.* Schmitz, 58 Conn. 522.

4. Chicago *v.* Sherwood, 104 Ill. 549; McAuley *v.* Chicago, 22 Ill. 563; Matter of Merriam, 84 N. Y. 596; Jenkins *v.* Stetler, 118 Ind. 275. See also *supra*, this title, *Report of Commissioners—Confirmation of Report and Assessment*.

to recover.<sup>1</sup> Under some charters, special tax bills in regular form are made *prima facie* evidence of the liability of the property owners named therein.<sup>2</sup> The acceptance of the work by the municipal authorities as having been performed according to contract is, in the absence of proof of fraud, strong evidence of its completion and the manner in which it was done.<sup>3</sup>

g. DEFENSES.—It may be stated as a general proposition that a property owner should have an opportunity at some stage of the proceedings to make a defense, if he has one,<sup>4</sup> and charters are so widely variant that no general rule can be stated as to defenses which are available in a suit to collect an assessment and those which must be made earlier, except that the defendant may in such suit interpose any valid defense which he has had no previous opportunity to make.<sup>5</sup> It is, as a rule, no defense that the work was not done in accordance with the terms of the contract, if it has been accepted by the proper authorities,<sup>6</sup> but it may be

1. *Dorland v. McGlynn*, 47 Cal. 47; *Himmelman v. Danos*, 35 Cal. 441; *Burke v. Turney*, 54 Cal. 486; *Himmelman v. Carpentier*, 47 Cal. 42; *Dougherty v. Harrison*, 54 Cal. 428; *Stockton v. Creamor*, 45 Cal. 643; *Fanning v. Leviston*, 93 Cal. 186.

2. *St. Louis v. Oeters*, 36 Mo. 456; *St. Louis v. Coons*, 37 Mo. 44; *St. Louis v. Armstrong*, 38 Mo. 29; *Sheehan v. Gleeson*, 46 Mo. 100; *Neenan v. Smith*, 60 Mo. 292; *Seibert v. Allen*, 61 Mo. 482; *Creamer v. Allen*, 3 Mo. App. 545; *Grimm v. Shickle*, 4 Mo. App. 585; *Schultze v. DeMenil*, 4 Mo. App. 595; *Stifel v. Dougherty*, 6 Mo. App. 441; *Waud v. Green*, 7 Mo. App. 85; *Seibert v. Tiffany*, 8 Mo. App. 37; *Perkinson v. Partridge*, 7 Mo. App. 581; *Galbreath v. Newton*, 30 Mo. App. 380.

3. *Municipality No. 2 v. Guillotte*, 14 La. Ann. 295; *Emery v. Bradford*, 29 Cal. 75; *Shepard v. McNeil*, 38 Cal. 72; *Dixon v. Detroit*, 86 Mich. 516.

And it has been held to be conclusive in such action, as the property owner's remedy is an appeal from the decision of the city authorities. *Cochran v. Collins*, 29 Cal. 129; *Emery v. Bradford*, 29 Cal. 75.

4. See *supra*, this title, *Constitutionality—Notice*.

5. *Stockton v. Creanor*, 45 Cal. 643; *St. Louis v. Richeson*, 76 Mo. 470; *Murdock v. Cincinnati*, 44 Fed. Rep. 726.

The sufficiency of the petition by property owners may not be called in question in such action, as that is a matter to be determined by the common

council. *Scranton v. Jermyn*, 156 Pa. St. 107.

6. *Fass v. Seehawer*, 60 Wis. 525; *Emery v. Bradford*, 29 Cal. 75; *Cochran v. Collins*, 29 Cal. 130; *Dixon v. Detroit*, 86 Mich. 516; *Motz v. Detroit*, 18 Mich. 514; *State v. Jersey City*, 29 N. J. L. 441; *Municipality No. 2 v. Guillotte*, 14 La. Ann. 295; *Ricketts v. Hyde Park*, 85 Ill. 110; *Murray v. Tucker*, 10 Bush (Ky.) 240; *Henderson v. Lambert*, 14 Bush (Ky.) 24; *Whitfield v. Hipple* (Ky. 1889), 12 S. W. Rep. 50.

Where the contractor receives tax bills in payment for work, a substantial compliance with the contract is sufficient to warrant a recovery thereof, *Pittsburgh v. McConnell*, 130 Pa. St. 463; *Erie v. Butler*, 120 Pa. St. 374; *Watson v. Philadelphia*, 93 Pa. St. 111; *Harrisburg v. Baptist*, 156 Pa. St. 526; but where there is no pretense that all the work provided for in the contract has been done, a city cannot, by accepting a portion of it, bind lot owners to the payment of assessments therefor. *Henderson v. Lambert*, 14 Bush (Ky.) 24.

And where the work is not completed within the time specified, and the council refuses to extend the time, there can be no valid assessment made therefor, notwithstanding the contractor goes on and completes the job. *Mappa v. Los Angeles*, 61 Cal. 309.

But it has been held that where the work was imperfectly done, a property owner sued on a special tax bill is entitled to have his damage, on account of the imperfection, deducted from

shown in defense that no valid contract was made.<sup>1</sup> If the contract is let for a price so grossly extravagant that it amounts to a fraud upon property owners, this may defeat the assessment.<sup>2</sup> If a portion of the work for which an assessment has been made was done by private individuals on their own responsibility, the assessment is liable to be defeated.<sup>3</sup> And if an assessment is illegal in part, it is invalid as a whole, unless the illegal part can readily be separated from that which is legal.<sup>4</sup> In one jurisdiction it is a good defense that the assessment was made for repairs and not for an original improvement.<sup>5</sup> Local assessments being a species of taxation, a property owner has not, as a rule, the right to set off damages occasioned by the wrongful act of the contractor,<sup>6</sup> although there are cases in which such right has been recognized.<sup>7</sup> It is a fatal objection to an assessment that it is for the improvement of a street which has never been laid out or dedicated to the public.<sup>8</sup>

**9. Remedies—*a*. APPEAL.**—City charters usually provide that aggrieved property owners may appeal from the decisions of assessing officers to a court of justice, the city council, the board of public works, or some other body constituted a tribunal of review, and a failure to appeal in due time is a waiver of all objections which are reviewable on such appeal.<sup>9</sup>

the charge against him in such tax bill. *Eyermann v. Zeppenfeld*, 6 Mo. App. 581.

And the damage arising from the non-compliance with the contract should not be distributed *pro rata* among all those assessed. Each person injured has a right to have the special injury done him deducted from the charge made against him. *Creamer v. Bates*, 49 Mo. 523.

1. *Brock v. Luning*, 89 Cal. 316; *Manning v. Den*, 90 Cal. 610; *Dean v. Borchsenius*, 30 Wis. 236.

But an omission to approve the contractor's bond, will not defeat an assessment for the work done by him. *Miller v. Mayo*, 88 Cal. 568.

2. *Matter of Livingston*, 121 N. Y. 94. See also *Matter of Leake*, etc., *Orphan Home*, 92 N. Y. 116; *Matter of Righter*, 92 N. Y. 112.

Where property is damaged, rather than benefited, by an improvement, it has been held that this may be shown in defense, as an assessment for such improvement would, under the circumstances, be fraudulent. *Foss v. Chicago*, 56 Ill. 354. But, on the other hand, it has been held that this is no defense in an action to collect the assessment. *Keith v. Bingham*, 100 Mo. 300.

A fraudulent side contract by the contractor with the owners of some of

the lots to be assessed, is no defense in an action against other lot owners to collect the assessment. The contract should be attacked in a direct proceeding. *Himmelmänn v. Hoadley*, 44 Cal. 213; *Nolan v. Reese*, 32 Cal. 484.

3. *Creote v. Chicago*, 56 Ill. 422; *Chicago v. Burtice*, 24 Ill. 489.

4. *Dorland v. Bergson*, 78 Cal. 637; *Walker v. District of Columbia*, 6 Mackey (D. C.) 352.

5. *Wistar v. Philadelphia*, 80 Pa. St. 505; 21 Am. Rep. 112; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Extension of Hancock St.*, 18 Pa. St. 26; *Greensburg v. Laird*, 138 Pa. St. 533; *Harrisburg v. Segelbaum*, 151 Pa. St. 172; *Boyer v. Reading*, 151 Pa. St. 185.

6. *Sims v. Hines* (Ind. 1890), 23 N. E. Rep. 515; *Himmelmänn v. Spanghel*, 39 Cal. 389; *Apperson v. Memphis*, 2 Flap. (U. S.) 363.

7. *New Orleans v. Wire*, 20 La. Ann. 500; *St. Joseph v. Anthony*, 30 Mo. 537; *St. Louis v. Clemens*, 36 Mo. 467.

8. *Allegheny City v. McCaffrey*, 131 Pa. St. 137; *Philadelphia v. McPherson*, 140 Pa. St. 5; *Philadelphia v. Ball*, 147 Pa. St. 243.

A mere irregularity in the proceedings to open the street, will not defeat the assessment. *Den v. Carron*, 26 N. J. L. 228.

9. *Ferguson v. Stamford*, 60 Conn.

*b. CERTIORARI.*—Assessment proceedings are of a judicial character, and, in the absence of a statutory substitute for such remedy, the record may be removed into a court of justice by the common-law writ of *certiorari* for the purpose of testing the validity of the assessment.<sup>1</sup>

*c. EQUITABLE RELIEF.*—(1) *In General.*—Where a property owner has just ground for relief, but has no adequate remedy at law, as where the matters complained of do not appear in the record of the proceedings, he may invoke the aid of a court of

432; *Brooks v. Baltimore*, 48 Md. 265; *Brown v. Grand Rapids*, 83 Mich. 101; *Tingue v. Port Chester*, 101 N. Y. 294; *Perine v. Torbush*, 97 Cal. 312; *McVerry v. Boyd*, 89 Cal. 304; *Hewes v. Reis*, 40 Cal. 255, 264; *Emery v. Bradford*, 29 Cal. 88; *Cochran v. Collins*, 29 Cal. 130; *Himmelmänn v. Hoadley*, 44 Cal. 279; *Dorland v. McGlynn*, 47 Cal. 51; *Boyle v. Hitchcock*, 66 Cal. 129; *Blair v. Luning*, 76 Cal. 134; *Jennings v. LeBreton*, 80 Cal. 11; *Frick v. Morford*, 87 Cal. 579; *Fanning v. Leviston*, 93 Cal. 186; *Campbell v. Monroe County*, 118 Ind. 119; *Bloomington v. Chicago, etc., R. Co.*, 134 Ill. 451.

But where the proceedings are void, or the objection taken is not remediable upon appeal, a failure to appeal is no waiver of the objection. *Frick v. Morford*, 87 Cal. 579; *Brock v. Luning*, 89 Cal. 316; *McBean v. Redick*, 96 Cal. 191; *Manning v. Den*, 90 Cal. 610.

On an appeal from a precept to enforce an assessment where the transcript shows jurisdiction, no question of fact which arose prior to the making of the contract can be tried. *Boyd v. Murphy*, 127 Ind. 174; *Reeves v. Grotendick*, 131 Ind. 110; *Sims v. Hines*, 121 Ind. 534, *overruling Moberry v. Jeffersonville*, 38 Ind. 198; *McEwen v. Gilker*, 38 Ind. 233; and *Kretsch v. Helm*, 45 Ind. 438. See also *Wiles v. Hoss*, 114 Ind. 371.

1. *Parks v. Boston*, 8 Pick. (Mass.) 218; 19 Am. Dec. 322; *Taber v. New Bedford*, 135 Mass. 162; *Snow v. Fitchburg*, 136 Mass. 179; *Brown v. New Bedford Sav. Inst.*, 137 Mass. 262; *Gelkey v. Watertown*, 141 Mass. 319; *State v. Jersey City*, 25 N. J. L. 309; *State v. Newark*, 25 N. J. L. 405; *State v. Jersey City*, 24 N. J. L. 662; *Swan v. Cumberland*, 8 Gill (Md.) 150; *Wilson v. Seattle*, 2 Wash. 543; *People v. Brooklyn*, 9 Barb. (N. Y.) 535; *LeRoy v. New York*, 20 Johns (N. Y.) 430; 11 Am. Dec. 289; *Matter of Eightieth St.*, 17 Abb. Pr. (N. Y. Supreme Ct.) 324;

*Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285.

In *State v. Newark*, 25 N. J. L. 404, the court said: "One of the defendants' counsel questioned the power of the court to review these proceedings upon *certiorari*, on the ground that they were legislative acts. I have no doubt of the power of the court. The practice is too well settled to be questioned. Some of the proceedings are clearly of a judicial character, whatever may be said of others; of this character, are the assessments for benefits, and their confirmation by the common council. This clearly gives jurisdiction, and the court may examine into the legality of such as are of a judicial character, and may also examine whether the previous proceedings, upon which these rest for support, are or not void; if void, the subsequent proceedings dependent upon them cannot be sustained; if not void, still the others may, for other causes, be illegal. If, for either cause, any person has been illegally assessed, he may come to this court for relief."

In *Parks v. Boston*, 8 Pick. (Mass.) 226; 19 Am. Dec. 322, the court said: "It has been contended, that *certiorari* will not lie to a court newly instituted and empowered to proceed by methods unknown to the common law; and a case from *Siderfin* was cited in support of this position. This is true as to writs of error, but not as to writs of *certiorari*. The law seems to be well settled, that *certiorari* may be awarded to remove the proceedings from any inferior court, whether it be of ancient or newly created jurisdiction; or whether it proceeds according to the course of the common law or not."

It is too late to review the preliminary proceedings upon *certiorari*, after the work has been fully completed. *State v. Rutherford* (N. J. 1890), 19 Atl. Rep. 972; *State v. Jersey City* (N. J. 1890), 19 Atl. Rep. 1096; *State v. Paterson*, 40 N. J. L. 244.

equity for relief against the assessment ;<sup>1</sup> unless some statutory form of relief is substituted for the equitable action.<sup>2</sup> But where the work has been done and the complaining party's property has been thereby benefited, the court may, as a condition precedent

Where an adequate remedy is provided by statute, that should be pursued rather than *certiorari*. *People v. Lohanas*, 54 Hun (N. Y.) 604; *Matter of Eightieth St.*, 17 Abb. Pr. (N. Y. Supreme Ct.), 324; *Matter of Tompkins Square*, 17 Abb. Pr. (N. Y. Supreme Ct.) 324, n.

1. *Ferguson v. Stamford*, 60 Conn. 432; *Heywood v. Buffalo*, 14 N. Y. 534; *Guest v. Brooklyn*, 69 N. Y. 506; *Strusburgh v. New York*, 87 N. Y. 452; *O'Reilly v. Kingston*, 114 N. Y. 439; *Beaumont v. Wilkes-Barre*, 142 Pa. St. 108; *Howell v. Tacoma*, 3 Wash. 711; *Meggett v. Eau Claire*, 81 Wis. 326.

In *Lyon v. Alley*, 130 U. S. 177, Lamar, J., said: "It may be proper to observe that in the present case the illegality does not appear wholly on the face of the record, but that it is shown in part by evidence outside. . . . We think, therefore, that the allegations of the bill and the facts proved in this case bring it fully within the equity jurisdiction of the court."

An equitable action may be maintained to vacate and set aside an assessment for illegal and fraudulent acts and practices of the city authorities or commissioners, which do not appear in the records. *Deiderer v. Voorhies*, 81 N. Y. 153; *Strusburgh v. New York*, 87 N. Y. 452.

But in such action, the complaint must set forth the facts which constitute the illegality or fraud, and not simply allege the conclusion that the expenses of the improvement have been so increased; otherwise it is bad on demurrer. *Knapp v. Brooklyn*, 97 N. Y. 520.

One who has an adequate remedy at law, or has had such a remedy and has slept on his rights until he has lost it, will not be granted equitable relief against an assessment. *Peoria v. Kidder*, 26 Ill. 351.

2. By an amendment to the charter of the city of New York, Laws of *New York* 1874, ch. 312, § 2, the right of an owner to maintain an equitable action to vacate assessments, or to remove the cloud thereby cast upon the title, was taken away, and it was provided that owners of property should thereafter be confined for their remedies in such

cases, to the proceedings under the act thereby amended. *Matter of Gantz*, 85 N. Y. 539.

Proceedings may be maintained under this charter to vacate or reduce an assessment which is so levied as to be a fraud upon property owners. *Matter of Livingston*, 121 N. Y. 94. But the burden of proof is upon the petitioner. Every presumption is in favor of the validity of the assessment. *Matter of Brady*, 85 N. Y. 268, and the petitioner can have no relief beyond the amount of his legal injury. Thus, where he had voluntarily paid a portion of the assessment, it was held that it could be vacated only so far as it was a lien upon the petitioner's property. *Matter of Hughes*, 93 N. Y. 512.

The case of *Strusburgh v. New York*, 87 N. Y. 452, was an equitable action against the city of New York to set aside an assessment; but the assessment was not made under the charter of New York City, as the land assessed was situated in the late town of Morrisania, and the assessment proceedings which gave rise to the action were had in said town before it became a part of the city of New York.

The *New York* Act of 1862, ch. 63, § 43, made that portion of the charter of the city of New York which applies to frauds in assessments for local improvements, applicable also to the city of Brooklyn, and when, in 1874, the charter of the city of New York was so amended as to take away the equitable action to vacate assessments, it was contended that the amendment was applicable also to the charter of Brooklyn; but it was held that it applied only to the charter of the city of New York, and did not take away the owner's equitable remedy in the city of Brooklyn. *Knapp v. Brooklyn*, 97 N. Y. 520.

The charter of the city of Albany also provides a statutory remedy in place of an equitable one. *Matter of Pennie*, 108 N. Y. 369.

The charter of the city of St. Paul provides that the owners of property assessed, may, upon the city's application for judgment on the assessment warrant, present and have determined, any objection to the assessment going

to granting relief, require him to do equity by paying the amount which is justly chargeable on his property.<sup>1</sup>

(2) *Injunction*.—The equitable relief most frequently sought is injunction to restrain the enforcement and collection of assessments alleged to be illegal. Unless otherwise provided by statute, this form of relief may be granted where it will prevent a multiplicity of actions, or where the validity of the assessment must be established by evidence *dehors* the record.<sup>2</sup> But if the plaintiff has an adequate remedy at law, an injunction will not be granted.<sup>3</sup>

to its validity. Under this provision it is held that the property owner may not, when the city objects, maintain an equitable action to set aside an assessment and restrain its collection, but that such action may be maintained, and the validity of the assessment may be determined and the proper relief granted, if the city does not object to the matter's being presented to the court in that manner. *Albrecht v. St. Paul*, 47 Minn. 531, *overruling Mayall v. St. Paul*, 30 Minn. 204.

1. *Meggett v. Eau Claire*, 81 Wis. 326; *Mills v. Carleton*, 29 Wis. 400; *Baker v. Omaha*, 16 Neb. 269; *Darst v. Griffin*, 31 Neb. 668; *Pittsburgh's Appeal*, 118 Pa. St. 458.

But this will not be required, where the assessment is made upon a basis so false and unwarranted as to furnish no data from which a just proportion of the amount assessed can be ascertained. *Howell v. Tacoma*, 3 Wash. 711.

In such action, the complaint should allege an offer to pay the amount of the assessment justly chargeable to the property of the plaintiff. *Meggett v. Eau Claire*, 81 Wis. 326.

**Invalid in Part.**—Where an assessment is invalid in part only, the court will not quash or set aside the whole of it, if the invalid part can be separated from that which is valid. *Elkhart v. Wickwire*, 121 Ind. 331; *Loesnitz v. Seelinger*, 127 Ind. 422; *Dyer v. Scalmanini*, 69 Cal. 637; *Kinsella v. Auburn*, 7 N. Y. Supp. 634; 54 Hun (N. Y.) 634; *Matter of Feust*, 121 N. Y. 299, *aff'd* 8 N. Y. Supp. 420.

A refusal to vacate an assessment as to a particular lot, does not affect the rights of the owners of other lots. *Matter of Rosenbaum*, 119 N. Y. 24.

2. *Clark v. Dunkirk*, 12 Hun (N. Y.) 181; *aff'd* without opinion, 75 N. Y. 612; *Tift v. Buffalo* (Buff. Super. Ct.), 7 N. Y. Supp. 633; *Knell v. Buffalo*, 54 Hun (N. Y.) 80; *Upington v. Oviatt*, 24 Ohio St. 232; *Beaumont v.*

*Wilkes-Barre*, 142 Pa. St. 198; *Lockwood v. St. Louis*, 24 Mo. 20.

In *Heywood v. Buffalo*, 14 N. Y. 534, wherein a perpetual injunction against the enforcement of an assessment was sought, it was held that the court would not entertain a suit for such relief, unless such suit would prevent a multiplicity of actions or irreparable injury to the freehold, or unless the assessment was valid on the face of the proceedings and extrinsic facts were necessary to be proved in order to establish its invalidity or illegality. Accordingly, the complaint showing none of these grounds for relief, was held bad on demurrer. See also *Guest v. Brooklyn*, 69 N. Y. 506.

It should be alleged in the complaint, that the assessment is regular on its face. *Clark v. Dunkirk*, 12 Hun (N. Y.) 181.

Where the irregularities are apparent on the face of the proceedings, the aggrieved party has a remedy at law, and an injunction will not be granted. *Haff v. Fuller*, 45 Ohio St. 495.

Where the assessors have proceeded on a principle which is wrong in law, the collection of the assessment may be enjoined. *Clark v. Dunkirk*, 12 Hun (N. Y.) 181; *aff'd* 75 N. Y. 612.

But where they proceed upon a correct principle, an error of judgment on their part is no ground for an injunction; *certiorari* is the proper remedy. *Hoffed v. Buffalo*, 130 N. Y. 387; *Kennedy v. Troy*, 77 N. Y. 494, *reversing* 14 Hun (N. Y.) 308.

In *Nebraska*, the courts are prohibited by statute from enjoining the collection of assessments, unless they are levied for an illegal or unauthorized purpose. *Wilson v. Auburn*, 27 Neb. 435.

3. *Bloomington v. Blodgett*, 24 Ill. App. 650; *Haff v. Fuller*, 45 Ohio St. 495; *Strenna v. Montgomery*, 86 Ala. 340; *Touzalin v. Omaha*, 25 Neb. 817.

An injunction will not be granted

(3) *Action to Quiet Title*.—Where the instrument or record alleged to be an incumbrance upon property is not void on its face, and it appears that the claimant would not develop the defects rendering the assessment invalid by proof which he would be obliged to produce if the title were litigated in an action at law, an aggrieved property owner may invoke the aid of a court of equity in a suit to quiet his title or to remove the cloud of the assessment lien therefrom.<sup>1</sup> But where the claimant's necessary proof would itself develop the infirmity of his claim, equity will not interfere.<sup>2</sup>

d. *RECOVERY BACK*.—One who has paid an apparently valid assessment upon his property, in ignorance of its invalidity, may, when such assessment has been vacated, recover the amount paid in an action as for money had and received.<sup>3</sup> When the proceedings are regular upon their face they have the force of a judgment, and a payment of the assessment upon presentation and

because the improvement was not made in accordance with the contract awarded. *McEneney v. Sullivan*, 125 Ind. 407; *Dever v. Junction City*, 45 Kan. 417.

1. *Lyon v. Alley*, 130 U. S. 177; *Guest v. Brooklyn*, 69 N. Y. 506; *Scott v. Onderdonk*, 14 N. Y. 9; *Jackson v. Smith*, 120 Ind. 520.

Equity may also enjoin the enforcement of an illegal assessment, in order to prevent a cloud upon title, as such cloud may be prevented as well as removed. *Touzalin v. Omaha*, 25 Neb. 817; *Hamilton v. Omaha*, 25 Neb. 826; *Tift v. Buffalo* (Buff. Super. Ct.), 7 N. Y. Supp. 633.

It was so held, where the tax deed was by statute made presumptive evidence of the regularity of all proceedings prior to its execution, as the property owner would, after sale, be obliged to show the invalidity of the assessment by proof *dehors* the record. *Marvin v. Town*, 56 Hun (N. Y.) 510; *Hanson v. Town* (Supreme Ct.), 10 N. Y. Supp. 150.

2. *Van Doren v. New York*, 9 Paige (N. Y.) 388; *Scott v. Onderdonk*, 14 N. Y. 14; 67 Am. Dec. 106; *Marsh v. Brooklyn*, 59 N. Y. 280; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132, *reversing* 8 Paige (N. Y.) 198. See also *Tax Titles*, sub-title, *Actions Concerning Tax Titles*, where this subject is fully treated.

3. *Smith v. Jersey City*, 52 N. J. L. 186; *Jersey City v. Riker*, 38 N. J. L. 225; 20 Am. Rep. 386; *Jersey City v. O'Callaghan*, 41 N. J. L. 349; *Campion v. Elizabeth*, 41 N. J. L. 355; *Elizabeth v. Hill*, 39 N. J. L. 555; *Schultze v. New*

*York*, 103 N. Y. 307; *Vaughn v. Port Chester*, 135 N. Y. 460; *Horn v. New Lots*, 83 N. Y. 100; 38 Am. Rep. 402; *Bruecher v. Port Chester*, 101 N. Y. 240.

And if, after the assessment is set aside, there be a reassessment of an amount less than the original assessment, the balance may be recovered, together with interest thereon from the date of payment. *Jersey City v. O'Callaghan*, 41 N. J. L. 349.

In *New Jersey*, an action will not lie to recover back the money paid, until the assessment is set aside. *Elizabeth v. Hill*, 39 N. J. L. 555; *Davenport v. Elizabeth*, 41 N. J. L. 362; *Fuller v. Elizabeth*, 42 N. J. L. 427; *State v. Elizabeth*, 51 N. J. L. 485.

But in *New York*, an action will lie to vacate an assessment, or a part thereof, and to recover the money paid, or so much thereof as was illegally assessed. *Strusburgh v. New York*, 87 N. Y. 452; *Knapp v. Brooklyn*, 97 N. Y. 520; *Trimmer v. Rochester*, 134 N. Y. 76; *De Montsaunlin v. New York*, 46 Hun (N. Y.) 188.

It is not necessary that the assessment be first set aside. *Bruecher v. Port Chester*, 101 N. Y. 240; *Horn v. New Lots*, 83 N. Y. 100; 38 Am. Rep. 402.

The Statute of Limitations begins to run, not from the time the assessment is set aside, but from the time the money is paid. *Trimmer v. Rochester*, 134 N. Y. 67.

In an action to recover back an assessment, the order of the city council for the improvement cannot be im-

demand is not voluntary, but is made under coercion of law.<sup>1</sup> But where an assessment is invalid on its face, or where the property owner has actual knowledge of its invalidity, a payment without duress is deemed voluntary and the money cannot be recovered back,<sup>2</sup> even though the payment be made under protest.<sup>3</sup>

*e.* ESTOPPEL.—Unless the proceedings under which an assessment is made are void, a property owner who stands by and sees the work in progress without making objections which are available to him is thereafter estopped to make them.<sup>4</sup> So, also, one who petitions for the improvement may be estopped to contest the assessment of actual benefits upon his property;<sup>5</sup> but if the proceedings are void, neither a failure to object nor a petition will work an estoppel.<sup>6</sup>

**XXII. MUNICIPAL TAXATION—1. Its Nature.**—Municipal taxation, here considered, consists in the imposition of taxes by municipalities and *quasi* municipalities for the purposes of defraying expenses and discharging obligations which they are authorized to assume or which are imposed upon them, other than for state

peached for alleged defects in the notices preceding it; such defects can be reached only upon *certiorari*. *Foley v. Haverhill*, 144 Mass. 352.

1. *Peyser v. New York*, 70 N. Y. 497; 26 Am. Rep. 624; *Jersey City v. O'Callaghan*, 41 N. J. L. 349; *Jersey City v. Riker*, 38 N. J. L. 225; 20 Am. Rep. 386.

2. *Redmond v. New York*, 125 N. Y. 632; *Pooley v. Buffalo*, 122 N. Y. 599; *Tripler v. New York*, 125 N. Y. 617; *Phelps v. New York*, 112 N. Y. 216; *Vanderbeck v. Rochester*, 122 N. Y. 285; *Falls v. Cairo*, 58 Ill. 403; *Bepler v. Cincinnati (Ohio)*, 23 Wkly. Law Bull. 229.

3. *Omaha v. Kountze*, 25 Neb. 60; *Newcomb v. Davenport (Iowa)*, 1892), 53 N. W. Rep. 232.

The legislature may, by general law, require that an assessment be paid under protest, where it is apparently legal, and provide for its recovery back if there is irregularity or error in the proceedings; but it may not require such payment of an assessment which is absolutely void. *Touzalín v. Omaha*, 25 Neb. 817.

4. *Powers v. New Haven*, 120 Ind. 185; *Ross v. Stackhouse*, 114 Ind. 200; *Jenkins v. Stetler*, 118 Ind. 275; *Lafayette v. Fowler*, 34 Ind. 140; *Hellenkamp v. Lafayette*, 30 Ind. 192; *Kellogg v. Ely*, 15 Ohio St. 64; *Sleeper v. Bullen*, 6 Kan. 300; *Ritchie v. South Topeka*, 38 Kan. 368; *Patterson v. Baumer*, 43 Iowa 477; *Taber v. New Bedford*,

135 Mass. 162; *Hyde Park v. Borden*, 94 Ill. 26.

There must be some sort of liability to pay an assessment before an estoppel can arise; consequently, when property attempted to be assessed, is outside of the assessment district, this may be shown, notwithstanding facts which might work an estoppel, if the property were within the district. *Rector v. Board of Improvements*, 50 Ark. 116.

And an owner's failure to object, while he has no right of action, will work no estoppel when his right of relief does arise. *Sim v. Hurst*, 44 Ind. 579.

5. *Tone v. Columbus*, 39 Ohio St. 281; 48 Am. Rep. 438; *Storer v. Cincinnati*, 4 Ohio Cir. Ct. 279; *State v. Hudson*, 34 N. J. L. 25, 531; *Johnson v. Allen*, 62 Ind. 57; *Motz v. Detroit*, 18 Mich. 495.

The signatures of the requisite number of property owners being a jurisdictional matter, one who has signed a petition will not be estopped to show that the petition is insufficient for want of signatures. *Petition of Sharp*, 56 N. Y. 257.

6. *Starr v. Burlington*, 45 Iowa 87; *Coggeshall v. Des Moines*, 78 Iowa 235; *McLauren v. Grand Forks*, 6 Dakota 397; *Gillett v. McLaughlin*, 69 Mich. 547; *Galbreath v. Newton*, 30 Mo. App. 380; *Kansas City v. Ratekin*, 30 Mo. App. 416; *Rector v. Board of Improvements*, 50 Ark. 116; *Quinn v.*



purposes.<sup>1</sup> The system of taxation adopted by a municipality may differ from that of the state, either as to the rate or manner of imposition.<sup>2</sup> But a local departure from the general policy of the state in imposing taxes, will not be justified unless expressly authorized.<sup>3</sup>

**2. Municipal and Corporate Purposes—***a. IN GENERAL.*—The purposes for which municipal taxes may be imposed are numerous.<sup>4</sup> The exercise of the general grant of power to levy taxes must be for such purposes only as are municipal and corporate.<sup>5</sup>

Paterson, 27 N. J. L. 35; Petition of Sharp, 56 N. Y. 257.

1. Public taxes are distinguished from local municipal taxes, such as town, parish, district and village taxes, in *Morgan v. Cree*, 46 Vt. 773; 10 Am. Rep. 640.

2. *Daily v. Swope*, 47 Miss. 367; *Firemen's Ins. Co. v. Baltimore*, 23 Md. 296; *State v. Milburn*, 9 Gill (Md.) 97; *Adams v. Somerville*, 2 Head (Tenn.) 363; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554; *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360.

A city may place a higher value upon property than that placed upon it by the state, but not an overvaluation. *Fulgum v. Nashville*, 8 Lea (Tenn.) 635.

In *New York*, state and county taxation forms a subject of the general provisions of the Revised Statutes relating to taxes, and municipal taxation is governed by these general rules only so far as the provisions of the law are either expressly or impliedly adopted by laws imposing municipal taxes. *Troy v. Mutual Bank*, 20 N. Y. 387.

In *San Luis Obispo v. Pettit*, 87 Cal. 499, it was held that the Municipal Corporation Act of 1883, p. 273, providing that an assessment, levy, and collection of city and town taxes shall conform to that of the state and county taxes, except as to the times therefor, did not prohibit the levy and collection at that time, but the selection of the time was left to the discretion of the council.

In *Virginia*, the power of the general assembly to authorize municipal corporations to levy taxes for their peculiar purposes, is not limited by art. 4, § 22 *et seq.*, of the constitution of *Virginia*, which relates to taxation for purposes of state revenue. *Gilkeson v. Frederick*, 13 Gratt. (Va.) 577.

3. *Sanders v. Butler*, 30 Ga. 679; *Howell v. Cassopolis*, 35 Mich. 471; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 194.

4. See *supra*, this title, *Purposes of Taxation; Occupation, Business, and Privilege Taxes; Local Assessments.*

As to the purposes for which municipalities may grant aid generally, see *MUNICIPAL CORPORATIONS*, vol. 15, p. 949; *MUNICIPAL SECURITIES*, vol. 15, p. 1204.

5. *Morford v. Unger*, 8 Iowa 82; *Covington v. Southgate*, 15 B. Mon. (Ky.) 492; *Cushing v. Newburyport*, 10 Met. (Mass.) 508; *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *Wells v. Weston*, 22 Mo. 386; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349; *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622.

It is not essential to constitute a "city purpose," that the work shall be wholly within the city limits. A bridge connecting two cities is a city purpose for each. *People v. Kelly*, 76 N. Y. 489.

In *Mead v. Acton*, 139 Mass. 341, it was held that a town could not raise money by taxation to pay the expenses of a committee appointed by the town, to effect the passage of an act which was declared unconstitutional when enacted.

When a town in its corporate capacity is the owner of property, it may raise money by taxation, or appropriate its corporate funds for its preservation and protection. *Van Sicklen v. Burlington*, 27 Vt. 70.

The constitution of *Illinois*, art. 9, §§ 9, 10, provides that the corporate authorities of the municipal governments of the state may be invested with the power to assess and collect taxes for corporate purposes. See *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268; 14 Am. Rep. 99; *Board of Trustees v. People*, 63 Ill. 299; *People v. Dupuyt*, 71 Ill. 651; *Johnson v. Campbell*, 49 Ill. 317; *Harward v. St. Clair, etc., Drainage Co.*, 51 Ill. 132; *Gage v. Graham*, 57 Ill. 144; *People v. Chicago*, 51 Ill. 17; 2 Am. Rep. 278;

Whether a tax is necessary for purposes embraced within the charter, is to be determined by the taxing power,<sup>1</sup> and the courts will not interfere unless the determination is clearly erroneous.<sup>2</sup>

*b. TAXATION IN AID OF RAILROADS.*—The power of municipalities to tax in aid of railroads has been discussed already in this work.<sup>3</sup> The conditions upon which a tax is voted must be performed.<sup>4</sup> But a departure from the original scheme of the work does not necessarily invalidate the tax.<sup>5</sup> A departure, however, so radical as to amount to a complete change in the

*Wilson v. Salomon*, 51 Ill. 37; *Livingston County v. Darlington*, 101 U. S. 407.

A corporate purpose, within the meaning of the constitution, is one necessary or proper to carry into effect the purpose of the corporate body. A tax by a school district, to aid a railroad, is not for a corporate purpose, *People v. Trustees of Schools*, 78 Ill. 136; nor is a tax imposed for the payment of a debt not incurred by the authority imposing it, and for which it is not responsible. *Sleight v. People*, 74 Ill. 47.

The levying of a tax, in pursuance of a general law of the state, for the purpose of building bridges, highways, etc., in which the people at large are interested, is not a tax for a corporate purpose within the meaning of the constitution. *Will County v. People*, 110 Ill. 511.

*Taylor v. Thompson*, 42 Ill. 9, defined a corporate purpose to mean "a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it." See also *Middleton v. Aetna L. Ins. Co.*, 82 Ill. 562.

Taxes for the purpose of defraying election expenses are imposed for a corporate purpose. *Wetherell v. Devine*, 116 Ill. 631.

The erection of hotels, mercantile, manufacturing and trading houses are not such purposes as are contemplated in the constitution. *Mather v. Ottawa*, 114 Ill. 659.

The entertainment of official visitors is not a corporate purpose for which a tax may be levied. *Law v. People*, 87 Ill. 385.

The term "corporate purposes" should not be so strictly construed as to render null a self-imposed tax, merely because it might be questionable whether it would promote the corporate welfare. *Taylor v. Thompson*, 42 Ill. 9.

1. *Hawkins v. Jonesboro*, 63 Ga. 527;

*Wheeler v. Plattsmouth*, 7 Neb. 270; *Anderson v. Mayfield* (Ky. 1892), 19 S. W. Rep. 598.

2. *People v. Kelly*, 76 N. Y. 475. And see *McCallie v. Chattanooga*, 3 Head (Tenn.) 317.

A tax levied to pay the expenses of officers not named in the general law, will be presumed to be legal. *Law v. People*, 87 Ill. 385.

In *Board of Com'rs of Public Schools v. Allegany County*, 20 Md. 449, it was held that a power to levy all needful taxes, and discharge all claims authorized by law, confers authority to provide for any local object sanctioned by the legislature.

3. See *supra*, this title, *Purposes of Taxation*. See also *MUNICIPAL CORPORATIONS*, vol. 15, p. 1192; *MUNICIPAL SECURITIES*, vol. 15, p. 1204.

As to the power of the legislature to authorize such taxation, see *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666; *Chicago, etc., R. Co. v. Otoe County*, 16 Wall. (U. S.) 667; *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678; *Rogers v. Burlington*, 3 Wall. (U. S.) 654.

4. *Lamb v. Anderson*, 54 Iowa 190; *Meeker v. Ashley*, 56 Iowa 188; *People v. Clayton*, 88 Ill. 45; *Chicago, etc., R. Co. v. Marseilles*, 84 Ill. 145.

*Insolvency of Road.*—The insolvency of a railway company, or its inability to complete its road, does not affect the legality of a tax previously levied in its behalf. *Wilson v. Hamilton County*, 68 Ind. 508.

5. *Shontz v. Evans*, 40 Iowa 139; *Muscatine West. R. Co. v. Horton*, 38 Iowa 33; *Jenkins v. Burlington, etc., R. Co.*, 29 Iowa 255; *First Nat. Bank v. Concord*, 50 Vt. 257; *Lynch v. Eastern, etc., R. Co.*, 57 Wis. 430.

A tax voted to aid in the construction of a railroad is collectible, although the road constructed be narrow gauge, unless it be shown that it is unable to do the business of the country through which it passes. *Casady v. Lowry*,

original purpose will invalidate the tax, although no conditions were imposed.<sup>1</sup>

The statute may declare a tax in aid of a railroad assignable.<sup>2</sup> A tax in aid of a railroad is not forfeited by a perpetual lease of the road made in good faith,<sup>3</sup> or by a sale of all its property, rights, and franchises<sup>4</sup> after the aid is voted. And, on the other hand, the obligation to perform the conditions imposed is as binding upon the transferee as upon the original grantee.<sup>5</sup>

c. SINKING FUND TAXES.—Power may be conferred on municipalities to provide a sinking fund for the payment of public loans, principal or interest.<sup>6</sup> Under the power to tax for such a fund,

49 Iowa 523; *Meador v. Lowry*, 45 Iowa 684.

1. *Lamb v. Anderson*, 54 Iowa 190.

2. As under *Iowa Private and Local Acts of 1874*, ch. 48. *Merrill v. Welsher*, 50 Iowa 61.

3. *Chicago, etc., R. Co. v. Shea*, 67 Iowa 728; *Manning v. Mathews*, 66 Iowa 675; *Lynch v. Eastern, etc., R. Co.*, 57 Wis. 430; *Nugent v. Putnam County*, 19 Wall. (U. S.) 241.

Even though a sale of a railroad amounts to a voluntary dissolution of the corporation, it would still be considered as surviving, to the extent of permitting its rights and obligations, growing out of a vote of a tax in aid of it, to be enforced. *Muscatine West. R. Co. v. Horton*, 38 Iowa 33.

In *People v. Clayton*, 88 Ill. 45, it was held that a condition that a subscription should not be paid until the company should run their first locomotive "over their projected line of road," contemplates the substantial completion of the road for the movement of trains, and that the running of the company's trains over the road of another company for the distance of several miles, under a terminable lease from such company, is not a compliance with the conditions; but that a purchase of such other road, or a perpetual lease of it, adopting it as a permanent part of the projected road, is sufficient. See also *Iowa, etc., R. Co. v. Schenck*, 56 Iowa 628.

4. *Henry County v. Nicolay*, 95 U. S. 619; *Nugent v. Putnam County*, 19 Wall. (U. S.) 241; *Smith v. Clark County*, 54 Mo. 58; *Muscatine West. R. Co. v. Horton*, 38 Iowa 33; *Parsons v. Childs*, 36 Iowa 108; *Merrill v. Marshall County*, 74 Iowa 24; *Lynch v. Eastern, etc., R. Co.*, 57 Wis. 430. And see *Scotland County v. Thomas*, 94 U. S. 682.

But in *Manning v. Matthews*, 66 Iowa

675, it was held that a tax voted by a township in aid of a railroad is forfeited by alienation of the road before its completion, and that the collection of the tax may be enjoined. See also *Canntillon v. Dubuque, etc., R. Co.* (Iowa, 1887), 35 N. W. Rep. 620.

**Sale of Insolvent Road.**—*Mandamus* does not lie in favor of a railway company which has purchased the stock of another insolvent company at foreclosure sale, to which the people of the township had voted aid, to compel the levy and collection of a tax for the purpose of paying to it the amount voted in the aid of the original company. *Board of Com'rs v. State* (Ind. 1888), 36 Am. & Eng. R. Cas. 210.

5. *State v. Central Iowa R. Co.*, 71 Iowa 410; *Campbell v. Marietta, etc., R. Co.*, 23 Ohio St. 168.

6. *Union Pac. R. Co. v. York County*, 10 Neb. 612; *Union Pac. R. Co. v. Buffalo County*, 9 Neb. 449; *Bagby v. Bateman*, 50 Tex. 442; *Houston v. Voorhies*, 70 Tex. 356; *Wilkes-Barre's Appeal*, 116 Pa. St. 246; *State v. New-ark*, 50 N. J. L. 126.

Where an act providing for the creation of a sinking fund, also provided that the commissioners of the fund should report to the council the amount necessary to be raised, it was held that the council had no authority to levy the tax until the commissioners had made their report. *St. Louis County v. Nettleton*, 22 Minn. 356.

**Property Subsequently Annexed.**—Property which has been annexed to the city after the creation of the debt, may be taxed for this purpose. *Stilz v. Indianapolis*, 81 Ind. 582.

The constitution of *Pennsylvania* requires cities to impose annual taxes, when necessary for the purpose of paying their public debt. They are in addition to the usual taxes for city purposes; and, although limited, they may

taxes may not be levied to pay a floating indebtedness.<sup>1</sup> The tax cannot be continued after the purpose for which it was authorized has been accomplished;<sup>2</sup> nor can the fund, when collected, be applied to any other purpose.<sup>3</sup>

**3. Power to Impose**—*a.* IN GENERAL.—While the power to tax belongs to the sovereign power of the state, it is not inherent in municipal corporations, towns or townships, counties, and other artificial districts and subdivisions, and can be exercised by them only when delegated by the legislature in plain and unmistakable terms,<sup>4</sup> or when resulting by necessary implication from other

be used to extinguish indebtedness arising subsequently to the adoption of the constitution, as well as those previously existing. *Wilkes-Barre's Appeal*, 116 Pa. St. 246.

**Reservation of Special Tax.**—In *New York*, it is provided that taxes assessed upon any railroad in a town, city, or village, which has issued bonds in aid of the construction of the road, are to be set apart as a sinking fund to be applied in payment of such bonds. *Clark v. Sheldon*, 106 N. Y. 104.

In *North Carolina*, there is a similar provision which has been held to be constitutional. *Brown v. Hertford*, 100 N. Car. 92.

1. *Union Pac. R. Co. v. Buffalo County*, 9 Neb. 449; *Burlington, etc., R. Co. v. Clay County*, 13 Neb. 367.

2. *Louisville v. Murphy*, 86 Ky. 53; *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254.

3. See *supra*, this title, *Distribution and Disposition of the Avails of Taxation*.

4. *Beck v. Allen*, 58 Miss. 143; *Com'rs of Highways v. Newell*, 80 Ill. 587; *Clark v. Davenport*, 14 Iowa 494; *Leavenworth v. Norton*, 1 Kan. 405; *Basnett v. Jacksonville*, 19 Fla. 664; *Mays v. Cincinnati*, 1 Ohio St. 269; *Zanesville v. Richards*, 5 Ohio St. 590; *Mount Carbon Coal, etc., Co. v. Blanchard*, 54 Ill. 240; *Hitchcock v. St. Louis*, 49 Mo. 484; *Steines v. Franklin County*, 48 Mo. 167; *St. Louis v. Bircher*, 76 Mo. 431; *Oliver v. Keightley*, 24 Ind. 514; *Probasco v. Moundsville*, 11 W. Va. 501; *Vanover v. Davis*, 27 Ga. 354; *Hare v. Kennerly*, 83 Ala. 608; *Winston v. Taylor*, 99 N. Car. 210; *State v. Macon County Ct.*, 68 Mo. 29; *Caldwell v. Rupert*, 10 Bush (Ky.) 182; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Lisbon v. Bath*, 21 N. H. 319; *Concord v. Boscawen*, 17 N. H. 465; *Dillingham v. Snow*, 5 Mass. 547; *Heine*

*v. Levee Com'rs*, 19 Wall. (U.S.) 660; *Von Hoffman v. Quincy*, 4 Wall. (U.S.) 554; *Matter of Second Ave. M. E. Church*, 66 N. Y. 395; *Columbia v. Guest*, 3 Head (Tenn.) 413; *Brownsville Taxing Dist. v. Loague*, 129 U. S. 493; *Richmond v. Daniel*, 14 Gratt. (Va.) 385; *Green v. Ward*, 82 Va. 324; *Sewell v. St. Paul*, 20 Minn. 511; *Vance v. Little Rock*, 30 Ark. 439.

In *Cushing v. Newburyport*, 10 Met. (Mass.) 508, it was held that municipal corporations are possessed of limited powers, and that they cannot vote and assess money upon the inhabitants for all purposes indiscriminately, but must be confined to the established powers of such organizations, as settled by positive enactment, or by well-defined and ancient usage.

The words "authority of law," when used with reference to the power of a municipality to tax, can refer only to an act of the legislature, the law-making power under the constitution, duly passed and approved. *Reineman v. Covington, etc., R. Co.*, 7 Neb. 310.

So far as the power to tax exists in municipal corporations, it is by grant, and is called a franchise. *O'Byrne v. Savannah*, 41 Ga. 331.

Under constitutional provisions prohibiting local or special laws, the delegation to cities of legislative authority incident to municipal governments, can be made only by general law. *Covington v. East St. Louis*, 78 Ill. 548.

**Cannot be Acquired by Prescription.**—The exercise of a municipal authority by one town, over a portion of the territory of another, and the acquiescence of the latter for a period of more than twenty years, will not authorize the former to levy and collect taxes on persons dwelling in such territory. *Ham v. Sawyer*, 38 Me. 37.

**Cannot be Imparted by U. S. Courts.**—The power to tax cannot be imparted by the *United States* courts, and an at-

powers expressly granted.<sup>1</sup> The source and measure of the powers of a municipal corporation or division are its charter or act of incorporation,<sup>2</sup> and the grant of power is, as has been said, to be subjected to a strict construction,<sup>3</sup> and, furthermore, is to be

tempt by them to compel by *mandamus* the levy of a tax, not authorized by the laws of the state, will be an abuse of the writ. *Vance v. Little Rock*, 30 Ark. 435.

1. See *infra*, this title, *By Necessary Implication*.

2. *New Iberia v. Migue*, 32 La. Ann. 923; *Hooper v. Emery*, 14 Me. 375; *Hitchcock v. St. Louis*, 49 Mo. 484; *St. Louis v. Russell*, 9 Mo. 507; *Jonas v. Cincinnati*, 18 Ohio 318; *Douglass v. Harrisville*, 9 W. Va. 166; 27 Am. Rep. 548; *Probasco v. Moundsville*, 11 W. Va. 501.

A municipal council may be authorized to make an assessment of such property as has been omitted or concealed by the owners. *Owensboro v. Callaghan* (Ky. 1891), 17 S. W. Rep. 278; 13 Ky. L. Rep. 418.

The property subject to taxation by a city, under a charter authorizing a tax on all property subject to state and county taxation, is determined by a state law in force at the time, though passed after the city charter. *Anderson v. Mayfield* (Ky. 1892), 19 S. W. Rep. 598.

By the *Illinois* Act of 1883, power is conferred on cities not organized under the general law, but acting under special charters, to levy, in addition to the municipal taxes authorized by their charters, taxes for distinct objects named—as a sewer-fund tax and a water-fund tax—to be levied at the discretion of the legislative authority of the city. *Thatcher v. Chicago*, etc., R. Co., 120 Ill. 560.

3. See *supra*, this title, *Levy by Subordinate Political Division*. *Leavenworth v. Norton*, 1 Kan. 405; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Keese v. Denver*, 10 Colo. 113; *Mee v. Paddock*, 83 Ill. 494; *People v. Ulster County*, 93 N. Y. 397; *People v. Adsit*, 2 Hill (N. Y.) 619; *Barker v. Loomis*, 6 Hill (N. Y.) 463; *Bussey v. Gilmore*, 3 Me. 191; *People v. Buffalo County*, 4 Neb. 150; *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 42. And see *Nashville, etc., R. Co. v. Franklin County*, 5 Lea (Tenn.) 707; *Nashville, etc., R. Co. v. Marion County*, 7 Lea (Tenn.) 664; *Stephens v. Wilkins*, 6 Pa. St. 260.

The state is presumed to have granted,

in clear and unmistakable terms, all the power it intended to grant. *Com'rs of Highways v. Newell*, 80 Ill. 587; *Alton v. Aetna Ins. Co.*, 82 Ill. 45; *State v. Brewer*, 64 Ala. 287; *Baldwin v. City Council*, 53 Ala. 437; *West School Dist. v. Merrills*, 12 Conn. 437; *New Iberia v. Migue*, 32 La. Ann. 923; *Crowell v. Hopkinton*, 45 N. H. 9; *Wells v. Board of Education*, 20 W. Va. 157. And see *Cobb v. Elizabeth City*, 75 N. Car. 1; *Weinstein v. Newbern*, 71 N. Car. 536.

Any doubt or ambiguity arising from the terms used by the legislature in making the grant, must be resolved in favor of the public. *Clark v. Davenport*, 14 Iowa 494; *English v. People*, 96 Ill. 566; *Minturn v. Larue*, 23 How. (U. S.) 435; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 585; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Probasco v. Moundsville*, 11 W. Va. 501; *Dean v. Charlton*, 27 Wis. 522. But the language used is not to be turned from its natural and obvious import so as to defeat the legislative intent. *Dean v. Borchsenius*, 30 Wis. 236. And powers expressly granted, or necessarily implied, are not to be defeated or impaired by a strict construction. *Kyle v. Malin*, 8 Ind. 34. See also *Smith v. Madison*, 7 Ind. 86.

The ordinances of municipal corporations are subject to revision by the courts, and though large discretion is allowed, when an ordinance is found not to be in conformity to the charter, or not reasonably incident to powers contained in the charter, it will be held to be void. *Cape Girardeau v. Riley*, 72 Mo. 220.

The general assembly cannot confer upon a corporation the power to repeal a statute of the state by ordinance; a by-law or ordinance of a corporation repugnant to the constitution, common or statute law of the state, is void. *Haywood v. Savannah*, 12 Ga. 404.

A statute giving a town power to raise money for necessary charges has been held to mean such sums as shall be necessary to meet the ordinary expenses of the year; such as the payment of municipal officers, the support and defense of actions to which it may be a party, and the expenses it incurs in performing duties imposed upon it

strictly pursued,<sup>1</sup> the enumeration of particular objects of taxation

by law. *Stetson v. Kempton*, 13 Mass. 272.

In *Kyle v. Malin*, 8 Ind. 34, it was held that municipal corporations are to be held strictly within the limits prescribed by statute, but within those limits they are favored by the courts.

In *Stockle v. Silsbee*, 41 Mich. 615, it was held that the action of a board of supervisors in voting money, is presumably lawful.

**Extension of Time.**—In *Brunswick v. Finney*, 54 Ga. 318, it was held that, under a city charter requiring the payment of a tax in quarterly installments at such times as the mayor and council shall direct, the council may indulge the taxpayers for the first and second quarters, and make the installments payable in the second or third quarter; but they cannot make any installment payable before it would be due under the charter. See also *Wheatley v. Covington*, 11 Bush (Ky.) 18.

1. See *supra*, this title, *Levy by Subordinate Political Division*. Webster *v. People*, 98 Ill. 343; *Alton v. Aetna Ins. Co.*, 82 Ill. 45; *Leavenworth v. Norton*, 1 Kan. 405; *Campbell County Ct. v. Taylor*, 8 Bush (Ky.) 206; *Murray v. Tucker*, 10 Bush (Ky.) 240; *Rebassa v. New Orleans*, 3 Mart. (La.) 218; *Ruggles v. Collier*, 43 Mo. 353; *Trenton v. Coyle*, 107 Mo. 193; *Brady v. New York*, 2 Bosw. (N. Y.) 173; *McSpedon v. New York*, 7 Bosw. (N. Y.) 601; *Probasco v. Moundsville*, 11 W. Va. 501; *Green v. Ward*, 82 Va. 324; *Hare v. Kennedy*, 83 Ala. 608; *Winston v. Taylor*, 99 N. Car. 210; *Sharpe v. Speir*, 4 Hill (N. Y.) 76; *Sharpe v. Johnson*, 4 Hill (N. Y.) 92; *Mays v. Cincinnati*, 1 Ohio St. 268; *Beaty v. Knowler*, 4 Pet. (U. S.) 152; *Dyckman v. New York*, 5 N. Y. 434; *Burnes v. Atchison*, 2 Kan. 454; *Henry v. Chester*, 15 Vt. 460 (nature of authority discussed by *Redfield, J.*); *Asheville v. Means*, 7 Ired. (N. Car.) 406; *Jonas v. Cincinnati*, 18 Ohio 318; *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81; *Harmony Tp. v. Osborne*, 9 Ind. 458; *Howell v. Buffalo*, 15 N. Y. 512; *Maurice v. New York*, 8 N. Y. 120; *Fairfield v. Ratcliff*, 20 Iowa 396; *Henderson v. Baltimore*, 8 Md. 352; *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *State v. Jersey City*, 26 N. J. L. 444; 25 N. J. L. 309; *Columbia v. Hunt*, 5 Rich. (S. Car.) 550; *Chicago v.*

*Wright*, 32 Ill. 192; *Taylor v. Donner*, 31 Cal. 480; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *St. Louis v. Laughlin*, 49 Mo. 559; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Turner v. Althaus*, 6 Neb. 54; *Clark v. Davenport*, 14 Iowa 494; *Fitch v. Pinckard*, 5 Ill. 69; *Gaddis v. Richland County*, 92 Ill. 119; *State v. Rogers*, 10 Nev. 250; 21 Am. Rep. 738; *Carron v. Martin*, 26 N. J. L. 594; *St. Louis v. Clemens*, 43 Mo. 395; *San Antonio v. Gould*, 34 Tex. 49; *Smith v. Sherry*, 54 Wis. 121; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 585; *Keese v. Denver*, 10 Colo. 113; *Mobile v. Baldwin*, 57 Ala. 61; *Stone v. Mobile*, 57 Ala. 61; 29 Am. Rep. 712; *State v. Guttenberg*, 39 N. J. L. 660; *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 471; *Richmond v. Daniel*, 14 Gratt. (Va.) 385. Any departure in any material respect, will be fatal to an attempt to exercise the power. *Campbell County Ct. v. Taylor*, 8 Bush (Ky.) 206.

Where the statute prescribes a mode and purpose of municipal taxation, it must be pursued, and no other mode or purpose can be substituted by the officials exercising the power. Webster *v. People*, 98 Ill. 343.

A city cannot, under the *Georgia* laws, bind itself by contract, either to forbear to impose taxes, or to impose them conditionally, or upon certain limitations. *Augusta Factory v. Augusta*, 83 Ga. 734.

**Must be Exercised by Proper Functionaries.**—The power to tax must not only exist, but it must be called into exercise by the proper functionaries. Webster *v. People*, 98 Ill. 343; *Hyde Park v. Ingalls*, 87 Ill. 11; *Gaddis v. Richland County*, 92 Ill. 119; *Bellinger v. Gray*, 51 N. Y. 610; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 585.

**Cannot be Redelegated.**—The authority is conferred upon them to be exercised, not to be redelegated to others. *McInerney v. Reed*, 23 Iowa 410; *Johnston v. Macon*, 62 Ga. 645; *Thompson v. Schermerhorn*, 6 N. Y. 92; 55 Am. Dec. 385; *Davis v. Read*, 65 N. Y. 566; *St. Louis v. Clemens*, 43 Mo. 395; *Ruggles v. Collier*, 43 Mo. 353; *Richmond, etc., R. Co. v. Brogden*, 74 N. Car. 707; *Ould v. Richmond*, 23 Gratt. (Va.) 471; 14 Am. Rep. 139.

The supervisors of a county cannot delegate their authority to license trades

excluding all others not enumerated;<sup>1</sup> and where general taxation alone is authorized, the sum required may not be raised by special taxation.<sup>2</sup>

The legislature, in delegating its power to tax to municipalities, is not confined to particular existing municipalities, but may create others, or other kinds or classes of political subdivisions, and, when so created, may endow them with the faculties and attributes of pre-existing municipalities.<sup>3</sup> Constitutional provisions conferring

and callings to others, or make its exercise depend upon the consent of others; the power invested in them is a public trust which can be executed only in consonance with the general purposes of the municipality, and in subordination to the general laws and policy of the state. *In re Quong Woo*, 13 Fed. Rep. 229.

1. *Plaquemine v. Roth*, 29 La. Ann. 261; *Baldwin v. City Council*, 53 Ala. 437; *Savannah v. Hartridge*, 8 Ga. 23; *St. Louis v. Laughlin*, 49 Mo. 559; *Concord v. Boscawen*, 17 N. H. 465; *Jonas v. Cincinnati*, 18 Ohio 318; *Primm v. Belleville*, 59 Ill. 142; *Charleston v. Condy*, 4 Rich. (S. Car.) 254.

All taxes authorized for specified purposes, must be levied for the purpose named. *Webster v. People*, 98 Ill. 343.

The words "all necessary expenses," cannot be construed to enlarge a power to tax for specific purposes. *Beaty v. Knowler*, 4 Pet. (U. S.) 152.

An authority to towns to vote money for certain specified purposes and other necessary charges, is not intended to be an enumeration of objects and purposes for which towns may raise money, but a mere expression of a few prominent objects by way of instance, and a general reference to others extending to all other matters falling within their rights and duties. *Van Sicklen v. Burlington*, 27 Vt. 70; *Willard v. Newburyport*, 12 Pick. (Mass.) 230.

2. *Webster v. People*, 98 Ill. 343; *Wright v. Chicago*, 20 Ill. 252; *Clark v. Davenport*, 14 Iowa 494; *Bussy v. Gilmore*, 3 Me. 191; *Annapolis v. Harwood*, 32 Md. 471.

Nor will a grant of power to impose a special tax, confer authority to accomplish the same purpose by a general tax. *Webster v. People*, 98 Ill. 343.

Between the right to make special assessments for local improvements, and that of taxation for general corporate purposes, there is a clear distinction involving in their exercise essentially dif-

ferent powers and principles. One is not included in the other, nor can one be exercised any more than the other, without a grant of authority from the legislature. *Fairfield v. Ratcliff*, 20 Iowa 396.

Where the expense of keeping up bridges is a duty imposed upon a county, it is included in a tax for general county purposes, and a special bridge tax is unauthorized. *Nashville, etc., R. Co. v. Franklin County*, 5 Lea (Tenn.) 707; *Nashville, etc., R. Co. v. Marion County*, 7 Lea (Tenn.) 663.

A statute authorizing a board of police of the several counties, to raise revenue for the support of the poor, and one authorizing them to raise revenue for general county purposes, are distinct and independent statutes, and the tax contemplated by the former may be levied and collected, even though the power conferred by the latter has been exhausted. *Coulson v. Harris*, 43 Miss. 728.

3. *People v. Salomon*, 51 Ill. 37; *Dunham v. People*, 96 Ill. 331; *Owners of Land v. People*, 113 Ill. 296; *People v. Wren*, 5 Ill. 273; *Pike County v. People*, 11 Ill. 202; *Richland County v. Lawrence County*, 12 Ill. 1; *Dennis v. Maynard*, 15 Ill. 477; *Daily v. Swope*, 47 Miss. 367.

In *Illinois*, the power to assess and collect taxes for corporate purposes, cannot be given to or exercised by a fractional portion of a municipality. *Madison County v. People*, 58 Ill. 456; *People v. Canty*, 55 Ill. 33.

In *Spring v. Olney*, 78 Ill. 101, it was held that an authority to incorporate cities, to levy taxes annually, to a certain extent, applies as well to cities incorporated under special charters as to those incorporated under general acts.

Although a power to tax, vested in a private corporation, is illegal and void, when it is transferred to a municipal corporation, it is not so. *Allentown v. Henry*, 73 Pa. St. 404.

the power to tax upon municipal authorities are sometimes self-executing, in so far as not to require further action on the part of the legislature,<sup>1</sup> but whether this is so or not depends upon the language of the constitution.<sup>2</sup>

b. BY NECESSARY IMPLICATION.—When power is granted a municipality to erect public works, borrow money, and incur obligations in payment thereof, the power is necessarily implied, without being specifically granted, unless the contrary appears, to levy the necessary taxes to discharge the obligations at maturity.<sup>3</sup> But the power to tax is not implied from a power to

1. *Davis v. Green*, 40 La. Ann. 281, construing article 214 of the *Louisiana Constitution*.

2. *State v. St. Louis, etc., R. Co.*, 74 Mo. 163, construing the *Missouri Constitution*.

3. See MUNICIPAL SECURITIES, vol. 15, pp. 1311, 1316; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Scotland County Ct. v. U. S.*, 140 U. S. 41; *U. S. v. New Orleans*, 98 U. S. 381; *Quincy v. Jackson*, 113 U. S. 332; *Sibley v. Mobile*, 3 Woods (U. S.) 535; *Ottawa v. Carey*, 108 U. S. 110; *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 660; *U. S. v. Macon County*, 99 U. S. 589; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Ex p. Parsons*, 1 Hughes (U. S.) 282; *U. S. v. New Orleans*, 98 U. S. 394; *Kelley v. Milan*, 127 U. S. 139; *Peoria, etc., R. Co. v. People*, 116 Ill. 401; *Prairie v. Lloyd*, 97 Ill. 179; *Galena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557; *Laughlin v. Santa Fe County* (N. Mex. 1885), 5 Pac. Rep. 817; *Lowell v. Boston*, 111 Mass. 460; 15 Am. Rep. 39; *Board of Com'rs of Public Schools v. Alleghany County*, 20 Md. 449; *Iowa R. Land Co. v. Sac County*, 39 Iowa 124; *Coy v. Lyons City*, 17 Iowa 1; *Coffin v. Davenport*, 26 Iowa 515; *Com. v. Allegheny*, 37 Pa. St. 277; *Hyde Park v. Ingalls*, 87 Ill. 11; *Hasbrouck v. Milwaukee*, 25 Wis. 122; *Gibbons v. Mobile, etc., R. Co.*, 36 Ala. 439. And see *New Orleans v. Lockett*, 3 La. Ann. 99; *State v. Clinton County*, 6 Ohio St. 280; *Adair v. Ellis*, 83 Ga. 464.

But the rule does not apply, in the absence of express authority, where some other means of payment, which is fully adequate, is substituted. *U. S. v. New Orleans*, 2 Woods (U. S.) 230.

Power to erect water works, carries with it power to impose a tax to pay therefor. *Taylor v. McFadden*, 84 Iowa 262.

And the same may be said of the power to erect gas works; and the

property of a gas company will be subject to such taxation, though the result may be disastrous to its business. *Hamilton Gas Light, etc., Co. v. Hamilton*, 37 Fed. Rep. 832.

Where the power of taxation is limited to seven mills on the dollar, a power of a city to raise more than that for the purpose of erecting hospitals, poor-houses, market-houses, etc., is not necessarily implied from a provision in the charter making it the duty of its officers to erect such buildings. *Leavenworth v. Norton*, 1 Kan. 405, *approved* in *Burnes v. Atchison*, 2 Kan. 454.

In *Ridenour v. Saffin*, 1 Handy (Ohio) 464, it was held that a constitutional provision directing the assembly to restrict the power of taxation of municipal corporations, presupposes its existence.

The power to pay debts or provide for their payment, to fund them and issue the necessary evidence thereof, exists in every corporation without any express authority in its charter. *Galena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557. And a town or its officers, duly authorized to settle a disputed claim against it, upon doing so in the exercise of good faith and sound discretion, may enforce a tax duly levied upon its citizens to raise money for its payment. *Vose v. Frankfort*, 64 Me. 229.

The powers of a municipal corporation consist of those granted in express words, necessarily implied or necessarily incident to the powers expressly granted, and those absolutely essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. *Merriam v. Moody*, 25 Iowa 163.

A city council may exercise implied or incidental powers, whenever they are necessary to carry out or execute those powers which are clearly expressed. *Hitchcock v. St. Louis*, 49 Mo. 484.



enact by-laws for the good government of the municipality; <sup>1</sup> nor from a mere police power to license and regulate certain specified avocations.<sup>2</sup>

c. LIMITATIONS ON POWER.—Constitutional provisions, both state and federal, limiting the rate of taxation, generally apply to municipal corporations,<sup>3</sup> and a constitutional limitation upon the right to incur indebtedness, operates as a limit upon the right to

Where the municipality undertakes that which does not necessarily appertain to it, it must have express power to do so, but the power is implied where it undertakes to do that which is necessary. *Williamsport v. Com.*, 84 Pa. St. 487; 24 Am. Rep. 208.

In *Davey v. Galveston*, 45 Tex. 291, it was held that an act authorizing the issue and sale of bonds for certain purposes, and a levy of a special tax to meet the same, is sufficient to authorize a tax to pay interest on the bonds.

But the right of a municipality to contract, and the validity of its contracts, is limited by the right to tax, and if, in a given case, no tax can lawfully be levied to pay a debt, the contract itself is void for want of authority to make it. *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Hanson v. Vernon*, 27 Iowa 28; 1 Am. Rep. 215; *Allen v. Jay*, 60 Me. 127; 11 Am. Rep. 185; *Lowell v. Boston*, 111 Mass. 454; 15 Am. Dec. 39; *Sharpless v. Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759; *Whiting v. Sheboygan*, etc., R. Co., 25 Wis. 188; 3 Am. Rep. 30.

In *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98, it was held that no valid and enforceable subscription for stock can be made without power to levy and collect taxes to satisfy it.

An act authorizing the municipality to incur a debt for a special purpose, confers authority to levy taxes for the payment thereof in excess of the limit of taxation authorized by law for ordinary municipal purposes. *Quincy v. Jackson*, 113 U. S. 332.

In *Louisiana*, where bonds are issued as security for a debt, it is essential that the ordinance creating the debt shall provide the means of paying the principal and interest thereon. *Knox v. Baton Rouge*, 36 La. Ann. 427. And in *Hamlin v. Meadville*, 6 Neb. 227, it was held that where the question of issuing bonds to any railroad was submitted to the people of a county, but without accompanying the same by a proposition to levy a tax to meet

the liability incurred, the bonds issued in pursuance of such vote were void.

1. *Ashville v. Means*, 7 Ired. (N. Car.) 406. And see *Mays v. Cincinnati*, 1 Ohio St. 268. But in such case, they may prevent the sale of liquor without a license. *Heisenbrittle v. City Council*, 2 McMull. (S. Car.) 233; *City Council v. Ahrens*, 4 Strobbh. (S. Car.) 241.

2. *Cincinnati v. Bryson*, 15 Ohio 625; *Mays v. Cincinnati*, 1 Ohio St. 268; *Kip v. Paterson*, 26 N. J. L. 298; *State v. Hoboken*, 33 N. J. L. 280; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Columbia v. Beasley*, 1 Humph. (Tenn.) 232; *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59.

3. *State v. Van Every*, 75 Mo. 530; *Arnold v. Hawkins*, 95 Mo. 569; *Elyton Land Co. v. Birmingham*, 89 Ala. 477; *Hebard v. Ashland County*, 55 Wis. 145; *Spann v. Webster County*, 64 Ga. 498; *Austin v. Nalle*, 85 Tex. 520; *Texas Water, etc., Co. v. Cleburne*, 1 Tex. Civ. App. 580; *Muller v. Denison*, 1 Tex. Civ. App. 293. And see *New Orleans v. Firemen Ins. Co.*, 41 La. Ann. 1142; *supra*, this title, *The Power to Tax—Constitutional Restrictions*.

In ascertaining whether the cost of an improvement exceeds the limit, it is necessary to consider only what is required to be actually paid. And where damages and benefits have been assessed, the excess of damages over the benefits is all that should be considered in estimating the cost. *Andrews v. People*, 84 Ill. 28; *Wright v. People*, 87 Ill. 582.

The *South Carolina* Const., art. 9, § 9, making it the duty of the general assembly to provide for the incorporation and organization of cities and towns, and restricting their powers of taxation, does not require a municipal corporation to be limited to a certain rate of taxation, but only that the power be restricted as to the subjects and objects of the tax imposed. *State v. Beaufort* (S. Car. 1893), 17 S. E. Rep. 355.

Special taxes levied upon districts

tax to satisfy it.<sup>1</sup> The legislature may also limit the power of a municipality, both as to expenditures and taxation,<sup>2</sup> and any

having territorial limits different from the municipality levying the tax, must likewise be kept within the constitutional limits. *In re* House Bill, No. 165, 15 Colo. 593.

1. *Law v. People*, 87 Ill. 385; *Howell v. Peoria*, 90 Ill. 104; *Springfield v. Edwards*, 84 Ill. 626; *Reineman v. Covington, etc.*, R. Co., 7 Neb. 310; *Johnston v. Becker County*, 27 Minn. 64; *State v. Medbery*, 7 Ohio St. 522; *Hebard v. Ashland County*, 55 Wis. 145. And see *Jonas v. Cincinnati*, 18 Ohio 318.

A general provision authorizing a municipality to create a debt upon compliance with certain formalities, but restraining it to a certain rate of taxation, and authorizing it to construct wharves, docks, piers, etc., the expense of which might far exceed the annual revenues of a municipality at the general rate of taxes, empowers it to create a debt for these undertakings only. *Lafayette v. Cox*, 5 Ind. 38.

A debt payable in the future, or upon a contingency, or the happening of some future event, is within a constitutional restriction upon the amount of municipal indebtedness, as well as a debt payable presently and absolutely, and it makes no difference whether the debt be for current expenses or for something else. *Springfield v. Edwards*, 84 Ill. 626.

In *People v. Flagg*, 12 Am. Law Reg. 80, it was held that constitutional provisions prohibiting the contracting of any debt by or in behalf of the state, unless authorized by a law submitted to the people, do not apply to the debts of cities or subordinate municipal divisions, but to those of the state itself.

2. *Warren County v. Klein*, 51 Miss. 807; *Boyce v. Sebring*, 66 Mich. 210; *Santa Barbara v. Eldred*, 95 Cal. 378; *Binkert v. Jansen*, 94 Ill. 283; *Johnston v. Becker County*, 27 Minn. 64; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Manley v. Emlen*, 46 Kan. 655. And see *Cobb v. Elizabeth City*, 75 N. Car. 1; *Weinstein v. Newbern*, 71 N. Car. 536; *Vaughan v. Bowie*, 30 Ark. 278; *Jonas v. Cincinnati*, 18 Ohio 318; *Howard v. Oshkosh*, 33 Wis. 309; *Kelly v. Pittsburgh*, 104 U. S. 78; *Kimball v. Grant County*, 21 Fed. Rep. 145.

A statutory limitation upon the

power to tax, is a limitation upon the taxing officers only; it in no way controls the legislature, who may repeal the same, either expressly, or impliedly, by inconsistent legislation. *Com. v. Allegheny County*, 40 Pa. St. 348.

A tax assessed prior to the time when a limit upon the rate takes effect, but not finally passed until afterwards, is subject to the limit. *Overall v. Reunzi*, 67 Mo. 203; *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444.

But a municipal corporation may levy a higher rate of taxation than that laid by the state and county for the same year. *Fulgum v. Nashville*, 8 Lea (Tenn.) 635.

The *Washington* Act of March 9th, 1893, providing for the assessment and collection of taxes in certain municipal corporations, does not apply to the city of Port Townsend, that not being a classified city under the general law of the state, and there being nothing in the act showing an intention to include cities not provided for by such classification. *Port Townsend v. Sheehan*, 6 Wash. 220.

Under *Wisconsin* Rev. St., § 1240, no town which has less than five hundred inhabitants may levy a highway tax of more than \$1,000 in one year, and no town having two or more congressional townships shall levy a tax, exclusive of the mill tax, of more than \$2,000 in any one year. It was held that a town which was composed of two congressional townships, and had less than five hundred inhabitants, could not levy a highway tax of more than \$1,000. *C. N. Nelson Lumber Co. v. Loraine*, 24 Fed. Rep. 456.

The power of a city of the second class to pay for electric lighting, water, and fire-department supplies, is within the limitation of the taxing power for general revenue purposes to ten mills on the dollar, by *Kansas* Gen. Sts., of 1889, par. 788, and does not extend to forty mills under par. 796, providing that the levy of city taxes for all general purposes, exclusive of school purposes, shall at no time exceed four per cent. of the taxable property, but giving no express power to tax. *Stewart v. Kansas Town Co.*, 50 Kan. 553; *Stewart v. Adams*, 50 Kan. 568.

City taxes for general purposes only, are included within par. 796.

taxation in excess of such limitations, is void.<sup>1</sup> But a limitation, either constitutional or legislative, does not apply to taxes levied

*Columbus Water Co. v. Columbus*, 48 Kan. 99.

**Unlimited Grant of Power Void.**—When the legislature attempts to confer upon a municipal corporation an unrestricted power to levy taxes and raise money, aside and above what may be necessary and proper to support the local government, and for legitimate municipal purposes, such unlimited grant of power is void. *Smith v. Fon du Lac*, 10 Biss. (U. S.) 418; *Foster v. Kenosha*, 12 Wis. 618; *Broadhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 71.

**Judicial Notice.**—All legislative acts conferring or restricting the revenue powers of a municipality are, in their nature, public laws, whether so declared in terms or not, and courts are bound to take judicial notice of them in all proceedings affecting revenue matters. *Binkert v. Jansen*, 94 Ill. 283.

**Does not Limit the Right to Contract.**—In *Emerson v. Blairsville*, 2 Pittsb. (Pa.) 39, it was held that a limitation on the taxing power does not amount to a prohibition to contract debts. And when a municipal corporation exceeds the limits of its taxing power, the courts are powerless to control it in the absence of restraint in the law creating it. And to the same effect, see *Howard v. Oshkosh*, 33 Wis. 309; *Kinsey v. Pulaski County*, 2 Dill. (U. S.) 253.

**Enlargement of Authority.**—The exercise by the legislature of its powers to limit taxation, does not prevent it from again exercising its power by enlarging the authority to tax. *Blanding v. Burr*, 13 Cal. 343. And see *State v. Beaufort* (S. Car. 1893), 17 S. E. Rep. 355. And a grant of authority by the legislature to county commissioners, to create a debt and provide for the payment thereof, is an enlargement of the power to tax to meet the demand, and an implied repeal of any conflicting statutory implication. *Com. v. Allegheny County*, 40 Pa. St. 349; *Com. v. Pittsburgh*, 34 Pa. St. 496; *East St. Louis v. People*, 124 Ill. 655.

But a general law requiring a city to make a return of taxes which it requires to be levied, to the clerk of the county, does not work a repeal of a provision in its charter prohibiting it from levying over a certain rate per cent. *Edwards*

*v. People*, 88 Ill. 340; *Kinsey v. Pulaski County*, 2 Dill. (U. S.) 253.

1. *Beard v. Lee County*, 51 Miss. 542; *State v. Marion County*, 21 Kan. 433; *Atchison, etc., R. Co. v. Woodcock*, 18 Kan. 20; *National Bank v. Barber*, 24 Kan. 546; *Osborne County v. Blake*, 25 Kan. 358; *Atchison, etc., R. Co. v. Atchison Co.*, 47 Kan. 722; *Reineman v. Covington, etc., R. Co.*, 7 Neb. 310; *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254; *Baier v. Humpall*, 16 Neb. 127; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *State v. Gosper Co.*, 14 Neb. 22; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Spann v. Webster County*, 64 Ga. 498; *Weston v. Syracuse*, 17 N. Y. 110; *Ketchum v. Buffalo*, 14 N. Y. 356; *Kemper v. McClelland*, 19 Ohio 324; *Cleveland v. Heisley*, 41 Ohio St. 670; *State v. Humphreys*, 25 Ohio St. 520; *Blessing v. Galveston*, 42 Tex. 643; *Seward v. Rising Sun*, 79 Ind. 351; *Weber v. Traubel*, 95 Ill. 427; *Thatcher v. People*, 93 Ill. 240; *Hebard v. Ashland County*, 55 Wis. 145; *Kimball v. Ballard*, 19 Wis. 601; 88 Am. Dec. 705; *Connors v. Detroit*, 41 Mich. 129; *Wattles v. Lapeer*, 40 Mich. 624; *Case v. Dean*, 16 Mich. 12; *Seymour v. Peters*, 67 Mich. 415; *Boyce v. Sebring*, 66 Mich. 210; *Campbell County v. Taylor*, 8 Bush (Ky.) 206; *Gonzoles v. Lindsay*, 30 La. Ann. 1085; *Carroll County v. U. S.*, 18 Wall. (U. S.) 71; *Jeffries v. Lawrence*, 42 Iowa 498; *Clark v. Davenport*, 14 Iowa 494; *Benoist v. St. Louis*, 19 Mo. 179; *State v. St. Louis, etc., R. Co.*, 75 Mo. 526; *Gage v. Williams*, 119 Ill. 566; *Harland v. Eastman*, 119 Ill. 27; *Huse v. Merriam*, 2 Me. 375; *Mobile v. Dargan*, 45 Ala. 310; *Joyner v. School Dist. No. 3*, 3 Cush. (Mass.) 567; *Cope v. Collins*, 37 Ark. 649; *Worthen v. Badgett*, 32 Ark. 496; *Elwell v. Shaw*, 1 Me. 339; *Wells v. Burbank*, 17 N. H. 393; *Warner v. Outagamie County*, 19 Wis. 611; *Sibley v. Mobile*, 3 Woods (U. S.) 535; *People v. Fort Edward*, 70 N. Y. 28; *Dean v. Lufkin*, 54 Tex. 265; *Libby v. Burnham*, 15 Mass. 143; *State v. Strader*, 25 Ohio St. 527; *Hubbard v. Brainard*, 35 Conn. 568; *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274; *Witkowski v. Bradley*, 35 La. Ann. 904; *Silsbee v. Stockle*, 44 Mich. 561; *Flint, etc., R. Co. v. Auditor Gen'l*, 41 Mich. 635; *Sterling*

*School Furniture Co. v. Harvey*, 45 Iowa 466.

In the absence of constitutional provision, if the legislature prescribes a limit to taxation, it must be observed, unless it is a total prohibition of all taxation; if it prescribes no limit, the right of the municipality is unlimited. *Beck v. Allen*, 58 Miss. 143.

Within the limitation of a maximum amount to be raised by taxation, the amount to be raised is a matter properly intrusted to the discretion of the committee or body authorized to raise it. *Brown v. Hoadley*, 12 Vt. 472.

If, at an annual meeting, a town has voted to raise so much money as to require the assessment of the full sum allowed by law to be assessed upon polls in any one year, a tax subsequently voted must be assessed only upon property. *Freeland v. Hastings*, 10 Allen (Mass.) 570.

The value of lands upon a tax list, upon which no valuation was placed, is admissible in evidence in an action upon orders of a school district, to establish that they were issued in excess of the constitutional limit of indebtedness. *Wormley v. Carroll Dist. Tp.*, 45 Iowa 666.

The levy of a school tax of three per cent. is not shown to be illegal, when the law allows a tax of that amount for building purposes, if it is not shown in what district the property taxed is situated, or what rate was required to be levied in each district. *Gage v. Bailey*, 102 Ill. 11.

A levy which imposes a tax smaller than that which by law it might have imposed, is good. *Hollister v. Bennett*, 9 Ohio 83.

Where a limitation upon the rate of taxation does not apply, a municipality may levy, assess, and collect such taxes as are necessary to the accomplishment of a proper object. *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119.

A statute conferring the power and duty to construct a public work according to a designated plan, with a separate clause authorizing the board charged with the duty to call on certain municipalities for such sums as they deem proper for the expense, providing the amount to be paid shall not exceed a specified sum, limits the amount of contribution by each, but does not limit the entire cost of the work. *People v. Kelley*, 5 Abb. N. Cas. (N. Y.) 383; 76 N. Y. 489.

Where a tax is levied, which might have been authorized by either of two statutes, but which would be excessive if levied under one of them, it will be presumed to have been levied under the other. *Lima v. McBride*, 34 Ohio St. 338.

A court will not assume, in the absence of any proof, that a tax voted would raise more money than was needed, so that there would be a balance to be applied to an unlawful debt. *Greenbanks v. Boutwell*, 43 Vt. 207.

In *Alvord v. Collin*, 20 Pick. (Mass.) 418, where one list of school taxes, and another of county taxes, is made, under a vote to raise a certain sum for the support of schools and another sum for contingent expenses, and on the first list, the sum assessed exceeded the sum voted for schools, but the aggregate of both was less than the amount authorized to be raised by taxation, the assessment was held valid.

There may be different rates of taxes for different taxes in the same year, provided the aggregate does not exceed the limit fixed by law. *Benoist v. St. Louis*, 19 Mo. 179.

Taxes levied for the support of the poor are to be regarded as current expenses of the county, within a statute limiting the amount which can be raised within any year for current expenses. *Atchison, etc., R. Co. v. Wilhelm*, 33 Kan. 206. And see *Kansas City, etc., R. Co. v. Albright*, 33 Kan. 211.

**Increase of Maximum Rate.**—Under the laws of some of the states, the maximum rate may be increased by a vote of the district upon which it is imposed, taken in a prescribed manner, and when the rate is so increased, the increased rate becomes the maximum limit. *Chicago, etc., R. Co. v. Lamkin*, 97 Mo. 496.

**Cure of Excessive Levy.**—Where a city levies a tax in excess of its power, it cannot be cured by directing the collector, after the warrant comes into his hands, to collect only a certain rate per cent., not in excess of the limit. *Webster v. People*, 98 Ill. 343.

**Remission of Excess.**—But in *State v. McClurg*, 27 N. J. L. 253, it was held that if taxes are assessed in excess of the limit, the assessment is not void in whole, but only as to the excess, which may be remitted. And to the same effect, see *Chambers v. Myrick*, 61 Miss. 459.

**Error in Judgment of Officers Fixing the Rate.**—A levy that produces an

in payment of debts incurred prior to its adoption,<sup>1</sup> nor is a limit upon the power to tax for general purposes inconsistent with the grant of authority to impose taxation for special purposes in excess of the limit;<sup>2</sup> and the taxing power of a municipality is not exhausted

amount greater than the sum authorized to be raised, is not invalid if the officers whose duty it is to make it, have fixed such a rate per cent. as in their judgment would produce the required amount. *Union Trust Co. v. Weber*, 96 Ill. 346; *Edwards v. People*, 88 Ill. 340; *Faris v. Reynolds*, 70 Ind. 359; *Dwyer v. Hackworth*, 57 Tex. 245; *Scoville v. Cleveland*, 1 Ohio St. 126; *Chandler v. Bradish*, 23 Vt. 416. And see *O'Grady v. Barnhisel*, 23 Cal. 287; *Kelly v. Corson*, 8 Wis. 182.

The probability of a delinquency is a matter which may fairly be considered in determining the amount of a levy. *Marion County v. Harvey County*, 26 Kan. 181; *Smith v. Leavenworth County*, 9 Kan. 296; *People v. Cooper*, 10 Ill. App. 384; *Hyde Park v. Ingalls*, 87 Ill. 11; *People v. Wiltshire*, 92 Ill. 260; *Vose v. Frankfort*, 64 Me. 229.

**Penalties.**—But interest on the tax due, and a penalty for delinquency, may be added over and above the limit. *Chicago, etc., R. Co. v. Hartshorn*, 30 Fed. Rep. 541. The penalty pertains to the remedy, and is no part of the tax when levied. *Tobin v. Hartshorn*, 69 Iowa 648.

1. *Dean v. Lufkin*, 54 Tex. 265; *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119; *Ralls County Ct. v. U. S.*, 105 U. S. 733. And see *Houston v. Voorhies*, 70 Tex. 356.

If such indebtedness is not ascertained until after the limitation takes effect, and the trustees of the village refuse to pay, *mandamus* will lie to compel them. *People v. Edgewater*, 51 How. Pr. (N. Y. Supreme Ct.) 280.

A creditor is required to take notice of statutes prohibiting or limiting the exercise of the taxing power of a municipality to raise money for the payment of the debt. *Rees v. Watertown*, 19 Wall. (U. S.) 107.

A railroad company's charter having conferred on municipalities power to subscribe to its stock, and, by implication, power to levy taxes to meet the obligation, it was held that a subsequent general law limiting the rate of taxation, had no application. *Peoria, etc., R. Co. v. People*, 116 Ill. 401.

And see *infra*, this title, *Withdrawal or Alteration of Power*.

2. *Watts v. Port Deposit*, 46 Md. 500; *Taft v. Wood*, 14 Pick. (Mass.) 362; *McCormick v. Fitch*, 14 Minn. 252; *Austin v. Gulf, etc., R. Co.*, 45 Tex. 234; *Austin v. Nalle*, 85 Tex. 520; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Quincy v. Jackson*, 113 U. S. 332; *Chiniquy v. People*, 78 Ill. 570; *Mason v. Shawneetown*, 77 Ill. 533; *Sioux City, etc., R. Co. v. Osceola County*, 52 Iowa 26; *Crooks v. Whitford*, 47 Mich. 283; *Nashville, etc., R. Co. v. Marion County*, 7 Lea (Tenn.) 663.

As a general rule, special taxes imposed to meet a special burden are held to be unaffected by restrictions upon the rate of general taxation, unless expressly placed within them. *Nashville, etc., R. Co. v. Franklin County*, 5 Lea (Tenn.) 707; 7 Am. & Eng. R. Cas. 260; *Peoria, etc., R. Co. v. People*, 116 Ill. 401; *Brodie v. McCabe*, 33 Ark. 690; *Rice v. Walker*, 44 Iowa 458; *Soens v. Racine*, 10 Wis. 271; *Stevens v. Anson*, 73 Me. 489; *Beck v. Allen*, 58 Miss. 143; *McCracken v. San Francisco*, 16 Cal. 591; *Brokaw v. Gibson County*, 73 Ind. 543; *Waller v. Perkins*, 52 Ga. 234; *Laughlin v. Santa Fe County* (New Mex. 1885), 5 Pac. Rep. 817; *Com. v. Allegheny County*, 40 Pa. St. 348; *Com. v. Pittsburgh*, 34 Pa. St. 496. And see *Sparland v. Barnes*, 98 Ill. 595; *Dean v. Lufkin*, 54 Tex. 265; *U. S. v. New Orleans*, 98 U. S. 381; *Wolff v. New Orleans*, 103 U. S. 358; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Macon County v. U. S.*, 134 U. S. 332. But the general restrictions in some of the states, are deemed to be sufficiently comprehensive to include them. See *State v. Gosper County*, 14 Neb. 22; *Burlington, etc., R. Co. v. Clay County*, 13 Neb. 367; *Reineman v. Covington, etc., R. Co.*, 7 Neb. 310; *Clark v. Davenport*, 14 Iowa 494; *Beck v. Allen*, 58 Miss. 143; *Leavenworth v. Norton*, 1 Kan. 405; *Burnes v. Atchison*, 2 Kan. 448; *U. S. v. Burlington*, 2 Am. Law Reg. N. S. 394. And many of the states have adopted restrictions upon the rate of taxation, with direct reference to special taxes. See *Barlow v. Sumter County*, 47 Ga. 639; *Couper v. Rowe*, 42 Ga. 229; *Arnett v. Griffin*, 60 Ga. 350; *Waller v. Perkins*, 52 Ga. 233;

by embracing in the general levy items as to which the limitation upon its power to tax does not apply.<sup>1</sup> Limitations on the taxing power are not to be enlarged by implication from general provisions conferring the power to contract, make improvements, erect usual and ordinary buildings, and incur liability.<sup>2</sup> Nor is any duty imposed upon a municipality, under a special authority to pay judgments, to levy a special tax in excess of the limit to pay a judgment against it for ordinary indebtedness;<sup>3</sup> though where the judgment is founded upon a contract, the obligation of which such a restriction would impair, the rule has been held otherwise.<sup>4</sup>

*d.* WITHDRAWAL OR ALTERATION OF POWER.—The power of municipal corporations to levy taxes may be enlarged, abridged,

Dunphy *v.* Humboldt County, 58 Iowa 273; Jackson County *v.* Brush, 77 Ill. 59; Bish *v.* Stout, 77 Ind. 255; Jones *v.* Hurlburt, 13 Neb. 127; State *v.* Lancaster County, 6 Neb. 214.

In Nashville, etc., R. Co. *v.* Franklin County, 5 Lea (Tenn.) 707, it was held that a statutory provision that the rate of taxation for county purposes should not exceed the rate of state taxation for the time being, prohibits the counties, after making a levy for general county purposes equal to the rate of state taxation, from making an additional levy for special purposes, unless specially authorized by law.

1. Warren County *v.* Klein, 51 Miss. 808. And see Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119; Pope County *v.* Sloan, 92 Ill. 177; Ralls County Ct. *v.* U. S., 105 U. S. 733; Quincy *v.* Jackson, 113 U. S. 332.

2. Weber *v.* Traubel, 95 Ill. 427; Binkert *v.* Jansen, 94 Ill. 283; Kane *v.* School Dist., 52 Wis. 502; State *v.* New Orleans, 23 La. Ann. 358; Wheeler *v.* Plattsmouth, 7 Neb. 270; Reineman *v.* Covington, etc., R. Co., 7 Neb. 310; Carroll County *v.* U. S., 18 Wall. (U. S.) 71. And see Pike County *v.* Rowland, 94 Pa. St. 238; State *v.* Columbia (Mo.), 35 Cent. L. J. 225.

The power of a municipality to raise more than the amount limited by law for the erection of certain works, is not necessarily implied from a provision making it the duty of its officers to erect such works. Leavenworth *v.* Norton, 1 Kan. 405.

3. Carroll County *v.* U. S., 18 Wall. (U. S.) 71, *distinguishing* Butz *v.* Muscatine, 8 Wall. (U. S.) 575; Osborne County *v.* Blake, 25 Kan. 356; Arnold *v.* Hawkins, 95 Mo. 569; Witkowski *v.* Bradley, 35 La. Ann. 904.

In Rice *v.* Walker, 44 Iowa 458, un-

der the Iowa code then in force, it was held, *distinguishing* Iowa R. Land Co. *v.* Sac County, 39 Iowa 126; Jeffries *v.* Lawrence, 42 Iowa 498, and Carroll County *v.* U. S., 18 Wall. (U. S.) 71, that a tax might be levied in excess of the limit to pay judgments against a city. And in Britton *v.* Platte City, 2 Dill. (U. S.) 1, it was held that the power and duty of a municipality to levy a special tax in payment of judgments, is not restricted by a provision in its charter authorizing it to levy, for ordinary municipal purposes, a general tax not exceeding a certain specified rate.

But a village which obtains a right to levy a higher rate, by reorganization under the general incorporation law, may raise money at such higher rate to pay a judgment upon a claim accruing before the reorganization. Carney *v.* Marseilles, 136 Ill. 401.

4. See Witkowski *v.* Bradley, 35 La. Ann. 904; Favrot *v.* East Baton Rouge, 34 La. Ann. 491. A party claiming a *mandamus* to compel the levy of a tax in excess of the limit, to pay his judgment, must allege and prove that it was founded upon a contract. State *v.* Police Jury, 32 La. Ann. 884.

In Iowa, the validity of negotiable bonds of a county, issued in satisfaction of judgments, in the hands of innocent holders for value, cannot be questioned by showing that the judgments were rendered upon warrants issued in excess of a constitutional limit upon the right to incur debts, and a tax levied to pay such bonds may be enforced. Sioux City, etc., R. Co. *v.* Osceola County, 52 Iowa 26; Sioux City, etc., R. Co. *v.* Osceola County, 45 Iowa 168.

**Merger of Bond in Judgment.**—The recovery of a judgment against a city,

or entirely withdrawn at the pleasure of the legislature.<sup>1</sup> Withdrawal or alteration of the power, however, will not be presumed in the absence of a clear expression of the legislative intent;<sup>2</sup> and if it would operate an impairment of the obligation of con-

on its bond, will not merge the indebtedness in the judgment so that it will lose its proper classification; the origin of the debt will fix its classification, which will remain, however numerous the changes it may undergo in form. *East St. Louis v. Underwood*, 105 Ill. 308.

1. *Meriwether v. Garrett*, 102 U. S. 472; *Williamson v. New Jersey*, 130 U. S. 189; *Blanding v. Burr*, 13 Cal. 343; *St. Louis v. Allen*, 13 Mo. 400; *State v. St. Louis County Ct.*, 34 Mo. 546; *Basnett v. Jacksonville*, 19 Fla. 664; *Trustees of Schools v. Tatman*, 13 Ill. 27; *People v. Chicago*, 51 Ill. 17; 2 Am. Rep. 278; *Richland County v. Lawrence County*, 2 Ill. 1; *People v. Morris*, 13 Wend. (N. Y.) 325; *Bailey v. New York*, 3 Hill (N. Y.) 531; *State v. St. Louis, etc.*, R. Co., 9 Mo. App. 532; *Atkins v. Randolph*, 31 Vt. 226; *Augusta v. North*, 57 Me. 392; 2 Am. Rep. 55; *Blessing v. Galveston*, 42 Tex. 642; *Covington, etc.*, R. Co. v. *Kenton County Ct.*, 12 B. Mon. (Ky.) 144; *Philadelphia v. Fox*, 64 Pa. St. 169; *Police Jury v. Shreveport*, 5 La. Ann. 661; *Richmond v. Richmond, etc.*, R. Co., 21 Gratt. (Va.) 604; *Wallace v. Sharon Tp.*, 84 N. Car. 164; *Lilly v. Taylor*, 88 N. Car. 495. And see *Gutzwiller v. People*, 14 Ill. 142; *Sangamon County v. Springfield*, 63 Ill. 66; *Parr v. Matthews*, 50 Ark. 390; *Com. v. Louisville*, 5 B. Mon. (Ky.) 293.

There is no element of property, in the right of taxation, conferred upon municipal corporations. *Williamson v. New Jersey*, 130 U. S. 189. They can only raise money and apply it to a particular purpose by virtue of a delegated authority, and the same authority that grants the power may alter the law and direct it to a different object. *St. Louis v. Shields*, 52 Mo. 354.

The legislature may, by an act retrospective in terms, which takes effect before a municipal tax becomes due, annul it, and vest in another body the power to levy the tax for that year. *State v. St. Louis, etc.*, R. Co., 9 Mo. App. 532. But it cannot entirely release the payment of taxes already levied. *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

The *Montana* constitution, adopted

at the time of its admission as a state, and the subsequent revenue law of 1891, did not repeal the prior ordinances of cities relating to the levy and collection of municipal taxes so as to invalidate all subsequent proceedings relating thereto, unless had under the general revenue law. *Lockey v. Walker*, 12 Mont. 577.

A statute providing for taking the vote of the people of certain counties in relation to a tax to be laid, confers a mere privilege upon the people, and when the right has not been exercised, it confers no rights which prevent the legislature from repealing the statute. *Covington, etc.*, R. Co. v. *Kenton County Ct.*, 12 B. Mon. (Ky.) 144.

Taxes levied by a municipality before the repeal of its charter, other than such as were levied in obedience to special requirements of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the municipality, cannot be collected through the instrumentality of a court of chancery and at the instance of its creditors; the remedy is by appeal to the legislature, which alone can grant relief. *Meriwether v. Garrett*, 102 U. S. 472.

**Quasi Municipality.**—The power of the legislature to abolish, at its discretion, school districts and other districts established by its authority for special municipal purposes, is undoubted. *Whitney v. Stow*, 111 Mass. 368; *Blackstone v. Taft*, 4 Gray (Mass.) 250; *Weymouth, etc.*, Fire Dist. v. *Norfolk County*, 108 Mass. 142.

2. *Orange, etc.*, R. Co. v. *Alexandria*, 17 Gratt. (Va.) 184. And see *Kinney v. Zimbleman*, 36 Tex. 554; *Reclamation Dist. v. Goldman*, 61 Cal. 205; *New Orleans v. Hart*, 14 La. Ann. 803; *Doggett v. Walter*, 15 Fla. 355.

In *Fuller v. Heath*, 89 Ill. 296, it was held that the adoption of a general incorporation law relating to cities, and the passage of a general school law, do not modify or impair any former special laws authorizing a city as a public agency to levy and collect taxes for school purposes.

Where the state constitution author-

tracts entered into upon a pledge, either express or implied, that the taxing power should be exercised for their fulfillment, the law withdrawing the power is void.<sup>1</sup> Upon the dissolution of a

izes the framing and adoption by a city, of such a charter for its own government, which the legislature cannot change or amend, the fact that a freeholder's charter was approved by the legislature by resolution, and not by bill, and is not, therefore, a law, will not deprive it of the power to levy and collect taxes, as the power of taxation is necessarily implied, being essential to municipal existence. *Security Sav. Bank & T. Co. v. Hinton*, 97 Cal. 214.

1. *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Wolff v. New Orleans*, 103 U. S. 358; *U. S. v. Mobile*, 4 Woods (U. S.) 536; *Amy v. Galena*, 7 Fed. Rep. 163; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Lee County v. Rogers*, 7 Wall. (U. S.) 181; *Furman v. Nichol*, 8 Wall. (U. S.) 44; *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522; *Mobile v. Watson*, 116 U. S. 289; *Louisiana v. Pilsbury*, 105 U. S. 278; *Garrett v. Memphis*, 5 Fed. Rep. 860; *Basnett v. Jacksonville*, 19 Fla. 664; *Gibbs v. Green*, 54 Miss. 592; *St. Louis v. Russell*, 9 Mo. 508; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *State v. Rahway*, 43 N. J. L. 338; *Blanchard v. Bissell*, 11 Ohio St. 96; *Goodale v. Fennell*, 27 Ohio St. 426; 22 Am. Rep. 321. And see *Duperier v. Police Jury*, 31 La. Ann. 709; *State v. New Orleans*, 34 La. Ann. 477; *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555; *New Orleans v. Southern Bank*, 15 La. Ann. 89; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144; *Hasbrouck v. Milwaukee*, 25 Wis. 122; *Soutter v. Madison*, 15 Wis. 30; *Smith v. Appleton*, 19 Wis. 468; *Brodie v. McCabe*, 33 Ark. 690; MUNICIPAL CORPORATIONS, vol. 15, p. 986.

Laws in force when an indebtedness is incurred, which provide for taxation to pay it, enter into the contract with the creditor, and constitute a part of it. *U. S. v. Howard County Ct.*, 2 Fed. Rep. 1; *Maenhaut v. New Orleans*, 2 Woods (U. S.) 108; *Ranger v. New Orleans*, 2 Woods (U. S.) 128; *Milner v. Pensacola*, 2 Woods (U. S.) 632; *Wadsworth v. Eau Claire County*, 102 U. S. 534; *U. S. v. Jefferson County*, 5

Dill. (U. S.) 310; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Sibley v. Mobile*, 3 Woods (U. S.) 535; *Brodie v. McCabe*, 33 Ark. 690; *Middleport v. Ætna L. Ins. Co.*, 82 Ill. 562; *Madison County Ct. v. Richmond, etc., R. Co.*, 80 Ky. 16; *Williams v. Duaneburg*, 66 N. Y. 129; *State v. Young* (Minn. 1881), 2 Am. & Eng. R. Cas. 348; *Beck v. Allen*, 58 Miss. 143; *Mercer County v. Pittsburgh, etc., R. Co.*, 27 Pa. St. 389.

But acts enlarging the taxing power, passed after the indebtedness is incurred, may be repealed. *U. S. v. Howard County Ct.*, 2 Fed. Rep. 1.

Where, at the time the debt was incurred or the bonds issued, there existed a power of taxation sufficient to pay them, with the accruing interest, such power enters into and forms part of the contract, and cannot be taken away by subsequent legislation. *Scotland County Ct. v. U. S.*, 140 U. S. 41; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Milner v. Pensacola*, 2 Woods (U. S.) 632; *Saloy v. New Orleans*, 33 La. Ann. 79. And see *Butz v. Muscatine*, 8 Wall. (U. S.) 583; *Welch v. St. Genevieve*, 1 Dill. (U. S.) 134.

Where bonds have been issued under an authority providing for the levy of taxes for their protection, the holder thereof has a right to look to the taxing provision as a part of his security, and to demand at the proper time that it be exercised in his favor. The measure of that right is the constitutional limit of the power which the legislature could grant to the municipality when the contract was made. *Brodie v. McCabe*, 33 Ark. 690.

A creditor of a county cannot be compelled to accept another and essentially different mode of payment from that provided by his contract; that is to say, by the laws existing at the time he became a creditor of the county; and if there were funds in the treasury of the county applicable to such payment at the time he made demand therefor, which were raised under the law as it stood at the time of the contract, he has a right to be paid from these funds, and the legislature cannot deprive him of it without his consent. *Rose v. Estudillo*, 39 Cal. 270.

A municipality cannot, by its own



municipal corporation, both the collected and uncollected taxes pass to the state, to be managed and disposed of as a trust fund for the benefit of the local community.<sup>1</sup>

*e.* POWER TO IMPOSE SPECIAL TAXES.—When a work partakes of a public nature, and is thought to be of special local benefit to certain municipal subdivisions, they may be authorized by the state, in the absence of constitutional inhibition, to engage in or aid in its prosecution, and to levy special taxes to meet the obligations thereby incurred.<sup>2</sup> But special taxation is not authorized

ordinances, under the guise of taxation, relieve itself from performing to the letter all that it expressly contracted to perform. *Murray v. Charleston*, 96 U. S. 432.

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 1199; *Cooley on Taxation* (2d ed.), p. 143, citing *Meriwether v. Garrett*, 102 U. S. 472; *Morgan v. Beloit*, 7 Wall. (U. S.) 613; *Mount Pleasant v. Beckwith*, 100 U. S. 514. And see *Atkins v. Randolph*, 31 Vt. 226; *Blanding v. Burr*, 13 Cal. 343; *Morgan v. Pueblo*, etc., R. Co., 6 Colo. 478; *State v. St. Louis County Ct.*, 34 Mo. 546; *St. Louis v. Russell*, 9 Mo. 507; *Hitchcock v. St. Louis*, 49 Mo. 484; *North Yarmouth v. Skillings*, 45 Me. 133; 71 Am. Dec. 530; *Rawson v. Spencer*, 113 Mass. 40; *Lilly v. Taylor*, 88 N. Car. 495; *Wallace v. Sharon Tp.*, 84 N. Car. 164; *Owners of Lands v. People*, 113 Ill. 296; *Garrett v. Memphis*, 5 Fed. Rep. 860; *Broughton v. Pensacola*, 93 U. S. 268.

In *Hare v. Kennerly*, 83 Ala. 608, it was held that the legislature, having dissolved the corporate existence of a city, may exercise the power of taxation given it within the constitutional limit.

In *Florida*, the ordinances in force in such defunct corporations, remain in force until altered or repealed by the commissioners appointed by the governor. *Pensacola v. Sullivan*, 23 Fla. 1.

2. *Bennington v. Park*, 50 Vt. 178; *First Nat. Bank v. Concord*, 50 Vt. 257; *Clapp v. Cedar County*, 5 Iowa 15; 68 Am. Dec. 678; *Prettyman v. Tazewell County*, 19 Ill. 406; 71 Am. Dec. 230; *Marshall v. Silliman*, 61 Ill. 218; *Nashville*, etc., R. Co. v. *Franklin County*, 5 Lea (Tenn.) 707; *State v. Linn County Ct.*, 44 Mo. 504; *Beck v. Allen*, 58 Miss. 143; *Brown v. Hertford*, 100 N. Car. 92; *Lewis v. Sherman County*, 5 Fed. Rep. 269; *Bard v. Augusta*, 30 Fed. Rep. 906; *Otoe County v. Baldwin*, 111 U. S. 1; *Thompson v. Lee County*, 3 Wall. (U. S.) 327; *Campbell v. Ken-*

*osha*, 5 Wall. (U. S.) 203; *Queensbury v. Culver*, 19 Wall. (U. S.) 83; *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678; *Cass v. Dillon*, 2 Ohio St. 607; *Cincinnati*, etc., R. Co. v. *Clinton County*, 1 Ohio St. 77; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24. And see *Chicago*, etc., R. Co. v. *Shea*, 67 Iowa 728; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Anderson Co. v. Houston*, etc., R. Co., 52 Tex. 228; *Bagby v. Bateman*, 50 Tex. 446; *Goddin v. Crump*, 8 Leigh (Va.) 120; *State v. Charleston*, 10 Rich. (S. Car.) 491.

Special taxation differs from general taxation, in that general taxation is imposed for the purpose of meeting the general and regularly recurring expenses of government, while special taxation is imposed for some special purpose, usually not governmental, but which is designed to indirectly affect the public welfare. *Treadway v. Schnauber*, 1 Dakota 235.

The state legislature, unless prohibited by constitutional provision, possesses the power to authorize a municipal corporation to aid a railroad company in constructing a railroad for the general benefit of the citizens of the municipality. *Rogers v. Burlington*, 3 Wall. (U. S.) 654.

Under the *Illinois* constitution, donations or loans of credit to a railroad company are prohibited under all circumstances; but subscriptions to the capital stock of a railroad company or a private corporation may still be made, if they have been authorized by the vote of the people, prior to the adoption of the constitution. *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625. And see *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644.

Many of the cases hold, however, that the exception applies to donations as well as subscriptions. *Fairfield v. Galatin County*, 100 U. S. 47; *Concord v.*

under a general power to tax; special authority is necessary to its imposition.<sup>1</sup>

*f. DIVISION AND CONSOLIDATION OF DISTRICTS.*—Upon the division of a town or other taxing district, any burden to which the whole district would be subjected by operation of general laws in force at the time of the division, may be apportioned between the parts so that it will still be borne by the whole of the original territory.<sup>2</sup> And when two or more towns or districts are united, the in-

Robinson, 121 U. S. 165; *Oustolt v. People*, 123 Ill. 489; Chicago, etc., R. Co. v. Pinckney, 74 Ill. 277.

The submission of the question of issuing bonds for the construction of a courthouse and levying a tax to pay the same, prescribing that the ballots shall be "for courthouse bonds," and "against courthouse bonds," which is voted in the affirmative, includes the adoption of the proposition to levy the tax. *Milwaukee, etc., R. Co. v. Kosuth County*, 41 Iowa 57.

Power to a municipality to make subscriptions to the stock of railway companies, issue bonds, and levy the requisite tax to pay them, providing that the bonds shall be in full payment of the subscription, provides for subscriptions payable in bonds to be ultimately discharged by the levy of a tax, and not for subscriptions to be paid in money, in the first instance, previously raised by taxation. *Prairie v. Lloyd*, 97 Ill. 179.

An incorporated town within a township, is part of the township for the purpose of a tax in aid of a railroad. *Reynolds v. Faris*, 80 Ind. 14.

**Power to Grant Aid in Territories.**—In *Treadway v. Schnauber*, 1 Dakota 236, the constitutional power of Congress to authorize a territorial legislature to grant aid to a railroad, or to grant the power to aid a railroad, to a municipality, was denied upon the ground that the power delegated by the states to Congress, consisted of powers of government only.

1. *Allen v. Peoria, etc., R. Co.*, 44 Ill. 85; *Welch v. Post*, 99 Ill. 471; *Pana v. Lippincott*, 2 Ill. App. 466; *Pitzman v. Freeburg*, 92 Ill. 111; *Gaddis v. Richland Co.*, 92 Ill. 119; *Lafayette v. Cox*, 5 Ind. 38; *Hamlin v. Meadville*, 6 Neb. 227; *Clegg v. School Dist. No. 56*, 8 Neb. 178; *Dundy v. Richardson County*, 8 Neb. 508; *Bullock v. Curry*, 2 Metc. (Ky.) 171; *Delaware County v. McClintock*, 51 Ind. 325; *Leavenworth County v. Miller*, 7 Kan. 479; 12

Am. Rep. 425; *Milan v. Tennessee Cent. R. Co.*, 11 Lea (Tenn.) 330; *Lewis v. Shreveport*, 108 U. S. 282; 3 Woods (U. S.) 205; *Thompson v. Lee County*, 3 Wall. (U. S.) 330; *Ottawa v. Carey*, 108 U. S. 110; *Commercial Bank v. Iola*, 2 Dill. (U. S.) 353; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Pendleton County v. Amy*, 13 Wall. (U. S.) 297; *Kenicott v. Wayne County*, 16 Wall. (U. S.) 452; *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644; *Harshman v. Bates County*, 92 U. S. 569; *Coloma v. Eaves*, 92 U. S. 484; *South Ottawa v. Perkins*, 94 U. S. 260; *Kelley v. Milan*, 127 U. S. 139; *Concord v. Robinson*, 121 U. S. 165; *McClure v. Oxford Tp.*, 94 U. S. 429; *Norton v. Brownsville Taxing Dist.*, 129 U. S. 479; *Dixon County v. Field*, 111 U. S. 83. And see *Welch v. Post*, 99 Ill. 471; *Vanover v. Davis*, 27 Ga. 354; *State v. Wapello County*, 13 Iowa 388; *Stokes v. Scott County*, 10 Iowa 166.

In *Bartemeyer v. Rohlfs*, 71 Iowa 582, it was held that a city acting under a special charter, may lawfully vote a tax in aid of a railroad, under a general statute authorizing such taxation.

In *Bard v. Augusta*, 30 Fed. Rep. 906, it was held that an act providing that city councils may take all needful steps to protect the interests of their cities respectively, in any railroad leading from or toward the same, authorizes the city to become interested in railroad enterprises.

**Aid Bonds.**—Special authority is necessary to issue negotiable bonds in aid of extraneous subjects. See *MUNICIPAL SECURITIES*, vol. 15, p. 1236.

2. *Londonderry v. Derry*, 8 N. H. 320; *Bristol v. New Chester*, 3 N. H. 524; *Dunmore's Appeal*, 52 Pa. St. 374; *Bowdoinham v. Richmond*, 6 Me. 112; 19 Am. Dec. 197; *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748; *Granby v. Thurston*, 23 Conn. 416. And see *Chandler v. Reynolds*, 19 Kan. 249; *Ottawa County v. Nelson*, 19 Kan. 234; 27 Am. Rep. 101; *Sedg-*

debtedness of each may be apportioned respectively to the indebted district, the existence of the original districts being considered as continuing to the extent necessary to the payment of their debts.<sup>1</sup>

**4. Compulsory Taxation** — *a.* **LEGISLATIVE COMPULSION.** — As regards matters of general interest, and duties which municipalities owe to the state at large, the control of the latter is complete, and the legislature may, by mandatory act, compel the levy of a tax necessary to the performance of such public duties and functions as fall within the general scope and object of the municipal organization.<sup>2</sup> But as regards property rights and matters exclusively local, the action of the municipality is usually founded upon its

wick County *v.* Bunker, 16 Kan. 498; Morris County *v.* Hinchman, 31 Kan. 729; Marion County *v.* Harvey County, 26 Kan. 181; Milwaukee, etc., R. Co. *v.* Kossuth County, 41 Iowa 57.

Upon the division of towns and school districts, the legislature has always exercised the power of making an equitable arrangement as to the common property and the common burdens, and unless taken away by constitutional provision, it is a power which must always exist. Willimantic School Soc. *v.* First School Soc., 14 Conn. 457.

Where a township has issued bonds for the construction of a bridge, and, before they are paid, a portion of such township is detached, and together with other territory organized into a new township, it is the duty of the officers of the old township to levy all taxes for the payment of such bonds, whether they are to be levied on the property of the old township or that of the detached territory. Fender *v.* Neosho Falls Tp., 22 Kan. 305.

The organization of a township created by the division of the territory of another, is not complete until its officers have been elected and have entered upon the discharge of their duties, and until that time, it remains a part of the original township, and is subject to the payment of taxes legally levied thereon. Lamb *v.* Burlington, etc., R. Co., 39 Iowa 333; Comins Tp. *v.* Harrisville Tp., 45 Mich. 442.

The policy of the law, on dividing municipalities, is to leave the financial arrangements chiefly to the business discretion of the administrative authorities, rather than to the courts, to be disposed of on business and equitable principles, resting largely in sound discretion. Midland Tp. *v.* Roscommon Tp., 39 Mich. 424.

1. Cleveland *v.* Heisley, 41 Ohio St.

670; Wallace *v.* Shelton, 14 La. Ann. 503; Layton *v.* New Orleans, 12 La. Ann. 515; Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; U. S. *v.* Memphis, 97 U. S. 284. And see Marion County *v.* Harvey County, 26 Kan. 181; Fender *v.* Neosho Falls Tp., 22 Kan. 305; Midland Tp. *v.* Roscommon Tp., 39 Mich. 424; State *v.* Rice, 35 Wis. 178.

An act providing for the union of two or more districts or townships, is wholly prospective in its operation; it furnishes a rule for the future only, and interferes with no vested rights, nor with the obligation of any contract. U. S. *v.* Memphis, 97 U. S. 284.

Where a county was bonded for the purpose of building bridges, and thereafter a township was detached, and attached to another county, the detached territory is still liable to contribute to the payment of the bonds, even though none of the bridges are within the limits of the detached territory. Marion County *v.* Harvey County, 26 Kan. 181.

In Iowa, where a territory is incorporated as a city, the levy following the incorporation must be based upon the preceding assessment made before the incorporation. Snell *v.* Fort Dodge, 45 Iowa 564.

2. People *v.* Detroit, 28 Mich. 228; 15 Am. Rep. 202; Newman *v.* Scott County, 5 Sneed (Tenn.) 695; State *v.* Franklin County, 35 Ohio St. 458. And see Com. *v.* Newburyport, 103 Mass. 129; State *v.* Tappan, 29 Wis. 664; 9 Am. Rep. 622; Shaw *v.* Dennis, 10 Ill. 405; Blanding *v.* Burr, 13 Cal. 343; Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; MUNICIPAL CORPORATIONS, vol. 15, p. 989.

The legislature may compel a county, against its will, to levy and collect a tax for the improvement of a river or harbor within its limits, and in which

express or implied powers, without the particular interference of the state.<sup>1</sup>

*b. JUDICIAL COMPULSION.*—See *MANDAMUS*, vol. 14, p. 186.

**5. Submission to Popular Vote**—*a. IN GENERAL.*—The legislature may authorize local bodies to incur obligations and raise revenue without the approval of the taxpayers and voters generally;<sup>2</sup> but

it is vitally interested, though the state at large and other counties may also derive benefit from the improvement. *Kimball v. Mobile County*, 3 Woods (U. S.) 555. And it may, by mandatory act, require the county commissioners of the county to levy a tax, and incur debts for the construction and maintenance of a bridge located within the limits of another county, where the purpose of the tax is not only public, but the object is at the same time local in its character, and of special and peculiar interest to the people to be taxed. *Talbot County v. Queen Anne's County*, 50 Md. 245. It may cause taxes to be imposed for the payment of the debts of a municipality, *Dunnoan v. Green*, 57 Ill. 63; *Decker v. Hughes*, 68 Ill. 33; and may compel such municipality to pay, out of the funds in its treasury or by taxation, a demand which in good conscience it ought to pay, though there be no legal liability to pay it. *Sinton v. Ashbury*, 41 Cal. 525; *Union Tp. v. Rader*, 39 N. J. L. 509.

But the power to decide whether a municipality is under a legal obligation to pay a claim, is a judicial one which must be exercised by the courts alone. *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622.

The legislature has power to compel local improvements which, in its judgment, will promote the health of the people and advance the public good, and in the exercise of this power, it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, all at the expense of those who are to be chiefly and more immediately benefited by the improvement. *Hagar v. Yolo County*, 47 Cal. 222; *Hagar v. Reclamation Dist.*, 111 U. S. 701. And it may compel the payment of the police expenses. *State v. St. Louis County Ct.*, 34 Mo. 546. And see *Baltimore v. State*, 15 Md. 376; *People v. Mahaney*, 13 Mich. 481.

But a municipality cannot be compelled to incur debts exceeding in

amount the constitutional limit. *People v. Chicago*, 51 Ill. 19; 2 Am. Rep. 278.

In *Darlington v. New York*, 31 N. Y. 164; 88 Am. Dec. 248, it was held that a statute which will result in requiring contributions from the taxpayers of local communities, to make good losses of persons who have suffered for the acts of rioters, are constitutional and valid, and fall within the general scope of legislative authority. And in *Wilkinson v. Cheatham*, 43 Ga. 258, it was held that the legislature may compel a county to pay the damages resulting to the property owners of a town from the removal of the county site therefrom.

1. *People v. Detroit*, 28 Mich. 22; 158 Am. Rep. 202. And see *State v. Haben*, 22 Wis. 629.

The legislature cannot compel a municipal corporation to incur a debt or issue its bonds for local corporate purposes, without its consent, *Williams v. Roberts*, 88 Ill. 11; *People v. Chicago*, 51 Ill. 17; 2 Am. Rep. 278; *Sleight v. People*, 74 Ill. 47; *Hampshire County v. Franklin County*, 16 Mass. 76; *Brunswick v. Litchfield*, 2 Me. 28; *Bowdoinham v. Richmond*, 6 Me. 112; 19 Am. Dec. 197; nor to bear burdens in respect to matters not strictly municipal which other counties or towns are not required to bear. *State v. Tappan*, 29 Wis. 664; 9 Am. Rep. 622. And see *Callam v. Saginaw*, 50 Mich. 7.

In *People v. Flagg*, 46 N. Y. 401, however, it was held that wherever the legislature may authorize a town to incur a debt, it may direct it to be done.

The legislature cannot compel taxation for private purposes. *State v. Foley*, 30 Minn. 350.

And a mandatory act requiring a town to issue bonds and exchange the same for, or invest the proceeds of a sale thereof in, the stock of a railroad, is unconstitutional. *People v. Batchelor*, 53 N. Y. 128; 13 Am. Rep. 480.

2. *Callam v. Saginaw*, 50 Mich. 7; *Bay City v. State Treasurer*, 23 Mich. 503; *People v. Flagg*, 46 N. Y. 401; 12 Am. L. Reg. 80; *Buell v. Ball*, 20 Iowa 289; *Marshall v. Silliman*, 61 Ill. 218;

a petition or a vote of the persons interested, is frequently required as a condition precedent thereto.<sup>1</sup> And such legislation is entirely competent, as the power to enact laws includes the right to determine and prescribe the conditions upon which they shall go into operation.<sup>2</sup> But the submission to the people of a mere plan or project of the law imposing a tax for their adoption or regulation, is an unconstitutional delegation of power to tax.<sup>3</sup> The propositions most frequently submitted to popular vote are

*Keithburg v. Frick*, 34 Ill. 405; *Quincey, etc., R. Co. v. Morris*, 84 Ill. 411; *People v. Brislin*, 80 Ill. 423; *Misner v. Bullard*, 43 Ill. 470; *St. Louis v. Oeters*, 36 Mo. 456; *McCallie v. Chattanooga*, 3 Head (Tenn.) 317; *Evans v. Cumberland County*, 89 N. Car. 154; *Halcombe v. Haywood County*, 89 N. Car. 346; *Hill v. Forsyth County*, 67 N. Car. 367; *Manly v. Raleigh*, 4 Jones Eq. (N. Car.) 370; *Newsom v. Earnheart*, 86 N. Car. 391; *Livingston County v. Darlington*, 101 U. S. 407; *Roberts v. Bolles*, 101 U. S. 119.

A statute imposing a tax upon a town is not invalid, because by a former statute, the question whether a tax should be levied for the same purpose had been submitted to electors of the town, and had been adversely determined by them. *Guilford v. Chencango County*, 13 N. Y. 143.

1. *Burr v. Carbondale*, 76 Ill. 455; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Bullock v. Curry*, 2 Metc. (Ky.) 171; *Starin v. Genoa*, 23 N. Y. 439; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *San Antonio v. Jones*, 28 Tex. 19; *Louisville, etc., R. Co. v. Davidson County*, 1 Sneed (Tenn.) 637; 62 Am. Dec. 424; *Vernice v. Murdock*, 92 U. S. 494.

No authority exists to submit to electors of a county, the question of voting taxes in excess of the limit fixed by law, and taxes levied under such proposition are illegal and may be enjoined. *Burlington, etc., R. Co. v. Clay County*, 13 Neb. 367.

In *Minnesota*, under the constitution, the legislature cannot authorize any person or class of persons other than the electors or officers chosen by the electors of the town, to determine what action the town will take in any particular case requiring local taxation. *Harrington v. Plainview*, 27 Minn. 224.

**Petition.**—The names of the petitioners must be personally subscribed,

or subscribed by some other person by the direction of each respectively, and in his presence. Subscription by an agent is not valid. *People v. Smith*, 45 N. Y. 776; *People v. Knowles*, 47 N. Y. 418; *People v. Peck*, 62 Barb. (N. Y.) 545.

Where a petition is required to be made by "taxpayers," it will be deemed to include owners of non-resident lands taxed as such. *Whiting v. Potter*, 2 Fed. Rep. 517. See also *People v. Oliver*, 1 Thomp. & C. (N. Y.) 570.

**Injunction to Restrain the Vote.**—An injunction will not issue at the instance of the taxpayers of a municipality, to prevent the officers thereof from holding an election under legislative authority, to enable the citizens to vote to levy or not to levy a certain tax on themselves. *Roudanez v. New Orleans*, 29 La. Ann. 271.

**Repeal.**—The legislature may rescind the authority to levy a tax, by a repeal of the law authorizing a vote, although the vote has been taken. *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 150.

2. *Bull v. Read*, 13 Gratt. (Va.) 78; *Blanding v. Burr*, 13 Cal. 343; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Winston v. Tennessee, etc., R. Co.*, 1 Baxt. (Tenn.) 60; *Louisville, etc., R. Co. v. Davidson County*, 1 Sneed (Tenn.) 637; 62 Am. Dec. 424. See also *STATUTES*, vol. 23, p. 221 *et seq.*

3. *Alcorn v. Hamer*, 38 Miss. 652. The true distinction is between the delegation of power to make the law which necessarily involves the discretion as to what it shall be, and conferring the authority or discretion as to its execution to be exercised under and in pursuance of law. *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185.

Where the law is unconstitutional, taxation cannot be sustained, even though the tax be voted by a majority of the taxpayers. *Anderson v. Hill*, 54 Mich. 477.

those in regard to aiding in the erection of public enterprises, such as railroads, etc.,<sup>1</sup> and for public school purposes.<sup>2</sup> In cases of public improvements, the operation of the law is generally conditional upon the petition of a specified proportion of the property owners to be affected thereby.<sup>3</sup>

6. NOTICE OF ELECTION.—When a vote for a tax for any purpose is to be taken, due notice or warning of the time, place, and purpose thereof must be given in the manner prescribed;<sup>4</sup> and if a meeting held for an election be not legally called, the tax

1. See MUNICIPAL SECURITIES, vol. 15, p. 1274, where the subject of voting municipal aid is treated at length.

2. *Bull v. Read*, 13 Gratt. (Va.) 78; *Barr v. Carbondale*, 76 Ill. 456; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Starin v. Genoa*, 23 N. Y. 439; *Cardigan v. Page*, 6 N. H. 182; *Fort Worth v. Davis*, 57 Tex. 225; *School Trustees v. Broadhurst*, 109 N. Car. 228; *Richards v. Raymond*, 92 Ill. 612; 34 Am. Rep. 151; *Mitchell v. Denton*, 5 Lea (Tenn.) 420.

That a law authorizing taxation for the purpose of establishing free schools, by the determination and vote of a majority of the voters of a school district, is constitutional, see *Steward v. Jefferson*, 3 Harr. (Del.) 335; *Burgess v. Pue*, 2 Gill (Md.) 11; *Matteson v. Rosendale*, 37 Wis. 254; *Plumer v. Marathon County*, 46 Wis. 163.

The erection of a schoolhouse, without a submission to a vote of the people, is not cured by a vote to defray the expenses, or by the acceptance and use of the building. *School Directors v. Fogleman*, 76 Ill. 189.

3. See *supra*, this title, *Local Assessments*.

4. *State v. Van Winkle*, 25 N. J. L. 73; *State v. Hardcastle*, 26 N. J. L. 143; *Union County Ct. v. Robinson*, 27 Ark. 116; *State v. St. Louis*, etc., R. Co., 75 Mo. 526; *McPike v. Pen*, 51 Mo. 63; *People v. Fort Edward*, 70 N. Y. 28; *Jordan v. School Dist. No. 3*, 38 Me. 169; *Thatcher v. People*, 93 Ill. 240; *Perry v. Dover*, 12 Pick. (Mass.) 205; *Stone v. School Dist. No. 4*, 8 Cush. (Mass.) 592; *Mustard v. Hoppess*, 69 Ind. 324; *Faris v. Reynolds*, 70 Ind. 359; *People v. Seale*, 52 Cal. 71; *People v. Castro*, 39 Cal. 69; *People v. Pratt*, 59 Cal. 77; *Bowen v. King*, 34 Vt. 156; *Sherwin v. Bugbee*, 17 Vt. 337.

"To warn" means nothing more than to notify a meeting appointed by other authority. *Stone v. School Dist. No. 4*, 8 Cush. (Mass.) 592.

As a general rule, no special notice is required of a regular annual meeting, the time of the annual meeting being fixed by law; but where the subject is to be considered at a special meeting, a special notice must be given. See *Smith v. Crittenden*, 16 Mich. 152; *Marchant v. Langworthy*, 6 Hill (N. Y.) 646; *Hodgkin v. Fry*, 33 Ark. 716.

Two distinct taxes for two distinct village purposes, though both are authorized, cannot be combined in one notice and resolution, so as to compel voters to vote either for both or against both. *North Tonawanda v. Western Transp. Co.*, 1 Buff. Super. Ct. (N. Y.) 371.

An application for calling a meeting of a school district, containing the purpose of the meeting, annexed to the warrant for calling the meeting, addressed to a person directed to warn the inhabitants of the district to meet for the purpose of acting on the articles named in such application, is a part of the warrant as effectually as if it were embodied in it. *George v. Second School Dist.*, 6 Met. (Mass.) 497.

Notice of an election is necessary, although the statute authorizing it makes no express provision as to the notice. *Mount Pike v. Pew*, 51 Mo. 63; *State v. St. Louis*, etc., R. Co., 75 Mo. 529.

Posting Notices.—A statute requiring an officer to post notices, does not require him to do so in person. *Phillips v. Albany*, 28 Wis. 341. The posting of a warrant instead of a copy does not render the meeting illegal. *Brewster v. Hyde*, 7 N. H. 206. A requirement that notices of elections shall be posted in "three of the most public places of the town," means such public places in the judgment of the officer. *Sauerhering v. Iron Bridge*, etc., R. Co., 25 Wis. 447.

A jury may presume that a warrant for a town meeting, shown to have been properly posted, remained so during the time required by law after the

voted is void.<sup>1</sup> No tax for any purpose other than that stated in the notice of the meeting can be legally voted.<sup>2</sup> But it has been held sufficient if the notice of the meeting or election enables those interested to understand its purpose.<sup>3</sup>

c. THE PROCEEDINGS.—Where no method is expressly pro-

lapse of thirty years. *Schoff v. Gould*, 52 N. H. 512.

**Return of Warrant.**—It seems that it is not necessary that any return of the warrant by the officer to whom it is directed should state the manner of service; so a return that "he had warned the inhabitants of a town," is sufficient. *Houghton v. Davenport*, 23 Pick. (Mass.) 237. See also *Saxton v. Nimms*, 14 Mass. 320. "That he had warned the inhabitants by posting up copies," has also been held sufficient. *Thayer v. Stearns*, 1 Pick. (Mass.) 109. See also *Briggs v. Murdock*, 13 Pick. (Mass.) 305. But see *Perry v. Dover*, 12 Pick. (Mass.) 206. In *Nelson v. Pierce*, 6 N. H. 194, a certificate that a warrant for holding a meeting which had been duly posted more than fifteen days, was insufficient to show that the meeting was duly notified. See also *Tuttle v. Cary*, 7 Me. 426.

1. *Haines v. School Dist. No. 6*, 41 Me. 246; *Lander v. School Dist.*, 33 Me. 239; *Jordan v. School Dist. No. 3*, 38 Me. 164; *People v. Castro*, 39 Cal. 65; *Williams v. Roberts*, 88 Ill. 11; *Gaddis v. Richland County*, 92 Ill. 119; *People v. Jackson County*, 92 Ill. 441; *Third School Dist. v. Atherton*, 12 Met. (Mass.) 105; *Rideout v. School Dist. No. 5*, 1 Allen (Mass.) 232; *Reynolds v. New Salem*, 6 Met. (Mass.) 340; *George v. Second School Dist.*, 6 Met. (Mass.) 497; *Lisbon v. Bath*, 21 N. H. 319; *Nelson v. Pierce*, 6 N. H. 194; *Cardigan v. Page*, 6 N. H. 182; *Township Board v. Hastings*, 52 Mich. 528; *Pratt v. Swanton*, 15 Vt. 147; *Greenbanks v. Boutwell*, 43 Vt. 206; *In re Independent School Dist.*, 33 Pa. St. 297.

It is not essential to the validity of the proceedings of a school district to raise a tax at their annual meeting, that there should have been a request to the clerk to warn the meeting. *Chandler v. Bradish*, 23 Vt. 416.

In *Greenbanks v. Boutwell*, 43 Vt. 206, where the statute required the notice of the meeting to be given at least seven, and not exceeding twelve, days before the meeting, a tax voted at a

meeting held under a warning giving more than twelve days' notice was held invalid.

In *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185, it was held that an election was not rendered illegal by the fact that the place of voting was changed two days before such election, of which change no notice was given to the voter, there being no fraud and no evidence that any legal voter had been prevented from voting, and no illegal voter being thereby enabled to vote.

**Liability of Trustees.**—Where a district clerk, in giving notice of a special district meeting regularly called, misrepresents the objects of the meeting, to some of the taxable inhabitants who, in accordance thereof, omitted to attend, and a tax is voted, the trustees who caused the tax to be collected are not thereby to be rendered trespassers, unless they are parties to the fraud. *Randall v. Smith*, 1 Den. (N. Y.) 214.

2. *Little v. Merrill*, 10 Pick. (Mass.) 543; *Thatcher v. People*, 93 Ill. 240; *State v. Greenleaf*, 34 N. J. L. 441; *Allen v. Burlington*, 45 Vt. 202; *Wiley v. Wilson*, 44 Vt. 404; *Atwood v. Lincoln*, 44 Vt. 332; *Drisko v. Columbia*, 75 Me. 73.

When a meeting was warned to see whether the town should appropriate money in the treasury for an object, it was held that the question of laying a tax for that purpose could not be considered. *Torrey v. Millbury*, 21 Pick. (Mass.) 64.

In *Holt's Appeal*, 5 R. I. 603, it was held that notice of a special district meeting, stating the purpose to be the levying of a tax for the expenses of repairing a schoolhouse, would not warrant the levying of an additional tax for paying the insurance of the same.

A meeting warned to vote upon the question of raising money to meet the accruing expenses of the city government, and for school purposes for the ensuing year, cannot legally vote a tax for the purpose of erecting a high-school building. *Allen v. Burlington*, 45 Vt. 202.

3. *South School Dist. v. Blakeslee*,

vided, the election must be conducted in the manner provided for general elections in the municipality where it is held.<sup>1</sup> Unless otherwise provided,<sup>2</sup> the majority required is that of the votes cast, and not of all the qualified voters.<sup>3</sup>

13 Conn. 234; *Bartlett v. Kinsley*, 15 Conn. 327.

A warning for a school meeting to decide whether the district shall have a school, and to provide for the expenses of the same, is sufficient to authorize a vote for a tax. *Chandler v. Bradish*, 23 Vt. 416.

A notice for a town meeting "to raise such sums of money as may be necessary to defray town charges for the ensuing year," is sufficient to authorize a vote to raise money for specific general purposes. *Westhampton v. Searle*, 127 Mass. 502. A meeting held in pursuance of a notice signed by one of the selectmen only "by order of the selectmen," was held to be unauthorized. *Reynolds v. New Salem*, 6 Met. (Mass.) 340.

A notice which is ambiguous will be construed to intend a tax which would be valid, rather than one which the law does not permit; and when a valid tax is voted upon such a notice, it may be lawfully collected. *Bartemeyer v. Rohlf*, 71 Iowa 582.

1. *People v. Dutcher*, 56 Ill. 144; *Prairie v. Lloyd*, 97 Ill. 180; *Leavenworth, etc., R. Co. v. Platte County Ct.*, 42 Mo. 171; *Phillips v. Albany*, 28 Wis. 340.

A requirement that elections to authorize municipal subscriptions by towns shall be conducted as in case of annual elections, does not refer to town meetings, but to general elections. *Prairie v. Lloyd*, 97 Ill. 179.

**Form of Ballot.**—Where the question of raising a tax for a specific purpose is authorized to be submitted to the electors, without prescribing the form of the ballot to be used, it is necessary, in order to render the vote operative, that the ballot should show that the specific question contemplated by the act was passed upon. *People v. Woodhull Tp.*, 14 Mich. 27.

**Qualification of Voters.**—Unless otherwise provided, those entitled to vote are those qualified to vote, at a general election. *McKenzie v. Wooley*, 39 La. Ann. 944.

Registration is a prerequisite to the right to vote, when voters are required to be registered. *Hawkins v. Carroll County*, 50 Miss. 735; *McDowell v.*

*Massachusetts R., etc., Constr. Co.*, 96 N. Car. 515.

Opportunity to register must be given to all persons qualified to vote; failure to do so will vitiate the election, if the denial should materially effect the result. *McDowell v. Massachusetts, etc., Constr. Co.*, 96 N. Car. 514.

2. The authority to levy the tax if two-thirds of the taxpayers shall vote therefor, precludes an implied assent to a tax by not voting at the election. *Fort Worth v. Davis*, 57 Tex. 225; *San Antonio v. Jones*, 28 Tex. 19.

Authority to levy a special tax, accompanied by a proviso that the levy shall not be made until a majority of the electors of the district to be affected shall vote at some regular election in favor of such levy, requires a majority of all the votes cast at regular elections, and not simply a majority of those voting for or against the levy. *Enyart v. Hanover Tp.*, 25 Ohio St. 618; *People v. Fort Edward*, 70 N. Y. 28; *Chestnutwood v. Hood*, 68 Ill. 132.

In *North Carolina*, the constitution, § 7, art. 7, will not permit a tax for the support of public schools "unless by a majority of the qualified voters therein," and not by a majority of the votes cast. See *Rigsbee v. Durham*, 98 N. Car. 81.

3. *Dunnovan v. Green*, 57 Ill. 63; *People v. Chapman*, 66 Ill. 137; *People v. Harp*, 67 Ill. 63; *Hawkins v. Carroll County*, 50 Miss. 735; *State v. Swift*, 69 Ind. 531; *Louisville, etc., R. Co. v. Davidson County*, 1 Sneed (Tenn.) 637; 62 Am. Dec. 424; *Harrington v. Plainview*, 27 Minn. 224; *Reiger v. Beaufort*, 70 N. Car. 319; *Mobile Sav. Bank v. Oktibbeha County*, 22 Fed. Rep. 580; *Carroll County v. Smith*, 111 U. S. 556; *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644; *Cass County v. Johnston*, 95 U. S. 360; *Cass County v. Jordan*, 95 U. S. 373.

Under the *Missouri* constitution, § 14, art. 11, inaction by the voters in failing to vote does not express assent, *State v. Brassfield*, 67 Mo. 331; and an act of the legislature permitting a subscription upon the vote of two-thirds of those who vote on the question merely is unconstitutional. *Webb v. Lafay-*



Fraud in the election, or undue influence brought to bear upon the voters, invalidates the tax voted.<sup>1</sup> But informalities or irregularities which cannot prejudice any substantial right will not affect the validity of the tax.<sup>2</sup> It is sufficient if the vote states in general terms the purpose and object for which the money is raised.<sup>3</sup>

ette County, 67 Mo. 353. But see *State v. Renick*, 37 Mo. 270.

In *Louisiana*, the constitution, § 209, requires only the majority of the legal voters cast at the election. See *Duperier v. Viator*, 35 La. Ann. 957.

In *Arkansas*, where a school meeting is not attended by a sufficient number of electors to hold an election, it is the duty of the trustees to lay their estimate before the county court for their action, upon which the county court is required to make the levy. *Union County Ct. v. Robinson*, 27 Ark. 116.

**Proof of Vote.**—Where it is required that the vote should be proved by affidavit in writing, the affidavit is not conclusive, but only *prima facie* evidence of the facts contained, unless otherwise provided by statute. *Cagwin v. Hancock*, 84 N. Y. 532.

1. *People v. San Francisco*, 27 Cal. 655; *Bish v. Stout*, 77 Ind. 255; *State v. Lake City*, 25 Minn. 404.

In *Chicago*, etc., *R. Co. v. Shea*, 67 Iowa 728, a tax was held to be void on account of undue influence brought to bear upon the voters, by the offer to pay them for their certificates of taxes paid. A tax procured by representation that it was to be enforced only against non-resident taxpayers is void. *Truesdell v. Green*, 57 Iowa 215.

The burden is upon the taxpayer who resists the collection of a tax voted, to show that the election was void. *School Dist. No. 88 v. Garvey*, 80 Ky. 159.

A vote to levy a tax sufficient to keep schools open for a specified time, will not authorize the levy of a tax for the succeeding year or any future year. *Wells v. Board of Education*, 20 W. Va. 157.

2. *Irwin v. Lowe*, 89 Ind. 540; *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57; *Benjamin v. Malaka Dist. Tp.*, 50 Iowa 648; *Rose v. Hindman*, 36 Iowa 160; *School Dist. No. 88 v. Garvey*, 80 Ky. 159; *Louisville, etc., R. Co. v. Davidson County*, 1 Sneed (Tenn.) 637; *Marshall v. Kerns*, 2 Swan (Tenn.) 637; 62 Am. Dec. 424; *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 120; *Henry v. Chester*, 15 Vt. 460.

**Time of Payment.**—In *Bartlett v. Kinsley*, 15 Conn. 327, an omission in a vote to fix the time for the payment of a tax, was held not to render the tax invalid, as otherwise it was legally imposed and payable on demand within a reasonable time.

**Attack on Validity of Proceedings.**—When the result of the election has been canvassed and declared to be carried by the requisite vote, the result cannot be inquired into in a suit by a taxpayer seeking to enjoin the collection of the tax in the absence of proceedings to contest the election. *Dwyer v. Hackworth*, 57 Tex. 247. See also *Edely v. Wilson*, 43 Vt. 362. After the tax has been voted and levied, its validity cannot be assailed on the ground that a petition calling for the election was not signed by one-third of the resident taxpayers as required. *Ryan v. Varga*, 37 Iowa 78.

Whether a special tax has been directed by popular vote, is a question of fact for the jury. *Dent v. Bryce*, 16 S. Car. 1.

**Waiver of Objections.**—Where no objections are made to the person who acts as judge at an election at the time it is held, it is too late to raise any question afterwards. *School Dist. No. 88 v. Garvey*, 80 Ky. 159.

3. **Specific Purpose Need not Be Stated in the Votes.**—A vote to raise a certain sum is sufficiently definite to authorize the assessment of a tax. *Taft v. Barrett*, 58 N. H. 447.

In *School District v. Merrills*, 12 Conn. 437, where it appeared from the vote, that the tax was for "defraying the expenses of the district as reported by our committee and approved by a vote of the district," the tax was held to be lawful; it not being essential to its validity that the particular object be specified.

A vote of a town to raise money to defray town charges, will not authorize the assessment of a tax to be appropriated for the support of the ministry. *Lisbon v. Bath*, 21 N. H. 319.

A vote to raise all the law allows is sufficient, as it can be rendered certain by reference to the law. *State v.*

The vote must be certified by the proper officers to the board or persons authorized to act upon it, and unless this is done, the tax is illegal.<sup>1</sup>

**6. Subjects of Municipal Taxation—*a*. IN GENERAL.**—A municipality, under a general power to levy taxes, may subject all property within its limits which is subject to taxation by the general laws of the state,<sup>2</sup> not only such as was taxable when the power

Sickles, 24 N. J. L. 125. The vote that a tax be raised to pay the expense of repairs, is sufficient, without the limitation as to the amount of a tax on the rate. *Adams v. Hyde*, 27 Vt. 221. A vote "to raise fifty cents on the dollar of the grant list to pay the bounty offered to soldiers," is sufficiently definite. *Blodgett v. Holbrook*, 39 Vt. 336. And see *Halleck v. Boylston*, 117 Mass. 469.

1. *School Directors v. Fogleman*, 76 Ill. 189; *Weber v. Ohio*, etc., R. Co., 108 Ill. 451; *State v. Duryea*, 40 N. J. L. 266; *State v. Van Winkle*, 25 N. J. L. 73; *Hardcastle v. State*, 27 N. J. L. 551; *Dent v. Bryce*, 16 S. Car. 1; *Hodgkin v. Fry*, 33 Ark. 716; *Worthen v. Badgett*, 32 Ark. 496; *Cairo*, etc., R. Co. v. *Parks*, 32 Ark. 131; *Matteson v. Rosendale*, 37 Wis. 254; *Plumer v. Marathon County*, 46 Wis. 163.

The certificate of a school-district tax which does not conform with the law confers no authority upon the officers to levy the tax. *McIntyre v. White Creek*, 43 Wis. 620; *Arnold v. Juneau County*, 43 Wis. 627; *State v. Sullivan*, 36 N. J. L. 89; *State v. Padden*, 44 N. J. L. 151; *State v. Duryea*, 40 N. J. L. 266. But in *Smyth v. Titcomb*, 31 Me. 272, it was held that where a school district legally votes to raise a sum of money, and the assessors of the town ascertain the fact, an assessment of the tax is rendered invalid by the omission of the district clerk to certify to the assessor the vote of the district.

The action of the trustees in calling and holding the meeting at which a tax was voted according to law, should appear in the certificate of the clerk to the assessor. *State v. Harff*, 38 N. J. L. 310.

Where the clerk was required to certify the rate per centum of a tax voted, a certificate that the election was held upon the appropriate day, and that a majority of the votes cast were in favor of the tax, was held sufficient. *Shontz v. Evans*, 40 Iowa 139.

It is held that the failure to return

the certificate of the vote, within the time required, will not invalidate the tax voted. *Moore v. Fessenbeck*, 88 Ill. 422; *Smith v. Crittenden*, 16 Mich. 152.

In *Michigan*, the failure of the supervisors of a township to authorize a tax is held not invalid in an action of the township authorities in assessing a tax. *Upton v. Kennedy*, 36 Mich. 215; *Robbins v. Barron*, 33 Mich. 124.

In *New York*, it was held that the certificate of town auditors allowing accounts, regular on its face, is a sufficient authority for the board of supervisors to proceed and cause the amount certified to be levied on the town, and such a certificate precludes the supervisors from inquiring as to the merits of particular items allowed. *People v. Queens County*, 1 Hill (N. Y.) 195.

2. *Augusta v. Augusta Nat. Bank*, 47 Ga. 562; *Frederick v. Augusta*, 5 Ga. 561; *Pearce v. Augusta*, 37 Ga. 597; *Maurin v. Smith*, 25 La. Ann. 445; *Anderson v. Mayfield* (Ky. 1892), 19 S. W. Rep. 598; *Stütz v. Indianapolis*, 81 Ind. 582; *Toledo*, etc., R. Co., v. *Lafayette*, 22 Ind. 262; *St. Louis v. Russell*, 9 Mo. 507; *State v. Bremond*, 38 Tex. 116.

The definition of the words "taxable property" when used in a grant of the power to tax, as "all property not excepted by law from taxation," was approved in *Slat v. Charleston*, 10 Rich. (S. Car.) 240; *St. Phillip Church v. Charleston*, 1 McMull. Eq. (S. Car.) 140; *State v. Charleston*, 5 Rich. (S. Car.) 564.

A city authorized to levy a tax upon the "taxpayers of the city taxable under the revenue laws of the state," must levy upon the same persons and property as prescribed by the revenue laws of the state. "Taxpayers of the city taxable under the revenue laws of the state" authorizing the levy of a tax, designates both the person and subject of taxation. *Barrett v. Henderson*, 4 Bush (Ky.) 255.

The products of mines are personal property and subject to taxation for

municipal purposes as such. *Virginia City v. Chollar-Potosi Gold, etc.*, Min. Co., 2 Nev. 86.

In *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521, it was held that the power of taxation conferred upon the city of Lexington, extended only to property within the city, meaning visible property actually situated within the city, and not such property as had merely a legal constructive status.

In *Baker v. Panola County*, 30 Tex. 87, it was held that, under a statute authorizing counties to levy and collect taxes for county purposes upon all subjects of taxation on which a tax may be levied by the state, if the state law omits to enumerate any particular thing or pursuit in the subjects to be taxed, it is not a subject of taxation on which a tax may be levied by the state and, therefore, is not taxable by the county.

An act enlarging the basis of county taxation so as to comprehend all objects liable to taxation for state purposes, does not render the additional subjects liable to taxation for borough and township purposes. *Blickensderfer v. School Directors*, 20 Pa. St. 38.

A charter made taxable whatever property "the city council may designate." It was held a sufficient designation, where the council ordered the taxation of "any property of any kind subject to taxation under the laws of this commonwealth." *Covington Gas-Light Co. v. Covington*, 84 Ky. 94.

In *Louisiana*, police juries are vested with power to tax all property and persons within the limits of incorporated towns, unless the power be withheld or withdrawn by express legislative provision. *Cook v. Dendinger*, 38 La. Ann. 261; *Benefield v. Hines*, 13 La. Ann. 420; *Maurin v. Smith*, 25 La. Ann. 445.

**Stock in Foreign Corporation.**—A city may tax its citizens for stock owned by them in a foreign railroad company, although the state where the corporation is located has collected a tax thereon. *Seward v. Rising Sun*, 79 Ind. 351.

**Land of Non-residents.**—In *Alexander v. Alexandria*, 5 Cranch (U. S.) 1, it was held that the city of Alexandria had power to tax the lands of non-residents within its limits.

**Deeds—Choses in Action.**—In *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521, it was held that the terms "personal property" and "personal estate," as used

in the grant of power to tax, did not embrace deeds and other choses in action, but visible property only.

But the power to tax "all property not exempt from taxation under the general laws of the state," *Trimble v. Mt. Sterling* (Ky. 1890), 12 S. W. Rep. 1066, and "real, personal and mixed estate," embraces choses in action. *Newport v. Ringo*, 87 Ky. 635.

**Promissory Notes.**—In *Bridges v. Griffin*, 33 Ga. 113, the power to impose a tax upon every species of property within the limits of the city, did not authorize the levy of a tax upon notes and other evidences of debt against persons residing without the limits of the city.

**Vessels.**—A vessel is taxable at the place of its registration; that is, at its home port. *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Pacific Mail S. S. Co. v. Com'rs of Taxes*, 58 N. Y. 242; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Irvin v. New Orleans, etc.*, R. Co., 94 Ill. 105; *Vogt v. Ayer*, 104 Ill. 583; *Peabody v. Essex County*, 10 Gray (Mass.) 97; *Pelton v. Northern Transp. Co.*, 37 Ohio St. 450; *St. Joseph v. Saville*, 39 Mo. 460.

In *Battle v. Mobile*, 9 Ala. 234; 44 Am. Dec. 438, it was held that a boat registered in Mobile as a coasting vessel, was liable to be assessed and taxed in the city of Mobile, although the owner resided in *Pennsylvania*. So in *Wilkey v. Pekin*, 19 Ill. 160, it was held that a steamboat belonging to a resident of the city, but registered elsewhere, could not be taxed under the power to tax property "within the limits of the city." *Battle v. Mobile*, 9 Ala. 234; 44 Am. Dec. 438.

A ferry-boat is taxable at its home port. *Newport v. Berry* (Ky. 1892), 19 S. W. Rep. 238. But a municipality, under general power to tax property within the city, has not the power to tax ferry-boats belonging to non-residents whose relation to the city is merely that of contact. *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423, reversing *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580.

In *New York, etc., R. Co. v. Haight*, 30 N. J. L. 428, it was held that ferry-boats registered in New York and plying between Jersey City and New York, were not liable to be taxed in Jersey City.

was granted, but all made so by any general statute subsequently enacted.<sup>1</sup> Property which is taxable for one purpose must be held to be taxable for all purposes of general taxation;<sup>2</sup> and, as in the exercise of the power by the general government, it is never to be presumed that the right is abandoned or surrendered unless it clearly appears that such was the intention.<sup>3</sup>

*b. PUBLIC PROPERTY.*—The rules generally governing the exemption of public property apply to municipal taxation.<sup>4</sup> Municipal property devoted to public purposes is not taxable by the corporation whose property it is, or by any other within whose limits it may be situated, unless expressly made so by statute.<sup>5</sup>

In *New Albany v. Meekin*, 3 Ind. 481; 56 Am. Dec. 522, it was held that the share of a part owner of a steamboat touching at the city of New Albany, was not liable to be taxed, although such part owner was a citizen of that place.

**Bridges.**—In *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238, it was held that such portion of a bridge as is situated within the corporate limits of a city is subject to taxation for corporate purposes equally with all other property within its limits. In *State v. Columbia*, 27 S. Car. 127, so much of the bridge as covered the stream within the corporate limits was held taxable. See also *Point Pleasant Bridge Co. v. Point Pleasant*, 32 W. Va. 328; *Fort Smith, etc., Bridge Co. v. Hawkins*, 54 Ark. 509.

But in *Louisville Bridge Co. v. Louisville*, 81 Ky. 189, it was held not sufficient to authorize a municipal taxation that a bridge was built within the corporate limits of the city; the bridge not being within the range of municipal benefits.

In *Henderson Bridge Co. v. Henderson* (Ky. 1890), 14 S. W. Rep. 493, where a contract with the city which authorized a bridge company to construct its bridge across a river which was within the city limits, provided that it should not be construed as waiving the right to tax the property of the bridge company, it was held that the city acquired the right to tax the entire bridge.

**Bonds—State and City.**—The grant of power to a municipality to tax all property will not include the power to tax its own bonds. *Macon v. Jones*, 67 Ga. 489. See also *Miller v. Wilson*, 60 Ga. 505. In *Augusta v. Dunbar*, 50 Ga. 387, it was held that without express and explicit authority it will not be presumed that the state, under gen-

eral words, granted the power to tax state bonds.

1. *Buffalo v. Le Couteulx*, 15 N. Y. 453.

In *Tackaberry v. Keokuk*, 32 Iowa 155, it was held that any change in the general law in respect to the subject of taxation effects a corresponding change as regards the subject of taxation for municipal purposes, where the power in the city refers to the general laws of the state for the subjects of taxation.

2. *Hale v. Kenosha*, 29 Wis. 599.

3. *Stein v. Mobile*, 17 Ala. 234; *Athens City Water Works Co. v. Athens*, 74 Ga. 413; *Plaisted v. Lincoln*, 62 Me. 91. See also *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Louisville, etc., Canal Co. v. Com.*, 7 B. Mon. (Ky.) 160; *Brewster v. Hough*, 10 N. H. 138.

In *Georgia*, the property of a railroad company, used in carrying on its usual and ordinary business, is not subject to taxation by municipal corporations. *Atlanta v. Georgia Pac. R. Co.*, 74 Ga. 16; *Albany v. Savannah, etc., R. Co.*, 71 Ga. 158; *Houston v. Central R. Co.*, 72 Ga. 211; *Savannah, etc., R. Co. v. Morton*, 71 Ga. 24. As to the general power to tax railroads, see *TAXATION (CORPORATE)*, vol. 25.

4. See *supra*, this title, *Instrumentalities of Government; Exemptions*. Such property exempt from state taxes cannot be subjected to taxation by municipalities. See *O'Donnell v. Bailey*, 24 Miss. 386.

**Educational Institutions.**—In *Richmond County Academy v. Augusta* (Ga. 1892), 17 S. E. Rep. 61, lands held by a public academy, though separate from the property of the academy proper, and used only as a means of income, were held exempt from municipal taxation.

5. *People v. Austin*, 47 Cal. 353;

And so county property is not, as a rule, subject to taxation by cities or towns within the county.<sup>1</sup>

c. PROPERTY IN ADJACENT TERRITORY.—As a general rule a corporation cannot tax property situated outside of its corporate limits.<sup>2</sup> But the legislature sometimes authorizes the assessment for benefits of property adjacent to the city.<sup>3</sup>

d. AGRICULTURAL LANDS.—The question of the taxation of agricultural or rural lands situated within the corporate limits of a municipality has been discussed already.<sup>4</sup>

*Low v. Lewis*, 46 Cal. 549; *Fall v. Marysville*, 19 Cal. 391; *Jersey City Water Com'rs v. Gaffney*, 34 N. J. L. 131; *State v. Hotaling*, 44 N. J. L. 347.

In *Galveston Wharf Co. v. Galveston*, 63 Tex. 14, the city had such an interest in the property proposed to be taxed as made it exempt.

In *West Hartford v. Water Com'rs*, 44 Conn. 360, it was held that land in the city of West Hartford, purchased by water commissioners of Hartford for reservoir purposes, was not subject to taxation by the city of West Hartford. See also *Rochester v. Rush*, 80 N. Y. 302, reversing 15 Hun (N. Y.) 439. But see *Chadwick v. Maginnes*, 94 Pa. St. 117. And in *People v. Brooklyn*, 111 N. Y. 505, it was held that the franchise and landing of a ferry operated by the city of New York could not be taxed by the city of Brooklyn.

1. *Piper v. Singer*, 4 S. & R. (Pa.) 354. It is exempt from all taxation, whether for public purposes or local improvements. *Worcester County v. Worcester*, 116 Mass. 193.

But in *Cook County v. Chicago*, 103 Ill. 646, it was held that where there was a constitutional provision that property of counties might be exempt from taxation by general law, there was an implication that such property was liable to taxation, and that, in the absence of any exemption law, a water tax could be assessed against county property by a city.

2. *St. Charles v. Nolle*, 51 Mo. 122; 11 Am. Rep. 440; *Wells v. Weston*, 22 Mo. 384; *Corn v. Cameron*, 19 Mo. App. 573; *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521; *Matter of Prospect Park*, 60 N. Y. 398.

Where the boundary of a corporation was the low-water mark in a river, it was held that the city had no power to tax coal under a river beyond that mark. *Gilchrist's Appeal*, 109 Pa. St. 600.

In *Stephens v. Boonville*, 34 Mo. 323, it was held that notes in the

hands of the administrator of a decedent who resided without the city at the time of his death, could not be taxed by the corporation, although they were actually kept within the city by the administrator.

But in *Richmond County Academy v. Augusta* (Ga. 1892), 17 S. E. Rep. 61, choses in action which were held by trustees as tenants in common, some of whom resided within and some without the limits of a municipal corporation, were taxable according to the proportion held by the trustees residing within the city.

A tax levied by a city on real estate not included within the city by any authority except an invalid ordinance, is illegal and void, and remains illegal, although the real estate upon which it was levied is afterwards made a part of the city by statute. *Atchison, etc., R. Co. v. Maquilkin*, 12 Kan. 301.

3. See *supra*, this title, *Local Assessments*; *Brooks v. Baltimore*, 48 Md. 265.

4. See MUNICIPAL CORPORATIONS, vol. 15, p. 1013. See also *supra*, this title, *Local Assessments*.

These recent cases may be added to those already cited, to the effect that such lands are subject to be taxed for all municipal purposes. See *Hurla v. Kansas City*, 46 Kan. 738; *Mendenhall v. Burton*, 42 Kan. 570; *Davis v. Point Pleasant*, 32 W. Va. 289; *Maddrey v. Cox*, 73 Tex. 538; *Smith v. Saginaw*, 81 Mich. 123; *Cary v. Pekin*, 88 Ill. 154; 30 Am. Rep. 543; *Eifert v. Central Covington* (Ky. 1891), 15 S. W. Rep. 180. Compare *Smith v. Sherry*, 50 Wis. 210.

In *Utah*, it was held that municipal taxation should be limited to the range of municipal benefits, and therefore the territorial legislature had no power to authorize the taxation of lands and their occupation located beyond the range of municipal benefits. *Territory v. Daniels* (Utah, 1889), 22 Pac. Rep. 159; *Ellison v. Linford*, 7 Utah 166.

*e. DETACHED TERRITORY.*—The remaining part of a corporation from which territory has been detached by annexation to another, or by the creation of a new corporation, remains subject to all the obligations previously incurred, and the detached portion is not subject to taxation therefor,<sup>1</sup> unless express provision is made by the legislature for a division of liabilities.<sup>2</sup>

*f. EXEMPTIONS.*—The requirement of equality and uniformity

In *Cook v. Crandall*, 7 Utah 344, the land proposed to be taxed was within the range of municipal benefits.

As to statutory exemptions of rural lands see *Conklin v. Cambridge City*, 58 Ind. 130; *Baldwin v. Hastings*, 83 Mich. 639; *Smith v. Americus*, 89 Ga. 810; *Stilz v. Indianapolis*, 81 Ind. 582; *South Bend v. Cushing*, 123 Ind. 290. The exemption was not allowed in *State v. Brown*, 53 N. J. L. 162.

In *Perkins v. Burlington*, 77 Iowa 553, an act providing that no lands within the extension should be taxed unless laid off into lots, was held not to apply to extensions made prior to the act.

In *Simms v. Paris* (Ky. 1886), 1 S. W. Rep. 543, a tract of land of fifteen acres, of which seven were used for pasture, one for garden, and the remainder for residence and stable, etc., was held not to be exclusively for farming purposes, under a law exempting such lands from taxation.

In *Dickerson v. Franklin*, 112 Ind. 178, an act providing that such lands should not be taxed at a higher percentage than that stated, was held not to refer to special assessments.

1. *Laramie County v. Albany County*, 92 U. S. 308; *Hampshire County v. Franklin County*, 16 Mass. 76; *Cobb v. Kingman*, 15 Mass. 197; *Windham v. Portland*, 4 Mass. 389. See MUNICIPAL CORPORATIONS, vol. 15, p. 1027.

2. *Board of Education v. Board of Education*, 30 W. Va. 424; *Willimantic School Soc. v. First School Soc.*, 14 Conn. 457; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Marshall County Ct. v. Calloway County Ct.*, 2 Bush (Ky.) 93; *Baltimore v. State*, 15 Md. 376; *Stone v. Charlestown*, 114 Mass. 214; *Dunmore's Appeal*, 52 Pa. St. 374. And see *Cleveland v. Heisley*, 41 Ohio St. 670; *Portwood v. Montgomery County*, 52 Miss. 523; *Bristol v. New Chester*, 3 N. H. 524; *Sill v. Corning*, 15 N. Y. 207; *Sedgwick County v. Bunker*, 16 Kan. 498; *Montpelier v. East Montpelier*, 29 Vt. 12;

67 Am. Dec. 748; *Milwaukee Tp. v. Milwaukee*, 12 Wis. 93; *Olney v. Harvey*, 50 Ill. 453; 99 Am. Dec. 530; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Bowdoinham v. Richmond*, 6 Me. 112; 19 Am. Dec. 197.

In *Galesburg v. Hawkinson*, 75 Ill. 152, it was held that, inasmuch as the corporate indebtedness is presumably incurred for the equal benefit of every part of the municipality, an act detaching a part of it is an injustice to the remaining taxpayers, unless attended with some corresponding benefit to the municipality.

In *Devor v. M'Clintock*, 9 W. & S. (Pa.) 80, it was held that where a new county is erected out of part of an old one, the old one may enforce the payment of taxes due before the separation; but where a sale is made for such taxes, and the county becomes the purchaser, it is bound to pay the taxes subsequently accruing to the new county, and the new county may collect them by a sale of the land, and the purchaser will have a title superior to that of the old county.

In *Kansas*, the taxation of detached territory to pay the bonded indebtedness of a county or township is authorized, where the bonds are both "authorized and issued" previous to the detachment. *Chandler v. Reynolds*, 19 Kan. 249; *Ottawa County v. Nelson*, 19 Kan. 234; 27 Am. Rep. 101; *Sedgwick County v. Bunker*, 16 Kan. 498; *Marion County v. Harvey County*, 26 Kan. 181; *Morris County v. Hinckman*, 31 Kan. 738; *Hurt v. Hamilton*, 25 Kan. 82.

*Disputed Territory.*—Where there is a dispute between two districts respecting their boundaries, each claiming the territory in question, if one permits the other to levy, collect, and receive the taxes thereon from year to year, and expend them in meeting the annual wants of the district, it is estopped from maintaining an action therefor as for money had and received. *Rapids Dist. Tp. v. Clinton Dist. Tp.*, 27 Iowa 323.

in taxation refers generally to taxation by municipalities,<sup>1</sup> and, consequently, they cannot grant exemption from, or commutation of, taxes.<sup>2</sup> The power to tax does not imply the power to exempt from taxation, and when the power is given a city to tax all the property, it can exempt none, unless expressly authorized to do so.<sup>3</sup>

The state cannot confer upon the municipality the power to tax property which it has not the power itself to tax.<sup>4</sup> That the state forbears to tax certain property or exempts it from general taxation, however, does not necessarily deprive the municipality of the right to tax it.<sup>5</sup> And, on the other hand, taxation for

1. *Knowlton v. Rock County*, 9 Wis. 410; *Hale v. Kenosha*, 29 Wis. 599; *Weeks v. Milwaukee*, 10 Wis. 242; *Primm v. Belleville*, 59 Ill. 142.

In *Kittle v. Shervin*, 11 Neb. 65, it was held that a municipal tax levied upon real estate and not upon personal property was unconstitutional. In *Dyar v. Farmington*, 70 Me. 575, it was held that a legislative act imposing a tax for general and public purposes upon the real estate of one part of the town only was void.

In *Cartersville Water Works Co. v. Cartersville*, 89 Ga. 689, it was held that a water company's property could not be exempted from municipal taxation by contract, gratuity, or commutation.

2. *State v. Hannibal, etc.*, R. Co., 75 Mo. 208; *Brewer Brick Co. v. Brewer*, 62 Me. 62; 16 Am. Rep. 395; *State v. Fyler*, 48 Conn. 145; *State v. Gracey*, 11 Nev. 223; *Mack v. Jones*, 21 N. H. 393; *Hayzlett v. Mt. Vernon*, 33 Iowa 229.

In *Wilson v. Sutter County*, 47 Cal. 91, an order remitting taxes, although made pursuant to a legislative act, was held to be void, as repugnant to the requirement of uniformity and equality.

In *Brewer Brick Co. v. Brewer*, 62 Me. 62; 16 Am. Rep. 395, it was held that it is for the legislature to determine what property shall be subject to, and what shall be exempt from, taxation, and that it cannot constitutionally transfer to municipal corporations the power to determine upon what property it shall or shall not be imposed. See also *Farnsworth Co. v. Lisbon*, 62 Me. 451.

3. *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *People v. Campbell*, 93 N. Y. 196; *Whiting v. West Point*, 88 Va. 905.

In *Bowen v. Newell*, 16 R. I. 238, it was held that where a town was au-

thorized to grant to any person the right of laying water pipes, etc., and to exempt such pipes from taxation, the exemption from taxation of pipes already laid was not authorized.

In *State v. Hannibal, etc.*, R. Co., 75 Mo. 209, a contract of the city of Hannibal with a railroad company to exempt its property from city taxation, was held invalid, the city having no right to make exemptions. See also *St. Joseph v. Hannibal, etc.*, R. Co., 39 Mo. 476; *Lexington v. Aull*, 30 Mo. 480; and in *Austin v. Austin Gas Co.*, 69 Tex. 180, the contract with defendant company to exempt its property, in consideration of benefits granted to the city, was held to be void upon the same ground. In *New Orleans v. New Orleans Water Works Co.*, 36 La. Ann. 432, although the exemption from taxation of defendant's property was in consideration of defendant's obligation to supply free water to the city, the city's demand for taxes was sustained. But in *Grant v. Davenport*, 36 Iowa 396, an exemption of the property of a water-works company for a similar consideration was held not invalid. In *Georgia*, it was held that, under a general power to tax all property, a corporation might leave certain species of property untaxed. *Athens v. Long*, 54 Ga. 330; *Waring v. Savannah*, 60 Ga. 93.

4. *Johnston v. Macon*, 62 Ga. 645; *O'Donnell v. Bailey*, 24 Miss. 386. See also *Kentucky Cent. R. Co. v. Pendleton* (Ky. 1886), 2 S. W. Rep. 176; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600.

5. In *Morgan v. Cree*, 46 Vt. 773; 14 Am. Rep. 640, an exemption of the lands of a town from public taxes was held not to apply to municipal taxes, on the ground that the term "public taxes" referred only to taxes for public revenue as distinguished from municipal

state purposes does not relieve the thing taxed from taxation for municipal purposes.<sup>1</sup>

**7. The Assessment.**—Generally speaking, the rules governing assessments by municipalities may be said to be the same as those governing assessments generally.<sup>2</sup> The assessment must usually be made by an assessor chosen by the electors of the district or municipality to be taxed,<sup>3</sup> though in some instances he must take the assessment for state purposes as a proper basis of valuation for local purposes.<sup>4</sup>

taxes. And see *Hassan v. Rochester*, 67 N. Y. 528.

So in *Lexington v. Aull*, 30 Mo. 480, where the payment by banks of a certain sum was by a charter act declared to be in full of all taxes to be paid to the state, a city was not prevented from taxing them.

In *St. Joseph v. Hannibal, etc.*, R. Co., 39 Mo. 477, it was held that the exemption from state and county taxes of the stock of a railroad company by its charter, did not prevent the legislature from repealing the exemption or subjecting the corporation to municipal taxes.

**State Banks.**—In *State Bank v. Madison*, 3 Ind. 43, where the charter of a bank provided that it should be taxable only for state purposes, it was held that a city could not tax its capital stock nor any part of it for city purposes.

1. *People v. Davenport*, 25 Hun (N. Y.) 630; *People v. Tax Com'rs*, 26 Hun (N. Y.) 446; *Seward v. Rising Sun*, 79 Ind. 351.

2. See *supra*, this title, *The Assessment*.

3. *Savings Loan Soc. v. Austin*, 46 Cal. 416; *Williams v. Cocoran*, 46 Cal. 553; *Reily v. Lancaster*, 39 Cal. 354; *People v. Sargent*, 44 Cal. 430; *Smith v. Farrelly*, 52 Cal. 77; *People v. White*, 47 Cal. 616; *Houghton v. Austin*, 47 Cal. 646; *People v. Stockton, etc.*, R. Co., 49 Cal. 421.

It has been held that an assessor elected for the city and county cannot make assessments for the city, the city and county being a different district from the city. *People v. Hastings*, 29 Cal. 449.

A county assessor cannot assess the property of a township for a tax levied on township property to raise a fund for township purposes. *People v. Sargent*, 44 Cal. 430. And see *Smith v. Farrelly*, 52 Cal. 77.

As a general rule, the selectmen or

trustees of a village are alone authorized to assess taxes where no assessors are elected. *Scammon v. Scammon*, 28 N. H. 419; *People v. Wood*, 71 N. Y. 371.

In *Hawkins v. Jonesboro*, 63 Ga. 527, it was held that no tax upon property within the corporate limits of a municipality can be legally collected by the municipal authorities until after assessment by three citizens thereof who are freeholders. See also *Reily v. Lancaster*, 39 Cal. 354.

Such assessors cannot assess property situated beyond the limits of their respective districts. *People v. Placer-ville, etc.*, R. Co., 34 Cal. 656; *People v. Stockton, etc.*, R. Co., 49 Cal. 415.

Where an assessment is required to be made in several towns, by the corporate authorities, an assessment made by the proper officers of each town, acting together through all the towns, is invalid, as the corporate authorities of one town have no jurisdiction to make or participate in the assessment of the property in another town. The assessment in each town should be made by its own authorities. *Hundley v. Lincoln Park*, 67 Ill. 559.

**Who May be Appointed.**—Where the power to appoint assessors is conferred upon the commissioners of a municipality, they cannot appoint any of their number to fill the office. *Hawkins v. Jonesboro*, 63 Ga. 527.

4. *Police Jury v. Harris*, 10 La. Ann. 676.

And in such case, even though the property be so situated as to render an original valuation necessary, it must follow that of the town or state as far as practicable. *People v. Adams*, 125 N. Y. 471.

In *Glover v. Edgewater*, 3 Thomp. & C. (N. Y.) 497, a charter provision requiring the assessment roll of the village to be prepared, as far as practicable, in the manner prescribed by law in respect to assessments made by



8. **The Collection.**—The grant to a municipality of full power to tax, carries with it authority to use all means necessary to accomplish the object by the enforcement of collection.<sup>1</sup> An action at law against the owner of the property to enforce payment, will lie,<sup>2</sup> and this, notwithstanding the legislature may have provided a special remedy.<sup>3</sup> The power to tax is usually deemed to include

town assessors, was held to relate only to taxes to be raised for municipal purposes.

Under the *Alabama* statutes, there is no such thing as an assessment of property for county taxes. The assessment is for state taxation alone; but, after equalization of the assessment by the county board, the court of county commissioners levy a tax on the state assessment to provide for county expenses. State taxes are assessed; county taxes are only levied. *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546. And the rule is substantially the same under the *North Carolina* statutes. *Covington v. Rockingham*, 93 N. Car. 134.

In *San Luis Obispo v. Pettit*, 87 Cal. 499, a provision that a city council may adopt a system for the assessment, levy, and collection of taxes, which shall conform to the general laws of the state as nearly as circumstances will permit, "except as to the times for such assessment," was held not to forbid the council selecting the time fixed for other taxes, but to leave the selection of the time to their discretion.

1. *Slack v. Ray*, 26 La. Ann. 674.

Unless there is some constitutional restriction, the legislature may authorize the municipality to levy and collect retrospective taxes, and, for this purpose, to use the assessment roll of a previous year. *Fairfield v. People*, 94 Ill. 244; *Cowgill v. Long*, 15 Ill. 202.

The legislature may devolve the office and duties of tax collector on the incumbent of any elective office, but the law must precede the election of the officer, and his election must be by the qualified voters of the district. *People v. Kelsey*, 34 Cal. 470.

A municipal tax collector cannot collect the taxes for an adjoining town, and this even though it has, after his election and after the levy of the tax, been annexed to the city. *Mason v. Johnson*, 51 Cal. 612.

In *State v. Heath*, 20 La. Ann. 172; 96 Am. Dec. 390, a contract made by the mayor of New Orleans with the city attorney, for the collection of all bills for taxes assessed upon property

as unknown, and all unsatisfied judgments in favor of the city for taxes, was held to violate no provisions of a city charter.

Where a city treasurer is alone empowered by law to enforce the collection of unpaid city taxes, any contract made by the city or its common council, with any person, for their collection, is *ultra vires*, and absolutely void. *Fort Wayne v. Lehr*, 88 Ind. 62.

Under the *Illinois* general incorporation law, municipal taxes are required to be certified to the proper officers of the county of which the municipality forms a part, for collection with state and county taxes, and are to be collected by the same officers by whom state and county taxes are collected. *Springfield v. Edwards*, 84 Ill. 626; *Mix v. People*, 106 Ill. 425.

A city cannot be vested with discretionary power to collect taxes, as provided by either of two laws which provided different officers and prescribed different methods for that purpose. *People v. Cooper*, 83 Ill. 585. In *Illinois*, taxes are levied generally upon a town, and all cities and villages situated in it, and it is the duty of the collector to pay to the treasurer of the town that portion of the taxes levied in the town, and to turn over to proper officers of the city or village that portion of the taxes levied upon them. *Baird v. People*, 83 Ill. 387; *Suppiger v. People*, 9 Ill. App. 290; *Britten v. Clinton*, 8 Ill. App. 164; *People v. Wilson*, 3 Ill. App. 368.

A bounty tax must be collected by the process and officer employed to collect the other taxes of the municipal division levying it. *Hilbish v. Hower*, 58 Pa. St. 93.

**Power to Collect by Sale.**—See *supra*, this title, *Tax Sales—Power to Sell*.

2. *San Luis Obispo County v. White*, 91 Cal. 432; *New York v. Colgate*, 12 N. Y. 140. See *supra*, this title, *Collection by Action*.

3. See *Howard v. Houston*, 59 Tex. 76; *Oakland v. Whipple*, 39 Cal. 113; *Burlington, etc., R. Co. v. Burlington*, 41 Iowa 134; *Dubuque v. Illinois*

the power to prescribe penalties for non-payment of the taxes assessed.<sup>1</sup>

**9. Taxes in Particular Districts and Quasi Municipalities—***a. GENERALLY.*—School, road, levee, irrigation, and districts for like purposes, the better to perform the special functions for which they are created, may be, and often are, invested with a corporate character,<sup>2</sup> and endowed with the taxing power.<sup>3</sup> They are *quasi* corporations—mere subdivisions of the state for political purposes—and not corporations within constitutional provisions prohibiting special acts conferring corporate powers;<sup>4</sup> and in levying

Cent. R. Co., 39 Iowa 56; *State v. Steamship Co.*, 13 La. Ann. 497; *Dugan v. Baltimore*, 1 Gill & J. (Md.) 499; *Camden v. Allen*, 26 N. J. L. 398; *Durant v. Albany County*, 26 Wend. (N. Y.) 66; *U. S. v. Lyman*, 1 Mason (U. S.) 482.

In order to preclude a municipality from maintaining an action for its taxes, the special remedy must be prescribed in the very law that confers the right to tax. *Howard v. Houston*, 59 Tex. 76.

1. *Burlington v. Burlington, etc.*, R. Co., 41 Iowa 134; *Augustine v. Jennings*, 42 Iowa 198; *Slack v. Ray*, 26 La. Ann. 674; *State v. Consolidated Va. Min. Co.*, 16 Nev. 445. But discretionary power granted to municipalities in respect to the imposition of penalties, extends only to general taxes; in case of special assessments, only such penalties can be collected as are affixed by statute. *Ankeny v. Henningsen*, 54 Iowa 29; *Bucknall v. Story*, 36 Cal. 67. The penalty when added, becomes part of the taxes due. *Kansas Pac. R. Co. v. Amrine*, 10 Kan. 318; *Burlington v. Burlington, etc.*, R. Co., 41 Iowa 134.

The municipal authorities may add a penalty for refusal to give the assessor proper information to enable him to properly make the assessment. *Virginia City v. Chollar-Potosi Gold, etc.*, Min. Co., 2 Nev. 86.

In *Missouri*, general words in a city charter are held not to be sufficient to give to the city the power to enforce a tax by fine or imprisonment, when the tax is levied not as a police regulation, but as a means of revenue, the municipality not having power to make the non-payment of a purely revenue tax a misdemeanor punishable by fine and imprisonment. *St. Louis v. Green*, 6 Mo. App. 591; *St. Louis v. Heinrich*, 6 Mo. App. 591.

And it has been held that a penalty cannot be affixed for the non-payment

of taxes, unless express authority to do so be granted by the legislature. *Augusta v. Dunbar*, 50 Ga. 387; *Jefferson v. Whipple*, 71 Mo. 519. And in *Webster v. San Francisco*, 1 Cal. 455, it was held that a penalty of one per cent. a day was exorbitant, and that the common council had no authority under the charter of the city to impose it.

2. See *Dean v. Davis*, 51 Cal. 406; *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360; *Taft v. Wood*, 14 Pick. (Mass.) 362; *Com. v. Beamish*, 81 Pa. St. 389.

Powers or privileges may be conferred, or duties enjoined, of such a character that a corporation would be required, and from which the corporation must be implied. If such powers or privileges cannot be enjoined, or if such duties cannot be performed without acting in a corporate capacity, a corporation, to that extent, is created by implication. *People v. Reclamation Dist.*, 53 Cal. 346.

School districts are not strictly municipal corporations, but territorial divisions for the purposes of common schools exercising, within a prescribed sphere, many of the faculties of a corporation. *Wharton v. School Directors*, 42 Pa. St. 358.

The word "district," signifies a part or portion of the state. A city therefore may be a district. *Keely v. Sanders*, 99 U. S. 441.

3. See *People v. McAdams*, 82 Ill. 356; *Bowles v. State*, 37 Ohio St. 35; *Kinney v. Zimpleman*, 36 Tex. 564.

In *California*, principles of local self-government apply to prevent a tax upon property within a highway district, for a purpose of building a bridge, from being assessed by an assessor elected by the county, nor can a tax be collected by a collector elected by the county. *Smith v. Farrelly*, 52 Cal. 77.

4. *State v. Powers*, 38 Ohio St. 54;

taxes for the purposes of their creation, they are in a large sense mere agencies of the state in carrying into effect general laws which have been enacted for the common good.<sup>1</sup>

*b. SCHOOL DISTRICTS AND SCHOOL TAXES*—(1) *In General*.—Taxation for the establishment and maintenance of educational institutions is a legitimate exercise of the taxing power.<sup>2</sup> The power to tax for the maintenance of schools is within a general grant of power to tax for municipal purposes;<sup>3</sup> but the authority to levy such taxes is usually expressly conferred upon political divisions of the state,<sup>4</sup> and upon districts constituted as corporations

*Speight v. People*, 87 Ill. 595; *People v. Buffalo County*, 4 Neb. 150; *Sherman County v. Simons*, 109 U. S. 735. See *State v. Englewood Drainage Com'rs*, 41 N. J. L. 154.

An act authorizing assessments for reclamation purposes is an act in relation to local taxation, and is not repealed by an act applicable to taxation for general purposes. *Reclamation Dist. v. Goldman*, 61 Cal. 205.

1. *Will County v. People*, 110 Ill. 511; *Dean v. Davis*, 51 Cal. 406; *People v. Flagg*, 46 N. Y. 401; *People v. Ulster County*, 93 N. Y. 397; *State v. Powers*, 38 Ohio St. 54.

**Agency for Levying Tax.**—The legislature may delegate the power to impose a tax, to commissioners, or such other agents as it may see fit to choose. *Kinney v. Zimpleman*, 36 Tex. 564; *Buel v. Read*, 13 Gratt. (Va.) 78.

**Corporate Authorities.**—By the phrase "corporate authorities," as used in a constitutional limitation upon the power of the legislature to grant the right to tax to any other than "corporate authorities," is understood those officers who are directly elected by the people of the district sought to be taxed, or appointed in some mode to which they have assented. *Harward v. St. Clair, etc., Drainage Co.*, 51 Ill. 130; *Lee v. Ruggles*, 62 Ill. 427; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *Cornell v. People*, 107 Ill. 372; *People v. McAdams*, 82 Ill. 356; *People v. Chicago*, 51 Ill. 17; 2 Am. Rep. 278; *People v. Salomon*, 51 Ill. 37; *Lovington v. Wider*, 53 Ill. 302.

Where the people of a municipality have assented to the appointment of commissioners or other officers who are invested with the power to tax in a particular manner, a subsequent legislative enactment revoking the power of appointment, and changing it to a manner not assented to, is unconstitutional and void, and an officer appointed by the latter method will have no right or authority to exercise the duties of the office. *Cornell v. People*, 107 Ill. 372.

2. See *supra*, this title, *Purposes of Taxation*.

That this power is not delegated by the constitution to Congress or prohibited to the states, see *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Collins v. Henderson*, 11 Bush (Ky.) 74.

The laws of the several states providing for the establishment and maintenance of public schools, are various, and therefore, in relation to this subject the practitioner must give particular attention to the statutes of his own state.

3. *Horton v. Mobile*, 43 Ala. 498.

But in *Indiana*, under a statute providing for the exemption of the stock of certain banks from taxation for municipal purposes, a tax for school purposes has been held to be not a tax for municipal purposes. See *Root v. Erdelmeyer*, 37 Ind. 225.

4. *Fuller v. Heath*, 89 Ill. 206; *Speight v. People*, 87 Ill. 595; *Richards v. Raymond*, 92 Ill. 612; 34 Am. Rep. 151; *Board of Com'rs of Public Schools v. Alleghany County*, 20 Md. 449; *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 120.

The general power to tax for the support of town schools, is not restricted to such schools as are required to be supported by general laws. *Cushing v. Newburyport*, 10 Met. (Mass.) 508.

The legislature may authorize the town to raise money for an agricultural college to be established therein by the state. *Merrick v. Amherst*, 12 Allen (Mass.) 500.

In *Nebraska*, the law relating to public schools in cities of the first class, does not confer on the board of education power to levy taxes, but only to

for school purposes.<sup>1</sup> But unless the power to tax is expressly conferred or necessarily implied, it cannot be exercised by such districts.<sup>2</sup>

In the absence of special provisions to the contrary, authority to impose taxes for school purposes, confers the power free of

report to the city council the amount of taxes necessary for school purposes. *State v. Omaha*, 7 Neb. 267.

In *Michigan*, school authorities in union school districts may levy taxes upon the general public for the support of high schools, for the purpose of free instruction of children in other languages than English. *Stuart v. School Dist. No. 1*, 30 Mich. 69.

**Mandatory Act.**—An act providing that the county commissioners may levy a tax for school purposes is held to be mandatory. *Jones v. Board of Public Instruction*, 17 Fla. 411.

1. *Kuhn v. Board of Education*, 4 W. Va. 499; *Pickering v. Coleman*, 53 N. H. 424; *Johnston v. Cathro*, 51 Mich. 80; *Wharton v. School Directors*, 42 Pa. St. 358; *Ewing v. Board of Education*, 72 Mo. 439.

**Constitutional Authority.**—*Kinney v. Zimpleman*, 36 Tex. 554; *Willis v. Owen*, 43 Tex. 41; *State v. Bremond*, 38 Tex. 116.

Towns may be authorized to determine the limit of such districts. *Taft v. Wood*, 14 Pick. (Mass.) 362; *Withington v. Evereth*, 7 Pick. (Mass.) 106.

The fact that the proposition to organize a city into separate school districts had been defeated in an election was no legal obstacle to the subsequent organization in pursuance of a vote at a second election. *Ewing v. Board of Education*, 72 Mo. 436.

In *Illinois*, there is no constitutional limitation to "the power" of the legislature in the formation of school districts, or in prescribing who shall and who shall not be empowered with the levy and collection of school taxes. See *Speight v. People*, 87 Ill. 595.

In *Tennessee*, school districts cannot be invested with power to levy and collect taxes for school purposes. See *Lipscomb v. Dean*, 1 Lea (Tenn.) 546.

In *New Hampshire*, power is given, in the first instance, to school districts, to raise money by vote, to build or repair schoolhouses for the use of the district, and to locate the same, but upon their unreasonable neglect or refusal, the jurisdiction devolves on the selectmen of the town, who are bound

to assess a sufficient tax on the district for that purpose. *Blake v. Sturtevant*, 12 N. H. 567.

In *Texas*, towns and cities have no power to levy taxes for school purposes other than that expressly authorized by the constitution. *Fort Worth v. Davis*, 57 Tex. 225; *Willis v. Owen*, 43 Tex. 41.

After a city assumes control of its free schools, its schoolhouses become public buildings, and the city can impose a tax of one-quarter of one per cent. for their erection. *Dwyer v. Hackworth*, 57 Tex. 246.

The discretion vested in the school directors to levy a tax, when once exercised in fixing the amount for any one year, cannot be revised nor set aside by their successors. *Oliver v. Carsner*, 39 Tex. 396.

In *Alabama*, an act giving the trustees of a school district, which is held to be a public and not a municipal corporation, authority to levy taxes, is violative of constitutional principles. *Schultes v. Eberly*, 82 Ala. 242.

**Private Schools.**—In *People v. McAdams*, 82 Ill. 356, it was held that the legislature could not constitute a private schoolhouse, erected under the provisions of a will, a district school, and provide for the election of trustees therein and invest them with the taxing power for the support of the school.

2. *Jenkins v. Andover*, 103 Mass. 94; *School Directors v. Fogleman*, 76 Ill. 189; *Fisher v. People*, 84 Ill. 491. And see *Norton v. Soule*, 75 Me. 385; *Estes v. School Dist. No. 19*, 33 Me. 170.

A new school district created by vote of a town uniting two old districts, has no authority to raise money by a tax to repay to one of the old districts the proportion of the value of a schoolhouse existing therein at the time of the union, for which the other old district would have been liable had it been built by the union district. *Bacon v. Thirteenth School Dist.*, 97 Mass. 421.

In *Maine*, school districts are under no legal obligation to support schools, and have no power to raise money for that object; the law imposes this duty

the control of the voters or taxpayers.<sup>1</sup> But it is usually provided that the levy of a school tax shall be submitted to a vote of the district.<sup>2</sup>

(2) *The Assessment*.—The mode of making the assessment for school taxes is usually expressly provided for.<sup>3</sup> In some cases, it is made the duty of the county clerk to extend upon the assessment books the amount of a tax certified to him,<sup>4</sup> and in others, this duty is imposed upon the officers of the district for which the tax is levied.<sup>5</sup> Unless otherwise provided, a levy for school taxes may be upon all property subject to taxation generally.<sup>6</sup> The

on towns. *School Dist. No. 3 v. Brooks*, 23 Me. 543; *Dore v. Billings*, 26 Me. 56.

**Implied Power.**—The power to tax is implied in the law providing for the establishment of schools, and that for the purpose of supporting schools and other necessary expenses the trustees shall have the power and discharge the duties of school directors, etc. *Fisher v. People*, 84 Ill. 491. Authority to establish schools and levy taxes to defray expenses will warrant school commissioners in building the necessary schoolhouses and in levying sufficient taxes to pay therefor. *Bull v. Read*, 13 Gratt. (Va.) 78.

1. *Munson v. Minor*, 22 Ill. 595; *Merritt v. Farris*, 22 Ill. 303; *Schofield v. Watkins*, 22 Ill. 66.

In *Illinois*, the school directors may levy a tax for ordinary school purposes without a vote of the people, but not for building purposes. *Pennington v. Coe*, 57 Ill. 118.

2. See *supra*, this title, *Submission to Popular Vote*.

Where a school tax is required to be assessed annually previous to January 1st, it should be assessed on the list last completed, when no other is specified. *Sprague v. Abbott*, 58 Vt. 331.

3. In *Massachusetts*, a school-district tax is required to be assessed in the same manner as a town tax. *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Little v. Little*, 131 Mass. 367; *Rawson v. School Dist.*, 100 Mass. 134. A provision requiring the assessment of school taxes within thirty days after the clerk of the district shall certify to the assessors the sum voted to be raised, is only directory, and does not prohibit an assessment after the expiration of that period. *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243.

**Notice of Assessment.**—In *Peckham v. Bicknell*, 11 R. I. 596, it was held that the assessors must give proper no-

tice of the assessment of a school tax, and must thereafter make the assessment upon their own judgment.

In *Randall v. Smith*, 1 Den. (N. Y.) 214, it was held that where trustees of a school district assess persons whose names are not contained in the last assessment roll of the town, or change the valuation of the property of any taxable inhabitant from that mentioned in the town assessment roll, it is their duty to give notice to parties interested before completing their assessment, but their omission to do so does not render them responsible as trespassers at the suit of persons whose property is seized for non-payment of the tax. See also *Jewell v. Van Stenburgh*, 58 N. Y. 85.

**Assessors' Responsibility.**—In *Little v. Merrill*, 10 Pick. (Mass.) 543, it was held that statutes exempting assessors from responsibility for the assessment of taxes on the inhabitants of any city, town, district, parish or religious society generally, applies to the assessment of taxes for school purposes.

**Valuation.**—In *Richardson v. Sheldon*, 1 Pinn. (Wis.) 624, it was held that authority to school trustees to assess a tax implies a power to make a valuation of the property for the purpose of levying the assessment.

School trustees in determining who are and who are not taxable within the provision of the statute, and in apportioning to each his share according to the value of his real and personal estate, act in a judicial capacity. *Randall v. Smith*, 1 Den. (N. Y.) 214; *Easton v. Calendar*, 11 Wend. (N. Y.) 90.

4. *Brown v. Harris*, 52 Mo. 306.

5. *Stephens v. School Dist. No. 21*, 6 Oregon 353; *People v. White*, 47 Cal. 616; *People v. Stockton*, etc., R. Co., 49 Cal. 414; *People v. Robinson*, 76 N. Y. 422; *Johnson v. Sanderson*, 34 Vt. 94.

6. *State v. Bremond*, 38 Tex. 116;

district has no power to levy taxes on lands not within its limits, or attached to it,<sup>1</sup> for school purposes; and when property is made subject to taxation in one district, it is withdrawn from all liability to taxation in others.<sup>2</sup>

The courts may compel the officers authorized to levy and collect these taxes, to perform their duties,<sup>3</sup> or restrain them in any unlawful exercise of their authority.<sup>4</sup> But if they exercise their powers unwisely, the courts cannot interfere.<sup>5</sup> The power must be exercised by the proper authorities,<sup>6</sup> and in the manner

*Stevens v. School Dist. No. 21*, 6 Oregon 354. See also *Rawson v. School Dist.*, 100 Mass. 134; *Little v. Little*, 131 Mass. 367.

A requirement that every inhabitant of a district shall be taxed for all his personal estate, must be understood as meaning all his personal property subject to taxation for municipal purposes by the town in which the district is situated. *Bates v. Eighth School Dist.*, 9 Gray (Mass.) 433.

**Exemptions.**—An exemption of property from taxation for borough and township purposes, does not exempt it from taxation for school purposes. *Blickensderfer v. School Directors*, 20 Pa. St. 38; *Henderson v. Gambert*, 8 Bush (Ky.) 607; *South Bend v. University of Notre Dame du Lac*, 69 Ind. 344; nor does an exemption from taxation for state purposes. *Conyghan School Dist.'s Appeal*, 77 Pa. St. 265.

1. *Ewing v. Board of Education*, 72 Mo. 436.

An injunction lies to restrain the sale of lands unlawfully included within a taxing district. *Simpkins v. Ward*, 45 Mich. 559.

But in *Kent v. Kentland*, 62 Ind. 291, it was held that a statute authorizing a municipality to collect a tax for the payment of a debt contracted in the construction of a school building, upon the property of persons residing and having property outside of the municipal limits, who have sent their children to a school within the municipality in such school building, is constitutional.

2. *Bates v. Eighth School Dist.*, 9 Gray (Mass.) 433.

Persons and property annexed to a school district of an adjoining town are subject to school taxes in the district to which they are annexed, and not elsewhere. *Pickering v. Coleman*, 53 N. H. 424.

A compliance with a requirement that the estates of non-resident own-

ers shall be taxed in such districts as the assessors of the town determine, is a condition precedent to a valid assessment of a school tax, and if it is not complied with, any inhabitant of the district may avail himself of the defect. *Rawson v. School Dist.*, 100 Mass. 134; *Taft v. Wood*, 14 Pick. (Mass.) 362. But a school tax is not rendered void by the omission of the assessor, through misinformation or error of judgment, to assign the real estate of one or more resident owners to any school district. *George v. Second School Dist.*, 6 Met. (Mass.) 497.

The union of two school districts is such a redistricting of a town as makes it necessary for the assessors to make a new certificate, before the estate of a non-resident previously taxed in one of the old districts can be taxed in the new one, under the *Massachusetts* statute requiring such a certificate whenever a town is districted anew. *Bacon v. Thirteenth School Dist.*, 97 Mass. 421; *Gustin v. Fifth School Dist.*, 10 Gray (Mass.) 85.

3. See *MANDAMUS*, vol. 14, p. 191.

4. See *INJUNCTIONS*, vol. 10, p. 872; *Holmes v. Baker*, 16 Gray (Mass.) 259.

5. *Wharton v. School Directors*, 42 Pa. St. 358.

The county court cannot interfere with an assessment of taxes for building a schoolhouse, on the ground that the schoolhouse is unnecessary. *In re Powers*, 52 Mo. 218. See also *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243.

6. *Johnson v. Sanderson*, 34 Vt. 94; *State v. Harper*, 11 Mo. App. 301.

An assessment made by two of three trustees of a school district, the third taking no part in the proceedings, is void. *Lamoreaux v. O'Rourke*, 3 Abb. App. Dec. (N. Y.) 15.

In *Iowa*, a board of directors of a school are alone authorized to fix the rates of taxation to be levied for teachers and contingent funds, and where

prescribed.<sup>1</sup> But mere irregularities will not invalidate the taxes assessed.<sup>2</sup>

(3) *Limitations and Restrictions*.—Limitations of the amount of taxes which may be assessed for school purposes, may be fixed by statute;<sup>3</sup> but restrictions upon the rate of taxes for state and county purposes, are held not to affect school-district taxes.<sup>4</sup>

(4) *Collection and Distribution*.—As to the collection of school taxes, see note.<sup>5</sup> When the tax has been voted and collected, the

this function is assumed by the board of supervisors, its acts are void. Cedar Rapids, etc., R. Co. v. Carroll County, 41 Iowa 153.

1. Taft v. Wood, 14 Pick. (Mass.) 362. See *supra*, this title, *Levy by Subordinate Political Division*.

2. State v. Bremond, 36 Tex. 116; Texas, etc., R. Co. v. Harrison County, 54 Tex. 119.

3. See Thatcher v. People, 93 Ill. 240; Vaughan v. Bowie, 30 Ark. 278; Milwaukee, etc., R. Co. v. Kossuth County, 41 Iowa 57; Worthen v. Badgett, 32 Ark. 496; State v. St. Louis, etc., R. Co., 74 Mo. 163; State v. St. Louis, etc., R. Co., 75 Mo. 526; State v. Holliday, 66 Mo. 387; St. Joseph Board of Public Schools v. Patten, 62 Mo. 444; Union Pac. R. Co. v. Dawson County, 12 Neb. 255; Burlington, etc., R. Co. v. York County, 7 Neb. 487; Wheeler v. Plattsmouth, 7 Neb. 270; Lee v. School Dist. No. 1, 36 N. J. Eq. 581; Oliver v. Carsner, 39 Tex. 396; Kane v. School Dist., 52 Wis. 502.

Where school taxes for all purposes, are restricted to a certain sum, an imposition of a greater sum is invalid. Union Pac. R. Co. v. Dawson County, 12 Neb. 254; Burlington, etc., R. Co. v. York County, 7 Neb. 487.

The board of supervisors of a county cannot levy a tax for the payment of a judgment against the schoolhouse fund of a district township, when the tax already levied for the use of that fund, equals the maximum rate allowed by law. Sterling School Furniture Co. v. Harvey, 45 Iowa 466; Iowa R. Land Co. v. Sac County, 39 Iowa 124.

If a contestant of a school tax desires to show that the levy was in excess of the amount authorized by law, he must show it by the levy itself. The record of the school board merely showing an estimate, is not admissible to defeat an application for judgment for the school taxes levied. English v. People, 96 Ill. 566.

In Tennessee, county courts cannot

levy a school tax a rate higher than the state tax, but any excess of the levy invalidates the tax only to the amount of such excess. Bright v. Halloman, 7 Lea (Tenn.) 309.

4. Goodrich v. Lunenburg, 9 Gray (Mass.) 38. See also Nashville, etc., R. Co. v. Franklin County, 5 Lea (Tenn.) 707.

A school tax is not synonymous with a borough and township tax. Blickensderfer v. School Directors, 20 Pa. St. 38.

A provision limiting the rate of taxation applicable to town taxes, does not apply to a school tax for building a schoolhouse. Taft v. Wood, 14 Pick. (Mass.) 362.

In Missouri, a tax larger than that limited by the general law, is authorized when voted at an election. State v. St. Louis, etc., R. Co., 75 Mo. 526.

5. See *supra*, this title, *Collection*.

The secretary or clerk of the district may be authorized to collect school taxes. See McKay v. Batchellor, 2 Colo. 591.

In Maine, the collector of a town is required to collect school taxes, and has the same power and is under the same obligations in their collection as in the case of town taxes. Smyth v. Titcomb, 31 Me. 272.

**Collection by Action**.—In an action to collect school taxes which are not authorized except by a vote of electors, the holding of an election is a jurisdictional fact and must be averred with precision. People v. Castro, 39 Cal. 65.

**Compensation of the Collector**.—Commissions for collecting school taxes, is properly money raised for school purposes, and may be added to the amount actually required for school expenses; the total constituting the full amount which may be raised. People v. Wiltshire, 92 Ill. 260. In Idaho, tax collectors are not entitled to compensation for collecting school taxes. Gorcham v. Boise County, 1 Idaho 647.

fund must be appropriated to the purposes for which it was raised.<sup>1</sup> The appropriation of a state school tax is subject to the control of the legislature.<sup>2</sup>

c. HIGHWAY DISTRICTS AND STREET AND HIGHWAY TAXES—

(1) *In General*.—We have already seen that the establishment of streets, highways, bridges, etc., are public purposes for which a tax may be levied.<sup>3</sup> The paramount and primary control, both of the highways in the state and the streets in its cities, is vested in the legislature,<sup>4</sup> which may, subject to constitutional restrictions, delegate its control, together with the power to tax for their construction and maintenance, to its municipalities, or *quasi* corporations or districts created for that purpose;<sup>5</sup> making it the duty

1. *Benjamin v. Malaka Dist. Tp.*, 50 Iowa 648; *Pennington v. Coe*, 57 Ill. 118; *German Tp. School Dist. v. Sangston*, 74 Pa. St. 454.

The fund when collected, is beyond the control of its officers, until its expenditure is authorized by a vote of the district. *School Dist. No. 2 v. Stough*, 4 Neb. 357.

Money raised to defray the expenses of carrying on a school cannot be applied by the trustees to the erection of schoolhouses. *Lee v. School Dist. No. 1*, 36 N. J. Eq. 581. And on the other hand, the building tax of a school district cannot be diverted to ordinary purposes. *German Tp. School Dist. v. Sangston*, 74 Pa. St. 454.

**Disposition of Surplus.**—If, after a portion of a tax voted has been paid, new and unforeseen circumstances render it unnecessary to use all collected, a town may properly vote to have the whole collected and refund the surplus to the taxpayers pro rata, or it may treat it as funds in the treasury to be used for other obligations. *Bellows v. Weeks*, 41 Vt. 590.

**Appropriation of "Dog Tax."**—Such an appropriation is held to be constitutional. *Ex p. Cooper*, 3 Tex. App. 489; 30 Am. Rep. 152. In *Indiana*, this fund must be appropriated among the schools of the township, and other funds appropriated for tuition. An injunction will lie to prevent the use of such a fund for the employment of a teacher in a single school district, or in advance of the general appointment for tuition for the year. *Maloy v. Madget*, 47 Ind. 241.

2. *School Dist. No. 1 v. Weber*, 75 Mo. 558. See SCHOOLS, vol. 21, p. 840.

3. See *supra*, this title, *Purposes of Taxation*.

4. *East Portland v. Multnomah County*, 6 Oregon 63; *Hingham, etc.,*

*Bridge Corp. v. Norfolk County*, 6 Allen (Mass.) 353.

And this power over the subject of laying out, altering, or discontinuing highways, it may exercise directly. *People v. Ingham County*, 20 Mich. 95.

5. To municipalities: *East Portland v. Multnomah County*, 6 Oregon 63. To commissioners of highways: *Com'rs of Highways v. Newell*, 80 Ill. 587; *Jensen v. Polk County*, 47 Wis. 298; *People v. Flaggs*, 46 N. Y. 401. To boards of supervisors: *People v. Ingham County*, 20 Mich. 95. To county commissioners: *Goodrich v. Winchester, etc., Turnpike Co.*, 26 Ind. 119; *State v. Franklin County*, 35 Ohio St. 458.

The construction of the roads of a town and the keeping of the same in repair, is one of the objects for which taxes are levied, and such a tax cannot be justly said to be for any other than a corporate purpose. *O'Kane v. Treat*, 25 Ill. 557.

In *Michigan*, the constitution places highways and roads under the control of the boards of supervisors, with certain legal restrictions. They are confined to state and territorial roads, and can raise money for no other roads, and must exercise their own judgment in expending such moneys as they may lawfully raise. *Atty. Gen'l v. Bay County*, 34 Mich. 46.

Highway districts are merely divisions of highways made from year to year, for the sake of convenience and system in keeping the roads in repair. They do not possess any of the attributes or functions of corporations. *Kimball v. Russell*, 56 N. H. 488.

Township highways and other local interests cannot be taken from the custody of proper local officers. *Hubbard v. Springwell Tp.*, 25 Mich. 153.

In *Illinois*, commissioners of high-



of each division to maintain its respective portion.<sup>1</sup> In marking

ways are corporate bodies whose power and jurisdiction are limited territorially to their respective towns, but they are a part of the machinery of the county and state governments, and as such, under certain contingencies, are required to act in concert with the county authorities. *Will County v. People*, 110 Ill. 511.

In *Nebraska*, the construction of roads and bridges is required to be let to the lowest competent bidder, and it is the duty of county commissioners to adopt plans and specifications in advance of the letting, as a basis upon which bids may be received. *People v. Buffalo County*, 4 Neb. 150; *Clark v. Dayton*, 6 Neb. 192.

In *State v. Hannibal, etc., R. Co.*, 101 Mo. 120, it was held that a road tax is a county tax, within the meaning of a corporate charter exempting a corporation from the payment of county taxes.

Where jurisdiction over roads, ferries, and bridges is conferred on boards of supervisors by constitutional provision, it is subject to legislative regulation as to the manner of its use, and must be exercised in conformity with the statute. *Paxton v. Baum*, 59 Miss. 531; *Jefferson County v. Arrighi*, 54 Miss. 668. But the jurisdiction of the boards of supervisors cannot be taken away. *Jefferson County v. Arrighi*, 54 Miss. 668.

Special commissioners named by statute to lay out state roads, are not county officers, though required, for purposes of record, to render an account of their proceedings to the board of supervisors. *Alcona County v. White*, 54 Mich. 503.

**Exemption of Property in Cities.**—The legislature cannot exempt property in cities from road taxes. It would be a violation of the rule requiring uniformity. *Fletcher v. Oliver*, 25 Ark. 289. If it commutes the tax for an equivalent burden borne by the cities and towns, or provides that the tax collected from property within such corporations shall be expended on the streets thereof, or declares that a similar and equal tax shall be collected and expended therein, the objection may be obviated. *Gunnison County v. Owen*, 7 Colo. 467.

1. *Com. v. Newburyport*, 103 Mass. 129; *Hingham, etc., Bridge Corp. v.*

*Norfolk County*, 6 Allen (Mass.) 393; *Salem Turnpike, etc., Corp. v. Essex County*, 100 Mass. 282; *Cambridge v. Lexington*, 17 Pick. (Mass.) 222; *Will County v. People*, 110 Ill. 511; *Shaw v. Dennis*, 10 Ill. 405; *Wilcox v. Deer Lodge County*, 2 Mont. 574; *People v. Ulster County*, 93 N. Y. 397; *State v. Franklin County*, 35 Ohio St. 458; *State v. Newark*, 44 N. J. L. 424.

The legislature of a state may compel a municipality to construct highways or other improvements for public purposes without the consent of the corporate authorities or a vote of its citizens, and it may direct it to levy a tax or to issue its bonds, to pay for such improvement. *People v. Flagg*, 46 N. Y. 401; 12 Am. Law Reg. 80.

It may authorize the construction of a state road by commissioners, and provide for the apportionment of the expense between the various townships through which it passes in the proportion that the length of road in the several townships bears to the entire length. *Mahanoy Tp. v. Comry*, 103 Pa. St. 362.

Taxes levied for road purposes include all taxes collected for the payment of damages arising from opening and laying out roads, the purchase of materials for constructing and repairing roads and bridges, etc., as well as that for making and repairing roads only. *People v. Wilson*, 3 Ill. App. 368. And see *People v. Buffalo County*, 4 Neb. 150.

In *Jensen v. Polk County*, 47 Wis. 298, it was held that the general rule and policy of the law of the state is to impose the burden of constructing and repairing highways upon the several towns through which they run, whether such roads are provided for by state, county, or town authorities; and an intent to the contrary must plainly appear in the act providing for the road.

Where a city is a part of a township which is a district for road purposes, the citizens of the city cannot escape the ratable share of the road tax of the district. But where the city is a district by itself, the citizens thereof cannot be compelled to work the roads of the town outside the city, nor pay taxes therefor. *Cooper v. Ash*, 76 Ill. 11.

In *O'Kane v. Treat*, 25 Ill. 557, it was held that a township has the right to

out the districts the legislature need not follow existing lines,<sup>1</sup> and may decide whether the cost of opening streets and highways shall be borne by the contiguous property, by the city, or county at large, or in part by each;<sup>2</sup> and in order to equalize the burden may unite several districts and municipalities into one taxing district.<sup>3</sup>

impose a road tax upon all the inhabitants of the town, even though some of them also reside within an incorporated city.

A provision that certain towns shall never be compelled to support any part of certain roads or bridges without their consent, is not in the nature of a contract between the commonwealth and such towns that they shall be forever exempt from the burden of maintaining such roads and bridges. *Brighton v. Wilkinson*, 2 Allen (Mass.) 27.

In *New York*, certain moneys are furnished annually to each town for the maintenance and care of its roads and bridges, but the methods by which they are raised do not require the consent of the town, and are altogether independent of its volition. Beyond this, any contributions or obligations by the towns for the repair of roads and bridges can be attained only through their voluntary consent, given in open town meeting. *People v. Ulster County*, 93 N. Y. 397. And see *Loomis v. Board of Town Auditors*, 75 N. Y. 318; *People v. Board of Town Auditors*, 74 N. Y. 310; *Barker v. Loomis*, 6 Hill (N. Y.) 463.

Taxes assessed by a city for "roads and bridges" are highway taxes, and under Rev. Stats. *Massachusetts*, ch. 7, § 27, one-sixth thereof must be assessed on polls, although it makes the poll tax exceed one dollar and a half for each person, or the entire assessment will be void. *Stone v. Bean*, 15 Gray (Mass.) 42.

**Apportionment of the Burden.**—Where the legislature finds that the apportionment of the burden of providing a thoroughfare among several counties and towns requires a more full and exact investigation than a committee of its own body could make, it may properly institute an investigation of a judicial character, giving parties interested an opportunity to be heard by evidence and argument. *Salem Turnpike, etc., Corp. v. Essex County*, 100 Mass. 282.

1. *Bowles v. State*, 37 Ohio St. 35; *People v. Lawrence*, 41 N. Y. 141.

In *Iowa*, the power of township trustees to divide their township into road districts, extends only to so much of the township as is not embraced in a city, and their power to levy a tax is co-extensive with the same territory. *Marks v. Woodbury County*, 47 Iowa 452. And see *Osborne v. Mecklenburgh County*, 82 N. Car. 400.

2. *Sinton v. Ashbury*, 41 Cal. 525; *People v. Whyler*, 41 Cal. 354; *Uhrig v. St. Louis*, 44 Mo. 458; *Garrett v. St. Louis*, 25 Mo. 505; *Hammitt v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615.

Local assessments for benefits is the mode usually adopted to raise funds for the construction and maintenance of streets and other local improvements in cities, and the same principle has been sometimes applied to agricultural lands in defraying the expense of constructing roads. See *supra*, this title, *Local Assessments—Improvements for Which Made*.

In *Maine*, when a county road exists within the limits of an unincorporated township, the whole township is liable to be taxed to keep it in repair, notwithstanding the road is entirely within the western half of the township. *King v. Aroostook County*, 63 Me. 567.

Under the *Illinois* statute, where a city proceeds to raise money for the construction of a sidewalk by special taxation, instead of by assessments, the tax cannot be defeated merely because the sidewalk had not been built before the tax was sought to be collected. *Mix v. People*, 106 Ill. 425.

3. *Carter v. Cambridge, etc., Bridge Proprietors*, 104 Mass. 236; *Com. v. Newburyport*, 103 Mass. 129.

A district may be made to consist of an entire city, or only one of its wards or precincts; an entire county, or only one or two of its towns. *Cooper v. Ash*, 76 Ill. 11; *Atty. Gen'l v. Cambridge*, 16 Gray (Mass.) 247; *Uhrig v. St. Louis*, 44 Mo. 458; *People v. Richmond County*, 20 N. Y. 252.

County commissioners may be authorized to lay out a highway across a river separating two towns, and appor-

The commissioners of highways, or other proper road officers, are usually required to ascertain annually the sum necessary for roads and bridges for the ensuing year, and after levying a tax therefor,<sup>1</sup> make a return of the levy to the county clerk, or other proper officer, that he may extend it the same as other taxes for

tion the expense of erecting and maintaining the bridge upon the towns in proportion to their valuations. *Water-ville v. Kennebec County*, 59 Me. 80.

Or the towns in which a bridge is situated may be relieved of the burden of maintaining it and the liability imposed upon the county. *People v. Dutchess County*, 1 Hill (N. Y.) 50.

Or the expense may be authorized to be borne in part by the county and in part by the town, *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60; and the legislature may delegate to commissioners the authority to determine the share or amount of the whole expense of establishing a highway which should be paid by the town and by the county in which it is located. *Hingham, etc., Bridge Corp. v. Norfolk County*, 6 Allen (Mass.) 353; *Boston Water Power Co. v. Boston, etc., R. Co.*, 23 Pick. (Mass.) 360.

1. Com'rs of Highways *v. Newell*, 80 Ill. 587; *Mee v. Paddock*, 83 Ill. 494; *Kansas City, etc., R. Co. v. Tontz*, 29 Kan. 460.

Under the *Illinois* township organization law, the town meeting is also authorized to direct the raising of money for the maintenance and construction of roads and bridges. *Thatcher v. People*, 79 Ill. 597.

Where the county is required to contribute to a township one-half the expense of building a bridge, the township commissioners of highways do not levy the tax, but simply determine, in pursuance of the statute, when the contingencies have arisen requiring the county to contribute, and ascertain and report to the county authorities the cost of the structure, one-half of which the law requires them to pay; and in such case it is their duty to levy a tax to raise the required sum. *Supervisors v. People*, 110 Ill. 511. And without such action by the board of supervisors, the tax cannot be extended. *Leachman v. Dougherty*, 81 Ill. 324.

In *Turpin v. Eagle Creek, etc., Road Co.*, 48 Ind. 45, it was held that where a county board has granted a petition for the assessment of benefits for the construction of a highway, it is the

duty of the county auditor, without further notice, to notify the assessors to proceed and report their assessment.

In *Ohio, etc., R. Co. v. People*, 119 Ill. 207, it was held that highway commissioners of a county are required to give the number of acres, as well as the number of feet of railroad track contained in each road district, in ordering the levy of a tax, under the *Illinois* statute.

An order by the commissioners for an assessment need not name the assessors. When they are not named, they will be presumed to have been previously appointed by another order of the board, and they will be presumed to possess the required qualifications. *Turpin v. Eagle Creek, etc., Road Co.*, 48 Ind. 45.

By the *Massachusetts* statute of 1871, all highway taxes are abolished, and the assessors of a town are not obliged to levy a separate highway tax.

**Must Not Exceed the Limit.**—A special highway tax exceeding the amount allowed by law and assessed for a highway not legally laid out, and without any showing in the township records that it has been voted, is void. *Flint, etc., R. Co. v. Auditor Gen'l*, 41 Mich. 635.

In *Taft v. Barrett*, 58 N. H. 447, it was held that an assessment for highway purposes of a sum exceeding the amount of taxes legally authorized, renders the assessment invalid as to the excess only.

In *Illinois*, commissioners of highways are limited to a certain amount in the levy of taxes, and also to what will be required to defray the costs of keeping the roads and bridges in repair for the year ensuing, and if an amount in addition to the limit is required, they must call upon the people to vote an additional amount, or for power to borrow money. Com'rs of Highways *v. Newell*, 80 Ill. 587.

In *Ohio*, taxes raised by general levy, for the improvement of streets, are included in the aggregate amount of taxes, as to which, municipalities are restricted. *State v. Strader*, 25 Ohio St. 527; *State v. Humphreys*, 25 Ohio St.

collection.<sup>1</sup> Constitutional provisions as to uniformity,<sup>2</sup> and requiring taxes to be levied by valuation, must be observed,<sup>3</sup> though mere irregularities in the levy or return of a highway tax will not defeat its collection.<sup>4</sup> Such taxes, when collected, become no part of the funds of the municipality collecting them,<sup>5</sup> and can-

520. And see *supra*, this title, *Power to Impose; Limitations on Power*.

1. *Com'rs of Highways v. Newell*, 80 Ill. 587.

In *Wabash, etc., R. Co. v. Binkert*, 106 Ill. 298, it was held that a bridge tax provided for by the *Illinois* statutes, is required to be extended upon assessment for the current year; and that the sum is to be levied upon the assessment for the previous year; but the tax is to be extended on that of the current year. In *Wisconsin*, the assessment must be based upon the valuation of the preceding year. *Hebard v. Ashland County*, 55 Wis. 145.

Though the law directs town taxes to be extended in a separate column, the failure of the clerk to extend the road tax in a separate column will not vitiate the tax; nor will the failure of the town clerk to certify the levy to the county clerk within the time required by law. *Thatcher v. People*, 79 Ill. 597. And see *Silsbee v. Stockle*, 44 Mich. 561.

**Authentication.**—If not authenticated by the officer whose duty it is to return it, according to law, subsequent proceedings are invalidated. *Hogleskamp v. Weeks*, 37 Mich. 422.

The *Ohio* Road Improvement Act of 1867, does not make the owner of land assessed thereunder personally liable, and a personal action against him is not authorized by the act of 1875. *Dreake v. Beasley*, 26 Ohio St. 315.

2. Road taxes levied upon sections of land or otherwise, without regard to valuation, are unauthorized and void, under constitutional provisions requiring taxes to be levied by valuation. *Covell v. Young*, 11 Neb. 510; *McCann v. Merriam*, 11 Neb. 241; *Dundy v. Richardson County*, 8 Neb. 508.

Though in the absence of such provisions, levies without regard to valuation have been upheld. *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Burlington, etc., R. Co. v. Saunders County*, 9 Neb. 507.

3. *Fields v. Highland County*, 36 Ohio St. 476. Taxes for road purposes, assessed upon real estate only, are repugnant to constitutional provisions

requiring a uniform and equal rate of taxation on all property both real and personal. *Bright v. McCullough*, 27 Ind. 223.

4. *Sioux City, etc., R. Co. v. Osceola County*, 45 Iowa 168; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153; *Kansas City, etc., R. Co. v. Tontz*, 29 Kan. 460; *Taft v. Barrett*, 58 N. H. 447; *Thatcher v. People*, 79 Ill. 597. And see *Hayford v. Belfast*, 69 Me. 63; *Rogers v. Greenbush*, 58 Me. 390; 4 Am. Rep. 292; *Gilman v. Waterville*, 59 Me. 491; *Lima v. McBride*, 34 Ohio St. 338; *Arnold v. Juneau County*, 43 Wis. 627.

A bridge and highway tax will not be presumed to be invalid for exceeding the percentage on the assessed valuation, if by proper action the amount levied might have been authorized. *Stockle v. Silsbee*, 41 Mich. 615.

In *Massachusetts*, a mere error or irregularity in the apportionment, by which a party is assessed more or less than his due proportion, does not avoid a levy or sale, and the injured party is left to his action against the town to recover back the excess. *Westhampton v. Searle*, 127 Mass. 502; *Cone v. Forest*, 126 Mass. 97.

5. See *Lima v. McBride*, 34 Ohio St. 338. And when paid over by the county treasurer to the township clerk, cannot be recovered back from the county although illegally collected. *Stone v. Woodbury County*, 51 Iowa 522. And see *Des Moines, etc., R. Co. v. Lowry*, 51 Iowa 486; *Butler v. Fayette County*, 46 Iowa 326.

Though in *Wisconsin*, where an unauthorized road tax is assessed by town officers, money paid thereon under protest or in consequence of a levy or distress, may be recovered in an action against the town. *Judd v. Fox Lake Tp.*, 28 Wis. 583.

Moneys raised by road tax as a special fund for the construction of state roads, are not county moneys, though placed in the hands of the county treasurer for safe keeping. *Alcona County v. White*, 54 Mich. 503.

In *Illinois*, road taxes collected by

not be applied by the commissioners of highways to any other purpose than that for which they were levied.<sup>1</sup>

(2) *Road Labor*.—Provision is usually made for keeping the roads in repair by means of road labor, each male inhabitant of the district, between certain ages, being required to work the roads for so many days, or pay a certain sum of money for each day he is absent.<sup>2</sup> Such provisions are considered in the nature

the officers of a town within a village, are required to be paid to the village treasurer, and that part of the tax which is derived from property outside the village is to be paid to commissioners of highways. *McFarland v. People*, 2 Ill. App. 615; *Clinton v. Clintonia*, 3 Ill. App. 36; *Baird v. People*, 83 Ill. 387; *People v. Suppiger*, 103 Ill. 434.

In *Kimball v. Russell*, 56 N. H. 488, it was held that selectmen have no authority to issue an extant against a highway surveyor for an unexpended balance of highway taxes on his list, for the reason that the district is not a legal person having power to make a contract.

1. *Com'rs of Highways v. Newell*, 80 Ill. 587.

While it is true in *Nebraska*, that the general road fund may be lawfully applied to the erection or maintenance of permanent culverts and bridges, the bridge fund raised from the five mills levy cannot be used in the general improvement of roads. *Clark v. Dayton*, 6 Neb. 192.

**Appropriation Before Collection.**—In *Barnard v. Argyle*, 20 Me. 296, it was held that under the *Maine* statutes, the assessors of plantations may draw orders on the highway commissioners to the extent of the fund, before it is actually received by the treasurer, where the fund applicable to highways is assessed and in process of collection, and that such order will be available to the holder against the plantation if not paid when demanded.

2. *Cooper v. Ash*, 76 Ill. 11; *Mee v. Paddock*, 83 Ill. 494.

The assessment is made in the first instance as a labor tax, and if the party notified to furnish labor or materials, fails to appear, the sum assessed to him in labor is then put in his cash tax. *Ingalls v. Auburn*, 51 Me. 352.

But the return of the road surveyor showing who are delinquent, is a condition precedent to the authority of the assessors to make the assessment as a money tax. *Hayford v. Belfast*,

69 Me. 63; *Patterson v. Creighton*, 42 Me. 367.

And where the overseer of highways had not sworn to the return of highway labor which he has made to the supervisor, a tax deed, where the taxes for which the sale was made included highway taxes, was held void. *Hogelskamp v. Weeks*, 37 Mich. 422.

Where the surveyor has made a return of the delinquency, and the amount has been assessed in the next town tax, such assessment cannot be shown to be illegal by proof of payment to the surveyor, the remedy of the aggrieved party being an application to the assessors for an abatement where such proof would avail him, or a suit against the surveyor to recover for the injury occasioned by the false return. *Treat v. Orono*, 26 Me. 217.

The road and bridge tax, authorized by the *Illinois* statutes, is designed for the construction and repair of bridges and payment of damages by reason of the opening, altering, or laying out of new roads, and is distinct and separate from the tax for the maintenance and repair of highways, and must be paid in money, while the highway tax may be discharged in road labor. *People v. Suppiger*, 103 Ill. 434.

Chinese laborers engaged on public works within a road district, are not residents of such district so as to render them liable to perform road labor therein. On *Yuen Hai v. Ross*, 8 Sawyer (U. S.) 385.

Where a highway tax is returned by the surveyor as unpaid, an instruction by the selectmen to a subsequent surveyor to consider it as one then to be worked out, is without authority. *Tufts v. Lexington*, 72 Me. 516.

**Notice of Time and Place.**—The taxpayer must be given notice of the time when, and place where, he must appear and pay his highway tax in labor. *Biss v. New Haven*, 42 Wis. 605; *Matteson v. Rosendale*, 37 Wis. 254; *Patterson v. Creighton*, 42 Me. 367.

But if a money tax is assessed without a compliance with the statute

of police regulations, and the money tax in which the labor is allowed to be commuted is in no sense a poll tax.<sup>1</sup>

requiring such a notice to be given, the assessment is not thereby rendered void, but the surveyor may be subjected to an action for the damages thereby occasioned. *Hayford v. Belfast*, 69 Me. 63.

In case of non-resident owners whose land is assessed for road taxes, notice may be given by advertisement, and tenants of the land must be permitted to work out the tax if they desire to do so. *Miller v. Gorman*, 38 Pa. St. 309.

In *Iowa*, the fact that a taxpayer has not been notified to work out the part of his road tax allowed to be paid in labor, will not authorize the collection of the entire tax to be restrained. *Sioux City, etc., v. R. Co. v. Osceola County*, 45 Iowa 168.

In *Osborne v. Mecklenburg County*, 82 N. Car. 400, it was held that road taxes which may be discharged by labor are governed by the same rules which govern taxation of the labor itself.

**Employment of Labor.**—The statutes authorizing the surveyor of highways to allow taxpayers to work out their highway taxes, do not authorize them to employ labor on highways for pay. If the interests of the town require further expenditures, it is his duty to consult the selectmen, and they may authorize him to employ laborers to a certain amount. *Ingalls v. Auburn*, 51 Me. 352; *Haskell v. Knox*, 3 Me. 445; *Moor v. Cornville*, 13 Me. 293; *Morrell v. Dixfield*, 30 Me. 157; *Field v. Towle*, 34 Me. 405.

And where a town has duly authorized highway officers, the selectmen cannot bind it by a contract to pay for labor on highways, either in money or by an allowance upon the highway tax. *Tufts v. Lexington*, 72 Me. 516.

**Exemptions.**—Where there is no exemption to citizens not able-bodied, the fact that one upon whom the tax is imposed is not able-bodied, constitutes no defense to the imposition of the tax. *Macomb v. Twaddle*, 4 Ill. App. 254.

**Road Labor in Cities.**—Where complete jurisdiction is given a city in regard to the improvement of its streets, the general laws of the state in regard to roads and road labor in counties, ceases to be applicable as soon as the city has exercised its powers. *Fax v.*

*Rockford*, 38 Ill. 451; *East Portland v. Multnomah County*, 6 Oregon 63.

Inhabitants of towns and cities may be exempted from road labor outside of their corporate limits. *Pleasant v. Kost*, 29 Ill. 490; *Fletcher v. Oliver*, 25 Ark. 289.

1. *State v. Halifax*, 4 Dev. (N. Car.) 345; *Sawyer v. Alton*, 4 Ill. 127. An assessment for road labor is not a capitation tax, and therefore a constitutional provision exempting all persons over 60 years of age from the payment of a capitation tax, does not exempt them from an assessment for road labor. *Fax v. Rockford*, 38 Ill. 451.

It is neither a capitation tax, nor a tax within a constitutional provision making property the basis of taxation. *Macomb v. Twaddle*, 4 Ill. App. 254. And see *Pleasant v. Kost*, 29 Ill. 490, where Walker, J., said: "Nor is such an assessment a capitation tax, as that is a sum of money levied upon each poll. This rate, on the contrary, is a requisition for so many days' labor, which may be commuted in money. No doubt the number of days levied and the sum which may be received by commutation, must be uniform within the limits of the district or body imposing the same. This requisition for labor to repair roads is not a tax."

The word "taxes" means a contribution in money, not labor or personal service, and the performance of labor on highways is not the payment of a tax so as to give a legal settlement within the meaning of an act for the settlement and relief of the poor. *Amenia v. Stanford*, 6 Johns (N. Y.) 92; *Starksboro v. Hinesburgh*, 13 Vt. 215.

A city may commute the requisition on the people to work the streets by a commutation street tax of three dollars, and it will not conflict with a constitutional provision respecting poll taxes. *Johnston v. Macon*, 62 Ga. 645.

In *Virginia*, the statute (Va. Code 1887, §§ 980, 1010) designates the payment made in commutation of the labor as a fine, not as a tax.

In *Hassett v. Walls*, 9 Nev. 387, however, a road tax of four dollars annually, or two days' labor, imposed by the *Nevada* statute, was held to be a capitation or poll tax, and under their constitution, prescribing specifically what poll tax could be levied, unconstitutional,

*d.* DRAINAGE AND RECLAMATION DISTRICTS AND DRAINAGE TAXES.—(See *supra*, this title, *Local Assessments*. See also DRAINS AND SEWERS, vol. 6, p. 2.)

*e.* LEVEE DISTRICTS AND TAXES.—The power to erect levees and collect taxes to defray the expense of their construction and maintenance, may be conferred upon commissioners or other officers elected or appointed for that purpose;<sup>1</sup> the expense being usually apportioned according to the benefits received.<sup>2</sup> Such taxes may be required to be levied and collected in the same manner and by the same officers as the ordinary taxes of the state, but when collected, like highway or drainage taxes, they should be set apart as a special fund which can be appropriated for no other purpose than that for which they were levied.<sup>3</sup>

*f.* PARK DISTRICTS AND TAXES.—(See *supra*, this title, *Local Assessments*. See also PARKS AND PUBLIC SQUARES, vol. 17, p. 414.)

the court disapproving the *Illinois* decisions and declining to follow them.

1. *McGehee v. Mathis*, 21 Ark. 40; *Nugent v. Board of Levee Com'rs*, 58 Miss. 197.

As to the power to levy taxes for the erection of levees, see *supra*, this title, *Purposes of Taxation—What Purposes are Public*.

Under the *Illinois* constitution, the general assembly possess no power to authorize the assessment and collection of taxes of special assessment for the construction of a levee to prevent the overflow of lands, unless the right of election in the matter be submitted to a vote of the persons affected thereby. *Udipe v. Wright*, 81 Ill. 49.

Under the *Mississippi* statutes, levee commissioners are public officers, and boards of levee commissioners are public corporations created to administer a public trust, the scope of which is defined by the act of the legislature creating it. *Nugent v. Levee Com'rs*, 58 Miss. 197.

A grant of power to the levee inspectors to adjust the assessment and levy of the taxes, and to hear and decide all questions in relation thereto, does not make them a court. In the performance of their duties, they act as ministerial and not as judicial officers. *McGehee v. Mathis*, 21 Ark. 40.

**Eminent Domain—Compensation for Land.**—Due compensation must be made for private property taken or injured in the construction of the levee. *Hollingsworth v. Tensas*, 17 Fed. Rep. 109. But see *Bass v. State*, 34 La. Ann. 494.

2. See *supra*, this title, *Local Assessments*.

3. *Louisiana Levee Co. v. State*, 31 La. Ann. 250; *State v. Maginnis*, 26 La. Ann. 558; *State v. Clinton*, 25 La. Ann. 401; *State v. Clinton*, 26 La. Ann. 561.

In *Daily v. Swope*, 47 Miss. 367, it is said that levee taxes need not be assessed by the county assessor or collected by the sheriff as tax collector. The usual practice has been to provide other agencies.

In *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508, it was held that the power to sell the land for the failure to pay a levee tax is but a means to an end legitimate and proper in itself; a mere incident to the power of taxation.

In *State v. Maginnis*, 26 La. Ann. 558, it was held that the legislature has the right to assess a tax and expend the money arising therefrom in the construction of levees in such a manner as they may deem beneficial; and no individual taxpayer has the right to resist the exercise of its discretionary power. The court, by Wyly, J., said: "The building of levees in *Louisiana* is a public enterprise or work which concerns directly at least half the people of the state, and incidentally the whole state. Of the propriety of constructing levees, the general assembly is the exclusive judge, because we find in the constitution no limitation upon the right of the people, through the general assembly, to exercise the power. They have the right to assess a tax and to expend the money arising therefrom."

**TAXATION (CORPORATE).**—(See also CORPORATIONS, vol. 4, p. 272a; DIVIDENDS, vol. 5, p. 744d; EXPRESS COMPANIES, vol. 11, p. 582; FOREIGN CORPORATIONS, vol. 8, p. 369; FRANCHISES, vol. 8, p. 584; INTERSTATE COMMERCE, vol. 11, p. 548; JOINT-STOCK COMPANIES, vol. 11, p. 1038; NATIONAL BANKS, vol. 16, p. 179; TELEGRAPHS AND TELEPHONES, vol. 25, p. 744.)

- I. Introduction, 624.
- II. Taxation of the Corporation, 625.
  1. General Principles, 625.
    - a. Taxability of Corporations, 625.
    - b. Method of Taxing Corporations, 626.
    - c. Classification for Taxation, 627.
    - d. Corporate Residence, 629.
    - e. Collection, 630.
  2. Franchise Tax, 630.
    - a. Definition of Franchise, 630.
    - b. Taxability of Franchises, 631.
    - c. Measurement of Franchise Taxes, 635.
    - d. Distinguished from Property Tax, 636.
  3. Capital Stock Tax, 638.
    - a. Definition of Capital Stock, 638.
    - b. Taxability of Capital Stock, 641.
    - c. Capital Stock of Interstate Corporations, 644.
    - d. Valuation of Capital Stock, 644.
  4. Income Tax, 646.
    - a. Definitions of Income, Gross Receipts, etc., 646.
    - b. Net Income, 646.
    - c. Gross Receipts, 646.
    - d. Income from Interstate Commerce, 647.
  5. Indebtedness Tax, 649.
  6. Dividend Tax, 650.
    - a. Definition of Dividends, 650.
    - b. Taxability of Dividends, 650.
  7. Railroads, 650.
    - a. General Method of Taxing, 650.
    - (1) Realty, 651.
      - (a) Roadway—Right of Way—"Railroad Track," 651.
      - (b) Unessential Realty, 653.
    - (2) Rolling Stock, 654.
      - (a) Generally, 654.
      - (b) In Interstate Commerce, 655.
      - (c) Sleeping Cars, 656.
    - (3) Railroads are Units, 656.
    - (4) Their Residence, 656.
    - (5) Valuation, 657.
  8. Foreign Corporations, 659.
    - a. General Principles, 659.
    - b. Definition of "Doing Business," 661.
    - c. "Retaliatory Legislation," 661.
- III. Taxation of the Shareholder, 662.
  1. Direct Tax, 662.
    - a. Resident Shareholder, 662.
      - (1) In Domestic Corporations, 662.
      - (2) In Foreign Corporations, 663.
    - b. Non-resident Shareholder, 664.
      - (1) In Domestic Corporations, 664.
      - (2) In Foreign Corporations, 665.
  2. Tax Collected from the Corporation, 665.
- IV. Double Taxation, 666.
- V. Exemptions (See CORPORATIONS, vol. 4, p. 272d; TAXATION—Exemptions, vol. 25, p. 156), 673.

**I. INTRODUCTION.**—(For the law applicable as well to the taxation of natural persons as to corporations, see TAXATION, vol. 25, p. 5.)

Corporate interests may include four elements of taxable value, namely: franchises, capital stock in the hands of the corporation, corporate property, and shares of the capital stock in the hands of the shareholder.<sup>1</sup>

1. *Tennessee v. Whitworth*, 117 U. S. 136; 29 Am. & Eng. R. Cas. 205.



Taxes can be measured by reference to business done, income, indebtedness, dividends, and many other standards. From these standards, however, the four elements of taxable value mentioned, all being in the largest sense property, are to be distinguished as the sources from which are drawn all corporate taxes, in whatever way measured.

**II. TAXATION OF THE CORPORATION—1. General Principles—***a.* **TAXABILITY OF CORPORATIONS.**—All private corporations,<sup>1</sup> unless by charter the state's right to tax has been expressly relinquished or curtailed,<sup>2</sup> are, barring constitutional prohibitions, taxable on their property and business.<sup>3</sup>

It is doubted whether the second and third element can be satisfactorily distinguished. See *infra*, this title, *Capital Stock Tax*.

**1. Definition of Corporation.**—See **CORPORATIONS**, vol. 4, p. 185; **JOINT-STOCK COMPANIES**, vol. 11, p. 1036. In *People v. Wemple*, 117 N. Y. 136; 29 Am. & Eng. Corp. Cas. 610, the court held that the United States Express Company, organized by a number of individuals signing articles of agreement which described the concern as a "joint-stock company," which provided for continuance a certain number of years, for a capital stock divided into shares, represented by certificates or scrip, and assignable in the usual manner, which provided further that the business should be managed by a board of directors, that suits should be brought in the name of the president, that deeds should run to and be made by him, and that the death of members fewer than a majority in interest should not dissolve the company, is either a "corporation, joint-stock company, or association;" and that, as such, it is liable to taxation under a statute providing for the taxation of "every corporation, joint-stock company, or association whatever, now and hereafter incorporated or organized under any law of this state," inasmuch as the word "incorporated," as here used, is not to be taken in a technical or restricted meaning and confined to an association brought into being according to the formality of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations of business the enabling provisions of the statutes.

The Adams Express Company is a co-partnership, and not an incorporated company created by any franchise, and, although it is a *quasi* corporation as between its members, it is not within

the meaning of the *New York* statute subjecting to taxation all moneyed or stock corporations deriving income or profit from their capital stock or otherwise. *Hoey v. Coleman*, 46 Fed. Rep. 221; 34 Am. & Eng. Corp. Cas. 283.

A joint-stock company is not a corporation, but is a partnership, with some of the powers of a corporation. A joint-stock company, whose organization is based wholly on the mutual agreement between the members, and which is dependent in no respect upon the grant of authority from the state, having accepted no franchise or license, is not a corporation within the meaning of 1 Rev. St. *New York*, pt. 1, ch. 13, tit. 4, § 1, enacting that "all moneyed or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital." *People v. Coleman*, 133 N. Y. 279; 37 Am. & Eng. Corp. Cas. 1. See also *Bell v. Streeter*, 1 Trans. App. (N. Y.) 6; *People v. Coleman* (Supreme Ct.), 5 N. Y. Supp. 394; *aff'd* at general term, 59 Hun (N. Y.) 624; *Hoadley v. Essex County*, 105 Mass. 519; *Sandford v. New York*, 15 How. Pr. (N. Y.) 172.

A state is not a "corporation" within the meaning of tax laws. *State v. Atkins*, 35 Ga. 315.

Municipal corporations created by the various states, are agencies of the state governments for the administration of local affairs, and Congress has no power to tax the revenues thereof. *U. S. v. Baltimore, etc.*, R. Co., 17 Wall. (U. S.) 322; *Buffington v. Day*, 11 Wall. (U. S.) 113.

**2.** If the charter provides a specific mode of taxation, this excludes all other modes. *New York, etc.*, R. Co. v. Sabin, 26 Pa. St. 242.

**3.** *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 147; *Mississippi Mills v.*

**b. METHOD OF TAXING CORPORATIONS.**—The method of taxing corporations, unless another method is provided by the state constitution or statute, or by the corporate charter, is the same as that of taxing natural persons,<sup>1</sup> the personalty, unless permanently located elsewhere,<sup>2</sup> being assessed at the corporation's residence,<sup>3</sup> and the realty where it is situated.<sup>4</sup> By the words "persons"<sup>5</sup> and

Cook, 56 Miss. 40; *State v. Yard*, 42 N. J. L. 357; *Dubuque v. Chicago*, etc., R. Co., 47 Iowa 196; *Mayor*, etc., of *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Thompson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Philadelphia*, etc., R. Co. *v. Pennsylvania*, 15 Wall. (U. S.) 284; *Portland Bank v. Apthorp*, 12 Mass. 252; *Boston*, etc., R. Co. *v. Com.*, 100 Mass. 399; *Bank of Pennsylvania v. Com.*, 19 Pa. St. 144; *Louisville*, etc., R. Co. *v. Louisville*, 4 Bush (Ky.) 478; *Citizens' Pass. R. Co. v. Pittsburgh*, 104 Pa. St. 502.

An exception to this doctrine is to be noted in the case of *quasi* public corporations, railroads, etc., in *Pennsylvania* and *Massachusetts*. See **TAXATION—Exemptions—Railroads**.

**Toll-Road over Government Land Taxable.**—Under *United States R. S.*, section 2477, providing that "the right of way for the construction of highways over public lands not reserved to public uses, is hereby granted," it was held that where such right of way is accepted by a toll-road company, which constructs and maintains a toll-road on the public domain of the *United States*, such road, including road-bed and right of way, is "property" of such company within the meaning of tax laws, and is taxable in the county where located; and the fact that the county commissioners are empowered to regulate tolls over such roads, does not affect the right to tax the same. *Estes Park Toll-Road Co. v. Edwards*, 3 Colo. App. 74.

1. Some state constitutions forbid any variation in the methods. See the constitutions of *Alabama*, *Colorado*, *Florida*, *Iowa*, *Mississippi*, *Nevada*, *Ohio*, and *South Carolina*.

2. *People v. Com's of Taxes*, 23 N. Y. 224; *People v. Com's of Taxes*, 58 N. Y. 242; *Sangamon*, etc., R. Co. *v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497; *Mills v. Thornton*, 26 Ill. 300; 77 Am. Dec. 377; *Munson v. Crawford*, 65 Ill. 186; *Fisher v. Rush Co.*, 19 Kan. 414; *State v. St. Louis Co. Ct.*, 47 Mo.

594; *State v. Howard Co.*, 69 Mo. 454; *Carrier v. Gordon*, 21 Ohio St. 605.

3. *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Mohawk*, etc., R. Co. *v. Clute*, 4 Paige (N. Y.) 384; *McKeen v. Northampton Co.*, 49 Pa. St. 519; 88 Am. Dec. 515; *Orange*, etc., R. Co. *v. Alexandria*, 17 Gratt. (Va.) 176; *State v. Illinois Cent. R. Co.*, 27 Ill. 64; 79 Ill. 396; *Jones v. Bridgeport*, 26 Conn. 283; *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *McHarg v. Eastman*, 4 Robt. (N. Y.) 635; *Metcalf v. Messenger*, 46 Barb. (N. Y.) 325; *People v. McLean*, 17 Hun (N. Y.) 204; *People v. Com's of Taxes*, 46 How. Pr. (N. Y.) 315.

In *Louisiana*, tangible movable property of foreign corporations may be taxed where situate, under a special statute providing for its taxation. *Liverpool*, etc., Ins. Co. *v. Board of Assessors*, 44 La. Ann. 760.

4. *Salem Iron Factory v. Danvers*, 10 Mass. 514; *Carbon Iron Co. v. Carbon Co.*, 39 Pa. St. 251; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *People v. Board of Assessors*, 39 N. Y. 81; *Tremont Bank v. Boston*, 1 Cush. (Mass.) 142.

But lands owned and occupied by a corporation, and situated partly in one township and partly in another, are subject to taxation in that township in which the corporation resides. *State v. Warford*, 37 N. J. L. 397; *People v. Oswego*, 6 Thomp. & C. (N. Y.) 673.

5. See **CORPORATIONS**, vol. 4, p. 272*b*; *Angell & Ames on Corporations* (11th ed.), § 440; *Cortis v. Kent Water Works*, 7 B. & C. 314; 14 E. C. L. 52; *School Directors v. Carlisle Bank*, 8 Watts (Pa.) 291; *British*, etc., L. Ins. Co. *v. Com's of Taxes*, 1 Keyes (N. Y.) 303; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *People v. McLean*, 80 N. Y. 254; *Baldwin v. Ministerial Fund*, 37 Me. 369. But see *School Directors v. Carlisle Bank*, 8 Watts (Pa.) 291, and *Fox's Appeal*, 112 Pa. St. 337; 14 Am. & Eng. Corp. Cas. 356.

Property devised to a corporation is liable to a tax imposed by statute on "property of any decedent which passes

"inhabitants,"<sup>1</sup> corporations are included in the provisions of tax laws which do not in their text indicate the contrary intent.

c. CLASSIFICATION FOR TAXATION.—Generally, separate and different statutory provisions are made for the taxation of natural persons and of corporations. This may be done, notwithstanding that corporations are "persons" within the meaning of the first section of the fourteenth amendment of the constitution of the *United States*, declaring that no state shall deprive any person within its jurisdiction of the equal protection of the laws. Farther, the constitutional rules as to uniformity do not prohibit the legislatures from placing certain specified corporations in one class, for which a uniform method of assessment is provided, and placing certain other specified corporations in another class, which latter class either may be exempted from the taxes imposed on the former or may be taxed under a different method of assessment.<sup>2</sup>

to any person other than" specified relative. *Miller v. Com.*, 27 Gratt. (Va.) 110.

1. *Baldwin v. Ministerial Fund*, 37 Me. 369.

2. The rules of taxation in this respect, were stated by Mr. Justice Bradley, in *Railroad Co. v. Pennsylvania*, 134 U. S. 232, as follows: "The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. . . . It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usu-

ally accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

See also *Home Ins. Co. v. New York*, 134 U. S. 594; 29 Am. & Eng. Corp. Cas. 575; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 523; 22 Am. & Eng. R. Cas. 557; *Santa Clara Co. v. Southern Pac. R. Co.*, 9 Sawy. (U. S.) 210; 13 Am. & Eng. R. Cas. 182; 118 U. S. 394; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 209; 33 Am. & Eng. R. Cas. 390; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 32.

In *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, it was held that express companies having no tangible property of their own, constituted a class separate from companies owning their means of transportation, and that discrimination between the two classes was not unconstitutional.

The *Pennsylvania Revenue Act of 1879*, p. 112, § 4, taxed the capital stock of all corporations except foreign insurance companies, banks, and savings institutions. Act June 30th, 1885, p. 193, § 20, abolishes the taxes laid upon manufacturing corporations under the revenue laws, and repeals the laws so far as they apply to and affect manufacturing corporations; "provided, that the provisions of this act shall not apply to corporations engaged in the manufacture of malt, spirituous or vinous

Within any class, however, the taxation must be uniform.<sup>1</sup>

liquors, or in the manufacture of gas." It was held in *Com. v. Germania Brewing Co.* (Pa. 1891), 22 Atl. Rep. 240, that the latter act was not unconstitutional, as its effect was merely to make two classes of manufacturing companies, one of which it taxed, while it left the other untaxed.

The fact that some railroads, by the process of valuation, pay only upon the tangible property, while others pay also upon the excess of value of capital stock over the value of tangible property, does not render the tax void for want of uniformity, where no fraudulent intention is shown. *Chicago, etc., R. Co. v. Siders*, 88 Ill. 320.

In *Sterling Gas Co. v. Higby*, 134 Ill. 557; 32 Am. & Eng. Corp. Cas. 348, it was held that *Illinois Rev. St.* 1889, ch. 120, § 3, which provides that the capital stock of certain classes of corporations shall be assessed by the state board of equalization, and of other corporations by the local assessors, is not in conflict with the provisions of the constitution which empowers the legislature to tax "persons or corporations owning or using franchises or privileges in such manner as it shall direct by general law, uniform as to the class upon which it operates."

The mere fact that railroad companies, as a class, are by law taxed more heavily than individuals, does not render the law invalid. *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56. One class of companies may be subject to taxation, while another is exempt therefrom. *Mississippi Mills v. Cook*, 56 Miss. 40; *Williams v. Rees*, 9 Biss. (U. S.) 405.

It has been held that the property of railroad companies in unorganized counties, may be taxed; while the property of individuals in such counties is exempt from taxation. *Francis v. Atchison, etc., R. Co.*, 19 Kan. 303. See also *Williams v. Rees*, 2 Fed. Rep. 891.

Seemingly not in harmony with the preceding case, which represents the prevailing rule, are the following: In *Exchange Bank v. Hines*, 3 Ohio St. 1, it was held that a statute was unconstitutional, which provided that banks should be taxed upon the amount of their profits, after first deducting the amount of their liabilities, when such deduction of the amount of outstanding liabilities was not permitted in the case of individuals and other corporations.

In *Mobile v. Stonewall Ins. Co.*, 53

Ala. 570, an act limiting the power of municipalities to impose taxation on banks and insurance companies, so that a tax could be levied only up to a certain fixed per cent. of the capital, was held unconstitutional, inasmuch as it exempted the corporation from a tax on its capital stock, as great as that imposed upon other property within the limits of the municipality.

In *State v. Winnebago Lake, etc., Plank Road Co.*, 11 Wis. 35, a law imposing a special tax on plank road companies in lieu of all other taxation, was held unconstitutional, inasmuch as it provided a different rate and rule of taxation on the property of such companies from that imposed on the property of other companies and of individuals. This case has since been distinctly overruled in *Kneeland v. Milwaukee*, 15 Wis. 454.

In *Franklin Ins. Co. v. State*, 5 Va. 349, a law requiring insurance companies to pay three per cent. on all premiums collected by them in lieu of all other taxes, was held void as imposing a higher tax on such corporations than on others of a different character.

In *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633, it was held that an act absolutely relieving railroad property from taxation to which individual property is subjected, is invalid. And see *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *Bureau Co. v. Chicago, etc., R. Co.*, 44 Ill. 229; *Chicago, etc., R. Co. v. Boone Co.*, 44 Ill. 240.

Indeed, it would seem that the rule permitting different rates of taxation for different classes, has its basis in the principle of the excise tax; and that if a state excludes the principle of the excise tax from its revenue system, and seeks to tax only property, it must, under the rules of uniformity, impose the same rate on the property of all. As bearing on this, see the vigorous and convincing opinion of Mr. Justice Field in *Santa Clara Co. v. Southern Pac. R. Co.*, 9 Sawy. (U. S.) 200; 13 Am. & Eng. R. Cas. 182. See also *Chicago, etc., R. Co. v. Boone Co.*, 44 Ill. 240; *State v. Cumberland, etc., R. Co.*, 40 Md. 22; *Cheshire v. Berkshire Co.*, 118 Mass. 386; *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *People v. Whyler*, 41 Cal. 351; *Emery v. San Francisco Gas Co.*, 28 Cal. 345.

1. *Illinois Railroad Tax Cases*, 92 U. S. 575; *New Orleans v. Kaufman*, 29

Different agencies may be employed by the state in the assessment and equalization of the taxes imposed upon the different classes.<sup>1</sup> If, however, the different agencies adopt different rules of assessment so as to produce different rates of taxation, a court of equity will, unless by express legislation the state has distinctly established different rates for the different classes, intervene in behalf of a constituent of the class upon which the heavier burden is imposed.<sup>2</sup>

d. CORPORATE RESIDENCE.—The residence of a corporation is, in revenue matters, in the state creating it and in the town wherein is its principal office or place of business. The principal office or place of business is where the governing power of the

La. Ann. 283; 29 Am. Rep. 328; State v. Lathrop, 10 La. Ann. 398; Kneeland v. Milwaukee, 15 Wis. 454; Durach's Appeal, 62 Pa. St. 491.

1. State Boards of Equalization.—Thus, railroads may be assessed by state boards, while all other property is assessed by county officials; and again, different boards may be provided for banks, for railroads, for insurance companies, and the like. Missouri River, etc., R. Co. v. Morris, 7 Kan. 210; Waggoner v. Loomis, 37 Ohio St. 571; United Express Co. v. Ellysen, 28 Iowa 370; Franklin Co. v. Nashville, etc., R. Co., 12 Lea (Tenn.) 521; 17 Am. & Eng. R. Cas. 445; Cincinnati, etc., R. Co. v. Com., 81 Ky. 492; 13 Am. & Eng. R. Cas. 270. See also Atchison, etc., R. Co. v. Wilson, 35 Kan. 175; 24 Am. & Eng. R. Cas. 626; Cummings v. Merchants' Nat. Bank, 101 U. S. 153.

A statute which creates the governor, secretary of state, and auditor, a board of commissioners, and empowers them annually to examine a sworn schedule of railroad property which is required to be filed by persons or corporations owning or operating railroads, and to appraise the value of such property, and certify to the county assessor the value of the portion lying within the county which shall be listed and assessed by the assessor, is not unconstitutional because it employs a different instrumentality for the valuation and assessment of railroad property from that employed for the assessment of other property, although the constitution provides that the value of property assessed for taxation shall be ascertained in such manner as the general assembly shall direct, but shall be equal and uniform throughout the state. St. Louis, etc., R. Co. v. Worthen, 52 Ark. 529; 41 Am. & Eng. R. Cas. 589; Huntington v. Worthen,

120 U. S. 97; 29 Am. & Eng. R. Cas. 230.

As to the functions of the state Boards of Equalization in the various states, see the following authorities: State v. Ormsby Co., 7 Nev. 392; Los Angeles v. Los Angeles Water Works Co., 49 Cal. 639; Chicago, etc., R. Co. v. Paddock, 75 Ill. 616; Kansas Pac. R. Co. v. Wyandotte Co., 16 Kan. 587; Burlington, etc., R. Co. v. Lancaster Co., 7 Neb. 33; Perry Co. v. Selma, etc., R. Co., 58 Ala. 546; St. Louis, etc., R. Co. v. Surrill, 88 Ill. 535; People v. Lothrop, 3 Colo. 428; Union Trust Co. v. Weber, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583; Chicago, etc., R. Co. v. People, 98 Ill. 351; 5 Am. & Eng. R. Cas. 94; Texas, etc., R. Co. v. Harrison Co., 54 Tex. 120; 6 Am. & Eng. R. Cas. 627; Chicago, etc., R. Co. v. People, 99 Ill. 464; 6 Am. & Eng. R. Cas. 627; International, etc., R. Co. v. Smith Co., 54 Tex. 1; 7 Am. & Eng. R. Cas. 263; State Auditor v. Jackson Co., 65 Ala. 142; 7 Am. & Eng. R. Cas. 273; Perry Co. v. Selma, etc., R. Co., 65 Ala. 391; 7 Am. & Eng. R. Cas. 298.

As to the state board's methods of inquiry and procedure, see also *infra*, this title, *Railroads—Valuation*.

2. Cummings v. Merchants' Nat. Bank, 101 U. S. 153.

And where the practice is to assess the property of individuals in a county, at less than the actual value, the property of a corporation cannot be assessed by a state board at a greater per cent. of its value. Bureau Co. v. Chicago, etc., R. Co., 44 Ill. 229; Chicago, etc., R. Co. v. Boone Co., 44 Ill. 240.

Some authorities, however, hold that relief cannot be obtained against the action of a board of equalization imposing a higher rate of taxation than that imposed by another board, unless

corporation is exercised and where officers are elected, not where the principal labor of the employés is carried on.<sup>1</sup>

*e.* COLLECTION.—Taxes assessed by the state against a corporation may be collected by an action brought by the state against such corporation, in the absence of any statutory provision for compelling corporations to pay their taxes.<sup>2</sup>

**2. Franchise Tax**—*a.* DEFINITION OF FRANCHISE.—The word franchise is applicable both to the privilege of being a corporation and to other privileges which may be held by the corporation from the government.<sup>3</sup>

fraud is made to appear. *Wagoner v. Loomis*, 37 Ohio St. 571.

An intention to tax all classes equally, will always be implied. *Rice Co. v. Citizens' Nat. Bank*, 23 Minn. 280.

1. *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *Putnam v. Fife Lake*, 45 Mich. 125; *McCoy v. Anderson*, 47 Mich. 502; where the books are kept, *People v. Oswego*, 6 Thomp. & C. (N. Y.) 673; where the safe and the secretary's office are, *State v. Person*, 32 N. J. L. 134.

In *New York*, the certificate of incorporation establishes the residence of a domestic corporation. By statute, this must designate a town where the principal operations of the company are to be carried on. *Western Transf. Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dollaway*, 21 N. Y. 449; *Union Steamboat Co. v. Buffalo*, 82 N. Y. 351.

A company may move its principal office, to escape taxation. *Pelton v. Transportation Co.*, 37 Ohio St. 450.

A corporation does not become a resident of a state, by being authorized to build a bridge across a river dividing the state creating the corporation and the former state. *State v. Mutchler*, 42 N. J. L. 461; 1 Am. & Eng. R. Cas. 395.

A vessel owned by a corporation has for its home port, the corporation's residence, and is there taxable, although the corporation may have its office in another state. *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 431; *Wheeling Transp. Co. v. Wheeling*, 99 U. S. 273; 9 W. Va. 170; 27 Am. Rep. 552; *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *Pelton v. Transportation Co.*, 37 Ohio St. 450.

Steamships belonging to a New York corporation, registered at New York, and employed in the transportation of passengers between New York and San Francisco, and San Francisco

and *Oregon*, are not liable to assessment in *California* or San Francisco, but are taxable at their home port in New York. *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596.

Under a statute providing for the taxation of lands in one county, to the owner, at his residence in another county of the same state, a corporation is taxable at its residence on lands in another county. *Salem Iron Factory v. Danvers*, 10 Mass. 514; *Amesbury Nail Factory Co. v. Weed*, 17 Mass. 53; *Amesbury Woolen, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461; *Goodell Mfg. Co. v. Trask*, 11 Pick. (Mass.) 514.

See generally, as to a corporation's residence, *Sangamon, etc., R. Co. v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497; *International L. Assur. Soc. v. Com'rs of Taxes*, 28 Barb. (N. Y.) 318; *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186; *State v. Warford*, 37 N. J. L. 397; *Pelton v. Transportation Co.*, 37 Ohio St. 450.

2. *State v. New York, etc., R. Co.*, 60 Conn. 326. Such an action must be regarded as warranted by usage, if not authorized by the statute. In this case the court said: "There is no way other than by a statute like the present one, in which the collection of any tax imposed by these statutes can be compelled, and in such a suit, any defendant may call into question the amount or the validity of the tax as a whole, or as to any part of it." And see generally, as to methods of collection, *TAXATION*, vol. 25, p. 5.

3. See *FRANCHISE*, vol. 8, p. 585.

"A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but which should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may

b. TAXABILITY OF FRANCHISES.—The franchises of a corporation are deemed to be property,<sup>1</sup> and, unless they are granted by

impose in the public interest and for the public security." *California v. Southern Pac. R. Co.*, 127 U. S. 40.

"No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority which is the same as to say, that the right of eminent domain can be only exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely." *California v. Southern Pac. R. Co.*, 127 U. S. 40.

"A franchise, in the wider sense, is a right conferred by government, of conducting an occupation either in a particular way, or accompanied with particular privileges." Edwin R. A. Seligman in 5 *Political Science Quarterly* 439.

"By the term 'corporate franchise or business,' as here used, we understand is meant . . . the right or privilege given by the state to two or more persons, of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise." *Home Ins. Co. v. New York*, 134 U. S. 594; 29 Am. & Eng. Corp. Cas. 575.

"Corporate franchises are legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vests in the corporation upon possession of its franchises, and whatever may be thought of the corporations, it cannot be denied that the corporation itself has a legal interest in such franchises." *Society for Sav. v. Coite*, 6 Wall. (U. S.) 594. See also *Pierce v. Emery*, 32 N. H. 507, and argument of counsel preceding opinion in *Spring Valley Water Works v. Schottler*, 62 Cal. 69. See generally *FRANCHISE*, vol. 8, p. 584.

1. *Bellville Nail Co. v. People*, 98 Ill. 399; *Sterling Gas Co. v. Higby*, 134 Ill. 557; 32 Am. & Eng. Corp. Cas. 348; *Atty. Gen'l v. Bank of Charlotte*,

4 Jones Eq. (N. Car.) 287; *Atlantic, etc., R. Co. v. Mechlenburg Co.*, 87 N. Car. 129; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; 48 Am. Dec. 531; *Fall v. Marysville*, 19 Cal. 391; *Central Pac. R. Co. v. Board of Equalization*, 60 Cal. 35; *State Board of Assessors v. State*, 48 N. J. L. 146; 24 Am. & Eng. R. Cas. 546; *Com. v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75; *Com. v. Provident Inst.*, 12 Allen (Mass.) 312; *Atlantic, etc., R. Co. v. Lesueur* (Arizona, 1888), 19 Pac. Rep. 157; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Northern Mo. R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *South Nashville, etc., R. Co. v. Morrow* (Tenn. 1889), 11 S. W. Rep. 348.

In some states the franchises of a water company are not assessable separate and distinct from its other property. *Fond du Lac Water Co. v. Fond du Lac* (Wis. 1892), 52 N. W. Rep. 439.

In *West River Bridge Co. v. Dix*, 6 How. (U. S.) 529, the franchise of the corporation was held to be property, and, as such, liable to be condemned for public use under the right of eminent domain, upon due compensation being made. Daniels, J., who delivered the opinion of the court, said: "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property and nothing more. . . . It is its character of property only, which imparts to it its value, and alone authorizes in individuals a right of action for invasion or disturbance of its enjoyment."

In *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533, the court, by Chase, C. J., said: "Franchises are property, often very valuable and productive property, and seem to be as properly objects of taxation as any other property."

In *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264, the statute of *North Carolina*, incorporating the railroad company, contained this clause: "And the property of said company, and the shares therein, shall be exempt from any public charge or tax whatever." It was held that this exempted from taxation, the franchise, as well as the other property, of the company. *Davis, J.*, in delivering the opin-

act of Congress,<sup>1</sup> or exempted by contract,<sup>2</sup> are taxable, either as property or under the principle of the excise.<sup>3</sup> If an excise is

ion of the court, used this language: "Nothing is better settled than that the franchise of a private corporation, which, in its application to a railroad, is the privilege of running it and taking fare and freight, is property, and of the most valuable kind. It is true it is not the same sort of property as the rolling stock, road-bed, and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter."

Franchises are declared to be property, by the *California* constitution. *San Jose Gas Co. v. January*, 57 Cal. 614; *Spring Valley Water Works v. Schottler*, 62 Cal. 69. "It is clear, upon authority, that the franchise of a corporation is property, and as such, it may be a proper object of taxation." *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561.

1. *California v. Southern Pac. R. Co.*, 127 U. S. 41. But see *Atlantic, etc., R. Co. v. Lesueur (Arizona)*, 1888, 1 L. R. A. 244. See *San Benito Co. v. Southern Pac. R. Co.*, 77 Cal. 518.

2. When a certain sum or an annual charge is paid or contracted to be paid, as the consideration of the grant of a franchise, the contract is a limitation upon the taxing power, and no further tax can be imposed upon the franchise. Any tax is a substantial addition to the price paid for the use of the privilege. *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 132 and note; *Atty. Gen'l v. Bank of Charlotte*, 4 Jones Eq. (N. Car.) 287; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; 18 Wall. (U. S.) 206; 7 Phila. (Pa.) 555; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; 48 Am. Dec. 531; *Farmers' Bank v. Com.*, 6 Bush (Ky.) 127.

However, if there was no consideration, an exempting clause may be repealed. Note to *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 132; *Hospital v. Philadelphia Co.*, 24 Pa. St. 229; *Holly Springs Sav., etc., Co. v. Marshall Co.*, 52 Miss. 281; 24 Am. Rep. 668; *St. Louis, etc., R. Co. v. Loftin*, 30 Ark. 693; *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481.

The charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the legislature has accepted with the declaration,

that is to be in lieu of all other taxation. *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436.

In *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; 48 Am. Dec. 531, it is held that a franchise, as property, is, whether paid for by a bonus or not, according to its value, liable to the general tax laid upon all property within the state under the act of 1841. The court, in its opinion by Dorsey, J., dissents from *dicta* to the contrary in *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133. See also *Illinois Cent. R. Co. v. McLean Co.*, 17 Ill. 296.

"No corporation can claim immunity from taxation or from a license, because it paid a consideration for its charter or franchise, in the absence of a stipulation on the part of the state, or other taxing power, that the bonus was received in lieu of any further or future taxation." *New Orleans v. Orleans R. Co.*, 42 La. Ann. 4; 21 Am. St. Rep. 365, *aff'g* *New Orleans v. New Orleans City, etc., R. Co.*, 40 La. Ann. 587. "No exemption is to be implied from the payment of the bonus." *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242; FRANCHISES, vol. 8, p. 596.

3. **Excise.**—For definition of excise tax, see *Oliver v. Washington Mills*, 11 Allen (Mass.) 272.

"The charter of a corporation does not open to the state a new source of revenue. It creates a valuable property, which, like all other property, the state may require to contribute to the support of the government." *Burroughs on Taxation* (ed. 1877) 168; *Cooley on Taxation* (2d ed.) 379; *Beach on Private Corporations*, §§ 799, 801; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 859; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133; *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 296; *State R. Tax Cases*, 92 U. S. 575.

"Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation . . . may be taxed by a state for the support of the state government. Authority to that effect resides in the state, independent of the federal gov-



ernment." *Society for Sav. v. Coite*, 6 Wall. (U. S.) 594.

In *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206, Field, J., said: "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary and capricious, are mere matters of legislative discretion."

In *Western Union Tel. Co. v. Atty. Gen'l*, 125 U. S. 552, it was held that a telegraph company was liable in *Massachusetts* to an excise upon its capital, under Pub. St. *Massachusetts*, ch. 13, § 54, notwithstanding its acceptance of the grant of the *United States*, under Rev. St. *United States*, § 5263, of the right to use military or post roads. *California v. Central Pac. R. Co.*, 127 U. S. 1; 33 Am. & Eng. R. Cas. 451; *Home Ins. Co. v. New York*, 134 U. S. 594; 29 Am. & Eng. Corp. Cas. 575; *Williams v. Rees*, 2 Fed. Rep. 889.

In *California*, the statute provides that "all property" belonging to corporations, shall be assessed and taxed. *California Pol. Code* 1885, § 3608; *San Jose Gas Co. v. January*, 57 Cal. 614. In *Spring Valley Water Works v. Schottler*, 62 Cal. 69, it is held that the franchise of a water-works company should be valued for taxation.

In *Connecticut*, railroad corporations are required to pay a tax of one per cent. on the market value of their stock, bonds, and funded and floating debt, after deducting corporate bonds held in trust as a sinking fund. They are allowed a deduction for taxes paid on corporate realty, and no other tax is imposed on the franchise property or debts. *Connecticut Gen. Stat.* 1888, §§ 3919, 3920.

In *Delaware*, railway and steamboat companies may pay a part of their gross receipts in lieu of a tax of ten cents for each passenger. *Delaware Code* 1874, p. 31.

In *Illinois*, the franchise is assessed by the state board. *Illinois Rev. Stat.* 1879, ch. 120, § 3; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Union Trust Co. v. Weber*, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583.

In *Indiana*, every franchise granted to any corporation shall be assessed as

personal property. *Indiana Tax Law* 1891, § 25.

In *Kentucky*, the value of a franchise of any corporation, excepting railroads in existence or in process of construction, banks and turnpike companies, shall be taxable. *Kentucky Pub. Acts* 1891, p. 29.

In *Louisiana*, see *New Orleans City Gas Light Co. v. Board of Assessors*, 31 La. Ann. 477.

In *Maryland*, savings banks must pay a franchise tax on one-fourth of one per cent. on total deposits, in addition to tax on real property. *Maryland Gen. Laws* 1888, p. 1236; *Baltimore, etc., R. Co. v. State*, 34 Md. 344; 21 Wall. (U. S.) 456.

In *Massachusetts*, all corporations except banks, are required to pay a franchise tax measured by the amount of capital stock. *Massachusetts Pub. Stat.* 1882, pp. 139, 140, 141. In this state, franchises have been held to be taxable under the constitutional provision for the taxation of "commodities." *Portland Bank v. Apthorp*, 12 Mass. 252; *Atty. Gen'l v. Bay State Min. Co.*, 99 Mass. 148; 96 Am. Dec. 717; *Com. v. Lancaster Sav. Bank*, 123 Mass. 493; *Gleason v. McKay*, 134 Mass. 424.

In *Nebraska*, "every person and corporation shall pay a tax in proportion to the value of his, her, or its property franchises." *Nebraska Constitution of 1875*, art. 9, § 1.

In *New Jersey*, corporations pay franchise taxes proportional to gross receipts, premiums, or capital stock. *Sup. to New Jersey Rev.* 1886, p. 1016.

In *New York*, domestic corporations and foreign corporations doing business in the state, excepting savings banks and institutions for saving, life insurance and insurance companies, banks and foreign insurance companies, and mining and manufacturing companies doing business in the state, not including gas or trust companies, shall pay to the state by way of a tax on their business or franchise, an annual tax of a quarter of a mill on the par value of the stock for each one per cent. dividend declared during the year, if it be a six per cent. dividend or over. If less than six per cent., then the tax is a mill-and-a-half on the actual value of all the shares of stock. *New York Laws* 1881, ch. 542; supplemented by *Laws* 1882, ch. 151, and 1885, ch. 501. It has been held by the state courts that these statutes do not

violate any provision of the constitution of the *United States*. *People v. Horn Silver Min. Co.*, 105 N. Y. 76; 18 Am. & Eng. Corp. Cas. 210; *People v. Gold, etc.*, Tel. Co., 98 N. Y. 67; *People v. Equitable Trust Co.*, 96 N. Y. 387. The Law of 1881 repeals § 3, Laws 1853, ch. 473, in so far as that enactment provides for the taxation of corporations for state purposes, *People v. Gold, etc.*, Tel. Co., 98 N. Y. 68, *aff'd* 32 Hun (N. Y.) 494; but it does not operate to repeal Laws 1849, ch. 178, which exact license fees from insurance agents. *Exempt Fireman's Fund v. Roome*, 29 Hun (N. Y.) 391, 398. The tax is levied upon the franchise or privilege of being a corporation and doing business as such within the state, and not upon the property of the corporation. *People v. Home Ins. Co.*, 92 N. Y. 328; 3 Am. & Eng. Corp. Cas. 363. See also *People v. Equitable Trust Co.*, 96 N. Y. 387. It is payable annually, not for the past, but for the future enjoyment of the franchise. *People v. Albany Ins. Co.*, 92 N. Y. 458; 1 Am. & Eng. Corp. Cas. 466. The whole capital of a foreign corporation, and not merely the capital employed within the state, is subject to the tax. *People v. Horn Silver Min. Co.*, 105 N. Y. 76; 18 Am. & Eng. Corp. Cas. 210; *People v. Equitable Trust Co.*, 96 N. Y. 387.

The remedy conferred by the statute upon the state is not exclusive; and, accordingly, the receiver of the property of an insolvent corporation may be compelled to pay the tax out of the funds in his hands, by an order of the court, entered upon the application of the attorney general. *Central Trust Co. v. New York City, etc.*, R. Co., 110 N. Y. 250, *rev'd* 47 Hun (N. Y.) 589; 35 Am. & Eng. R. Cas. 9.

A corporation organized under the laws of another state, which has officers in *New York*, holds its annual meetings of directors there, declares and pays its dividends there, and whose produce is all sent there for disposal, does business within the state, within the meaning of the act, and is subject to taxation, although its mines should be in another state and the greater part of its business transacted there. But the provision of section 3, excepting from the operation of the statute, manufacturing or mining corporations carrying on manufacture, or mining ores within the state, applies only to manufacturing corporations carrying on manufacture within the state. Hence,

a corporation which is engaged in mining outside of the state, which partially refines its ore before bringing it into the state, and delivers such partially refined metal to the *United States* assay office in New York city, is not a manufacturing corporation within the exception. *People v. Horn Silver Min. Co.*, 105 N. Y. 76; 18 Am. & Eng. Corp. Cas. 210; *aff'd* in 143 U. S. 305.

A company engaged in collecting, storing, and selling ice, is not a manufacturing corporation within the exception. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181; 9 Am. & Eng. Corp. Cas. 418.

The provision of the statute, that corporations taxed under the act shall be exempt from other taxation for state purposes, except upon real estate, has reference only to general taxes levied for state purposes, and does not relieve a foreign corporation from the operation of *New York* Laws 1875, ch. 60, which imposes upon any corporation organized in another state, the same tax that such state imposes on *New York* corporations doing business within its limits. *People v. Fire Assoc.*, 92 N. Y. 311; 1 Am. & Eng. Corp. Cas. 1; 44 Am. Rep. 380. See also *People v. Davenport*, 91 N. Y. 574; 1 Am. & Eng. Corp. Cas. 475; *Monroe Sav. Bank v. Rochester*, 37 N. Y. 365.

In *North Carolina*, see *Wilmington, etc., R. Co. v. Com'rs of Brunswick*, 72 N. Car. 10; *Wilmington R. Bridge Co. v. New Hanover*, 72 N. Car. 15; *Richmond, etc., R. Co. v. Brogden*, 74 N. Car. 707; *Belo v. Forsyth Co.*, 82 N. Car. 417; 33 Am. Rep. 688; *Worth v. Wilmington, etc., R. Co.*, 89 N. Car. 305; 13 Am. & Eng. R. Cas. 286; 45 Am. Rep. 679.

In *Pennsylvania*, see *Philadelphia Contributionship, etc. v. Com.*, 98 Pa. St. 48; *Com. v. Standard Oil Co.*, 101 Pa. St. 127.

In *Tennessee*, the franchises and privileges granted to savings banks are taxable as personal property. *Tennessee Acts* 1889, p. 152.

In *Vermont*, all state taxes are raised by a tax on the property, business, or corporate franchises of railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car and transportation, sleeping car, savings bank and trust companies, and other corporations. *Acts* 1882, *Vermont Act*, no. 1; *Acts* 1890, pp. 6, 15. Railroads, and steamboat and car transportation companies, may pay a per cent. of the gross

laid, the only limitation upon the exercise of the power to tax is the discretion of the legislature.<sup>1</sup>

c. MEASUREMENT OF FRANCHISE TAXES.<sup>2</sup>—Franchise taxes may be measured by dividends;<sup>3</sup> by the amount of the capital stock;<sup>4</sup> by the extent of the business transacted;<sup>5</sup> by the net earnings;<sup>6</sup> by the gross receipts;<sup>7</sup> by the average amount of

earnings in lieu of this tax. Acts 1890, *Vermont*, pp. 9, 11. None of these corporations is taxed locally, on property used in carrying on its business. Acts 1890, *Vermont*, p. 15.

**Taxable for Benefits.**—A franchise can be assessed for benefits from public improvements, only when the benefits are direct and immediate. *Bridgeport v. New York*, etc., R. Co., 36 Conn. 255; 4 Am. Rep. 63.

**Lien for Franchise Tax.**—A franchise tax is not a lien on any specific property of the corporation, except by express statutory provision, 2 Dillon Munic. Corp., § 821; *Tompkins v. Little Rock*, etc., R. Co., 18 Fed. Rep. 348; yet the state has a paramount right to collect it from the corporation's receiver, before he disposes of money in his hands. *Central Trust Co. v. New York City*, etc., R. Co., 110 N. Y. 250; 35 Am. & Eng. R. Cas. 9. In *Illinois*, it is held that franchises are taxed as personal property, and as such, the tax thereon does not become a lien upon the real estate of the owner, until the collector charges it on the real estate. *Belleville Nail Co. v. People*, 98 Ill. 939; *Cooper v. Corbin*, 105 Ill. 231; 13 Am. & Eng. Corp. Cas. 394.

1. *Minot v. Philadelphia*, etc., R. Co., 18 Wall. (U. S.) 231; *California v. Pacific R. Co.*, 127 U. S. 1; 33 Am. & Eng. R. Cas. 451.

This is true, because in those states having constitutional provisions requiring equality in the taxation of property, it is uniformly held that such provisions do not abridge or apply to the legislative power of indirect taxation by taxes on franchises, privileges, trades, and occupations. *Cooley on Taxation* 176, and cases there cited; *State Board of Assessors v. Central R. Co.*, 48 N. J. L. 146; *Standard Underground Cable Co. v. Atty. Gen'l*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394. See also *Gleason v. McKay*, 134 Mass. 424, holding that a franchise tax does not have to be proportional.

2. A franchise tax upon a corporation may be graduated or measured by an appraisal of the whole, or any por-

tion, of the corporate property, without thereby making it a property tax. Possessing the power to impose a franchise tax to any amount it deems proper, the legislature may measure the amount by any standard it pleases. *State v. Maine Cent. R. Co.*, 74 Me. 376.

3. *New York Rev. St.* 1890, p. 3011, § 335; *People v. Albany Ins. Co.*, 92 N. Y. 458; 1 Am. & Eng. Corp. Cas. 466; *People v. Home Ins. Co.*, 92 N. Y. 328; 3 Am. & Eng. Corp. Cas. 363; *Phoenix Iron Co. v. Com.*, 59 Pa. St. 104. In this case it was held that a company paying such a tax, and none specifically on dividends, was liable under the general law of the state to a tax on net earnings. See also *infra*, this title, *Dividend Tax*.

4. *Com. v. Lancaster Sav. Bank*, 123 Mass. 495; *Carbon Iron Co. v. Carbon Co.*, 39 Pa. St. 251. And see *Farmers' Bank v. Com.*, 6 Bush (Ky.) 127. See also *infra*, this title, *Taxability of Capital Stock*.

5. *Com. v. Lancaster Sav. Bank*, 123 Mass. 495.

6. In *Philadelphia Contributionship*, etc. v. Com., 98 Pa. St. 48, the court, by Sterrett, J., said: "Perhaps no standard or measure of taxation can be adopted that will operate more justly and equitably than a per centum on net earnings or income." See also *Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503; *State v. Central Pac. R. Co.*, 10 Nev. 47; *Atlantic*, etc., R. Co. v. *Mecklenburg Co.*, 87 N. Car. 129; *Belo v. Forsythe Co.*, 82 N. Car. 415; 33 Am. Rep. 688; *Richmond*, etc., R. Co. v. *Alabama*, 84 N. Car. 504; 7 Am. & Eng. R. Cas. 339; *Wilmington*, etc., R. Co. v. *Brunswick*, 72 N. Car. 10; *Richmond*, etc., R. Co. v. *Brogden*, 74 N. Car. 707. See also *infra*, this title, *Income Tax—Net Income*.

7. *Philadelphia*, etc., R. Co. v. *Pennsylvania*, 15 Wall. (U. S.) 284; *State v. Philadelphia*, etc., R. Co., 45 Md. 379; 24 Am. Rep. 511; *People v. Mayor*, etc., of *Brooklyn*, 6 Barb. (N. Y.) 209. Where the corporate franchise and property are exempt from taxation, it is not competent to impose

deposits;<sup>1</sup> by the market value of the shares, less the value of real and personal property;<sup>2</sup> by the deduction of the aggregate amount of the equalized or assessed valuation of all the tangible property from the sum of the market or fair cash value of the shares of capital stock and the market or fair cash value of the debt (exclusive of debt for current expenses);<sup>3</sup> by the amount of original stock actually paid in;<sup>4</sup> by the market value of the shares of capital stock;<sup>5</sup> by the value of life-insurance policies in effect;<sup>6</sup> by the number of tons of coal mined.<sup>7</sup>

*d.* DISTINGUISHED FROM PROPERTY TAX.—Necessity for the difficult but important distinction between those taxes which are tantamount to franchise taxes and those which are tantamount to property taxes is frequent.<sup>8</sup> No satisfactory rule for making the distinction has been established. The least unsatisfactory is that a tax according to a valuation is a tax on property, whereas a tax imposed according to nominal value or measured by some

a tax measured by gross receipts. *State v. Baltimore, etc., R. Co.*, 48 Md. 49.

In *Iowa*, a tax on railroad companies of one per cent. on gross earnings, one half to be paid to the state and the other half apportioned among the municipalities, was sustained in *Dubouque v. Chicago, etc., R. Co.*, 47 Iowa 196, and was held applicable to unincorporated owners of roads. See also *infra*, this title, *Income Tax—Gross Receipts*.

1. *Com. v. People's Five Cent. Savings Bank*, 5 Allen (Mass.) 428; *Com. v. Lancaster Savings Bank*, 123 Mass. 493; *Coite v. Society for Sav.*, 32 Conn. 173; *aff'd* in 6 Wall. (U. S.) 594. See *Com. v. Provident Inst. for Savings*, 12 Allen (Mass.) 312.

2. *Spring Valley Water Works v. Schottler*, 62 Cal. 117; *San Jose Gas Co. v. January*, 57 Cal. 614; *People v. Badlam*, 57 Cal. 594. Substantially this method was approved in *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 302; *aff'd* in 6 Wall. (U. S.) 632. See also *Com. v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75, and *Com. v. Cary Imp. Co.*, 98 Mass. 19.

3. *Porter v. Rockford, etc. Co.*, 76 Ill. 561. This is the *Illinois* method, and is approved by the *United States* Supreme Court as being as fair as any known to it. *Illinois Railroad Tax Cases*, 92 U. S. 575; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Union Trust Co. v. Weber*, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583.

4. *Portland Bank v. Apthorp*, 12 Mass. 252.

5. *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146.

6. *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161. Such a tax cannot be imposed on a copartnership, as it has no franchise or special privilege to be taxed. *Gleason v. McKay*, 134 Mass. 419.

7. *Kittanning Coal Co. v. Com.*, 79 Pa. St. 100.

8. "What is the real significance of the franchise tax? Why is it desirable that such a hard and fast line should be drawn between the property tax and the franchise tax? What is the meaning of the distinction? The answer is very plain. In the first place, according to the constitutions of several of the states, the taxes on property must be uniform. If, however, the corporation tax is held to be a franchise tax, then there is no necessity of such uniformity between the tax on individuals and that on corporations. Secondly, according to the principles of our property tax, deductions are allowed for certain classes of exempt or extra-territorial property. If the tax is a franchise tax, such exemptions cannot be claimed. Finally, if the tax is a franchise tax, many of the objections to double taxation would be removed, as we shall see in the succeeding essay. Every commonwealth imposing a franchise tax could, for instance, assess the entire capital of a corporation, although only a very small portion might be located or employed within the state. We can hence readily understand the persistence with which the corporations seek to uphold

standard of mere calculation, as contrasted with valuation, fixed by the law itself, may be a franchise tax.<sup>1</sup> The distinction has had to be made chiefly in cases pertaining to the taxation of capital stock and of bank deposits. If the tax is found to be in effect a franchise tax, that is on the corporation as such and not on the corporation's property, it clearly cannot then be complained of on the ground that the property of the corporation is otherwise taxed or is non-taxable.<sup>2</sup>

the distinction, and to have the imposition declared not a franchise, but a property tax." Edwin A. R. Seligman, 5 Political Science Quarterly 442.

1. *Com. v. Standard Oil Co.*, 101 Pa. St. 127. The difficulty has resulted largely, it is thought, from the confusion as to the meaning of "capital stock." See *infra*, this title, *Definition of Capital Stock*. "The usual and most certain test is whether the tax is upon the capital stock, *eo nomine*, without regard to its value; or at its assessed valuation in whatever it may be invested. If the former, it is a franchise tax; if the latter, a tax upon the property." *State v. Stonewall Ins. Co.*, 89 Ala. 335. This case held that a tax on capital stock was a property, not a franchise tax, and the corporation was therefore entitled to deduct, as exempt, such portion of its capital stock as was invested in state bonds.

2. A leading case on the distinction between franchise and property taxes, is *People v. Home Ins. Co.*, 92 N. Y. 328; 3 Am. & Eng. Corp. Cas. 363, which has been approved in 134 U. S. 594; 29 Am. & Eng. Corp. Cas. 575. The opinion of the *United States* Supreme Court has been interestingly criticised by Prof. Seligman in 5 Political Science Quarterly, 445. The statute in question was *New York Laws*, 1880, ch. 542, § 3, as amended by *Laws* 1881, ch. 361, which provided that the corporations subject to the provisions of the act should pay a tax upon corporate franchises or business, to be computed thus: "If the dividend or dividends made or declared by such corporation, joint-stock company or association during any year ending with the first day of November, amount to six, or more than six, per cent. upon the par value of the capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made and declared." The court said: "We have before seen that the state legislature

had an undoubted right, by virtue of its jurisdiction over corporations organized under its laws, to levy such tax upon their business and privileges, aside from all property taxation, as in its discretion it might deem just and proper in order to provide revenues for the state. Conceding this, the appellant claims that because the legislature has directed the amount of this tax to be arrived at in a particular way, *i. e.*, by requiring payment of a percentage upon declared dividends, and because such computation may be based in part upon interest derivable from funds invested in *United States* bonds, such method necessarily invalidates the tax to the extent of dividends accrued from the capital so invested.

"We are unable to see why this precise proposition has not been determined adversely to the appellant, both by this court and by the Supreme Court of the *United States*. The question was substantially involved in *Monroe Sav. Bank v. Rochester*, 37 N. Y. 365. . . . In *Society for Sav. v. Coite*, 6 Wall. (U. S.) 594; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Hamilton Co. v. Massachusetts*, 6 Wall. (U. S.) 633, the point here involved was also decided." The opinion quoted the language of the *United States* Supreme Court in *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611. In that case, as in *Hamilton Co. v. Massachusetts*, 6 Wall. (U. S.) 632, Justices Chase, Grier and Miller dissented, holding the tax to be on property, and not on the franchise. In the *Hamilton Company* case, their position seems unanswerable, inasmuch as the value of the exempt bonds was necessarily included, with the value of the franchise, in the value of the capital stock. This inclusion was inevitable, because machinery was the only deducted personality.

The *Pennsylvania* cases, referred to in the opinion in *People v. Home Ins. Co.*, 92 N. Y. 328; 3 Am. & Eng. Corp.

**3. Capital Stock Tax**—*a.* DEFINITION OF CAPITAL STOCK.—The phrase "capital stock," as used in revenue laws, means a unit comprising the whole or a part of the property of the cor-

Cas. 363, are approved in *Com. v. Standard Oil Co.*, 101 Pa. St. 119 (cited with approval in *Fox's Appeal*, 112 Pa. St. 354; 14 Am. & Eng. Corp. Cas. 356), where it was held that, under the application of the test, the tax laid by § 4, of the *Pennsylvania* Act of May 1st, 1868, P. L. 108, was a property, not a franchise, tax. The section is as follows: "The capital stock of all companies . . . incorporated by . . . this commonwealth, or . . . any other state, and lawfully doing business in this commonwealth, or that may be hereafter incorporated . . . shall be subject to and pay a tax into the treasury of the commonwealth annually, at the rate of one-half mill for each one per cent, of dividend made or declared . . . then three mills upon a valuation of the capital stock . . . made in accordance with the provision of the second section."

Among the few states that tax the deposits of savings banks, the decisions are almost uniform that the tax is a franchise tax on the corporation, and not a tax on the corporation's property. *Connecticut, Maine, Maryland*, and *Massachusetts* accept this view. *State v. Central Sav. Bank*, 67 Md. 290; *Coite v. Society for Savings*, 32 Conn. 173; *aff'd* in 6 Wall. (U. S.) 594; *Com. v. Lancaster Sav. Bank*, 123 Mass. 493; *Jones v. Winship Sav. Bank*, 66 Me. 242. *New Hampshire* has taken the contrary view. *Bartlett v. Carter*, 59 N. H. 105.

See generally, on franchise, as contrasted with property taxes, the following: *Bank of Commerce v. New York*, 2 Black (U. S.) 620; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, discussed in *Angell & Ames on Private Corporations* (11th ed.), §§ 465-470, and in *Burroughs on Taxation* (ed. 1877), § 85; *People v. Com'rs of Taxes*, etc., 2 Wall. (U. S.) 200; *First Nat. Bank v. Kentucky*, 9 Wall. (U. S.) 353; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206; *Illinois Railroad Tax Cases*, 92 U. S. 598; *Mercantile Nat. Bank v. Mayor, etc., of N. Y.*, 121 U. S. 158; 18 Am. & Eng. Corp. Cas. 92. See also *Lehigh Coal, etc., Co. v. Northampton Co.*, 8 W. & S. (Pa.) 334; *Saving Fund v. Yard*, 9 Pa.

St. 359; *New York, etc., R. Co. v. Sabbin*, 26 Pa. St. 242; *West Chester Gas Co. v. Chester Co.*, 30 Pa. St. 232; *Carbon Iron Co. v. Carbon Co.*, 39 Pa. St. 251; *Lackawanna Iron, etc., Co. v. Luzerne Co.*, 42 Pa. St. 424; *Phoenix Iron Co. v. Com.*, 59 Pa. St. 104; *Erie R. Co. v. Com.*, 66 Pa. St. 84; 5 Am. Rep. 351; *Lackawanna Co. v. First Nat. Bank*, 94 Pa. St. 221; *Coatesville Gas Co. v. Chester Co.*, 97 Pa. St. 476; *Philadelphia Contributionship, etc. v. Com.*, 98 Pa. St. 48; *Bank of Utica v. Utica*, 4 Paige (N. Y.) 399; *People v. Niagara Co.*, 4 Hill (N. Y.) 20; *Farmers' L. & T. Co. v. Mayor, etc., of N. Y.*, 7 Hill (N. Y.) 261; *British Commercial L. Ins. Co. v. Com'rs of Taxes*, 28 How. Pr. (N. Y.) 41; *Carpenter v. New York, etc., R. Co.*, 5 Abb. Pr. (N. Y.) 277; *International L. Assur. Soc. v. Com'rs of Taxes*, 28 Barb. (N. Y.) 318; *Mutual Ins. Co. v. Erie Co.*, 4 N. Y. 442; *Bank of Commonwealth v. Com'rs of Taxes*, 23 N. Y. 220; *People v. Ferguson*, 38 N. Y. 91; *State v. Albany F. Ins. Co.*, 92 N. Y. 458; 1 Am. & Eng. Corp. Cas. 466; *Drake v. Watson*, 4 Day (Conn.) 37; *Mutual Ins. Co. v. Erie Co.*, 4 N. Y. 448; *New Haven v. City Bank*, 31 Conn. 106; *Osborn v. New York, etc., R. Co.*, 40 Conn. 491; *Nichols v. New Haven, etc., Co.*, 42 Conn. 105; *Belo v. Forsyth Co.*, 82 N. Car. 415; 33 Am. Rep. 688; *Newark City Bank v. The Assessor*, 30 N. J. L. 16; *King v. Patterson, etc., R. Co.*, 29 N. J. L. 504; *Mechanics' Bank v. Bridges*, 30 N. J. L. 112; *State v. Haight*, 34 N. J. L. 319; *Holly Springs Sav., etc., Co. v. Marshall Co.*, 52 Miss. 281; 24 Am. Rep. 668; *State Bank v. Brackenridge*, 7 Blackf. (Ind.) 395; *State v. Hamilton*, 5 Ind. 310; *Floyd Co. v. New Albany, etc., R. Co.*, 11 Ind. 570; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380; *Whitney v. Madison*, 23 Ind. 331; *Illinois Mut. Ins. Co. v. Peoria*, 29 Ill. 180; *Chicago, etc., R. Co. v. Siders*, 88 Ill. 320; *Quincy R. Bridge Co. v. Adams Co.*, 88 Ill. 615; *Chicago, etc., R. Co. v. Raymond*, 97 Ill. 212; 13 Am. & Eng. R. Cas. 663; *Farmers' Bank v. Com.*, 6 Bush (Ky.) 127; *Frazer v. Seebern*, 15 Ohio St. 614; *Bibb Co. v. Central R. Co.*, 40 Ga. 646; *Gordon v. Mayor, etc., of Baltimore*, 5 Gill (Md.) 231; *Com. v. People's Five*

poration.<sup>1</sup> There is no uniformity in the decisions as to the amount or character of the property comprised in the unit. The

Cents Sav. Bank, 5 Allen (Mass.) 428; Com. v. Lowell Gas Light Co., 12 Allen (Mass.) 75; Com. v. Cary Imp. Co., 98 Mass. 19; Com. v. Berkshire L. Ins. Co., 98 Mass. 28; Manufacturers' Ins. Co. v. Loud, 99 Mass. 146.

1. See CAPITAL, vol. 2, p. 727; STOCK, vol. 23, p. 586.

The following discrimination is from the note following State Bank of Virginia v. City of Richmond, 79 Va. 113; 11 Am. & Eng. Corp. Cas. 644: "The phrase 'capital stock' or 'capital,' as used in revenue laws, has a meaning quite distinct from its technical meaning of 'the sum of all the rights and duties of its stockholders.' (Lowell, Transfer of Stock, p. 5.) In its strict technical sense the phrase stands for two intangible things: first, the right of the company to compel all stockholders to contribute to the corporate fund, and, second, the combined right of all the stockholders against the company to the profits of the corporation and to its property on dissolution. The phrase as employed in revenue laws seldom if ever has this meaning. It is generally, perhaps always, used to include the whole or a part of the property, assets, or estate of the corporation, taken collectively or as a unit. This use of the phrase 'capital stock,' or 'capital,' arose from confounding the funds collected from stockholders, or the property in which such funds were invested, with the obligation on the part of the stockholders to pay or contribute the funds. The phrase having been used to designate the property representing the capital when paid up, came to be used to include sometimes more and sometimes less than this property. . . . It is thought that this distinction of capital stock as a third kind of property, distinct from the franchise and other corporate property, is erroneous. Capital stock is a mere phrase used to designate as a unit or collectively more or less of the corporate property."

In *People v. Coleman*, 126 N. Y. 437, the court, by Finch, J., said: "Now, it is certain that the two things are neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money

or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend-earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both; but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition; so that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, and its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality; for it is a business photograph of all the corporate possessions and possibilities. A company also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even

more. And thus the two things, the company's capital stock and the shareholder's capital stock, are essentially and in every material respect different. They differ in their character, in their elements, in their ownership, and in their value. How important and vital the difference is, became evident in the effort by the state authorities to tax the property of the national banks. The effort failed, and yet the share stock in the ownership of individuals was held to be taxable as against them. The corporation and its property were shielded, but the shareholders and their property were taxed."

Capital stock "is usually the representative of the property of the corporation, and the property of the corporation is the representative of the capital stock, and for purposes of taxation it is represented by whatever it is invested in." 1 *Desty on Taxation*, p. 351. However, the value of the capital stock is not necessarily equivalent to the value of the property. "The market value of the shares of a corporation," etc., does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property, or it may fall very far short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enter into the market value of the shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges, and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a corporation, on its capacity to avail itself profitably of the franchise, and on the mode in which it uses its privileges as a corporate body, which materially influence and often control its market value. *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 303.

"From the economic point of view, capital stock is not necessarily identical with the property of a corporation. In the first place there is the question of the market or par value of the stock. Some of the commonwealths, as we know, tax corporations on the amount,

*i. e.*, the par value, of the capital stock. Yet manifestly, where the market value of the stock may be double or half the par value, it cannot be maintained that the latter is identical with or an index to the value of the property. In no sense can capital stock at its par value be declared equivalent to the whole property. But even if we take the market value of the stock, we are not in a much better condition. For many of our corporations, especially railroads, are created on the proceeds of the bonds. In such cases, although the property may be very great, the profits are devoted mainly to meeting the interest on the bonded debt. There may be no dividends, and the value of the stock therefore may be very slight; yet the property which produces these profits may be enormous. Evidently the capital stock and the whole property are not identical. But we may go still farther. Even in the case of corporations which have no bonded debt, if the property does not pay good dividends, the capital stock even at its market value is no index of the property. A model-dwelling company may have property worth a million dollars; yet, if it is so managed as to pay no dividends, the stock will sell in the market for a very small sum. The value of this depreciated stock is evidently not the same as that on the company's real property. They are not interchangeable terms. Thus from whatever point of view we regard it, capital stock, economically speaking, is not identical with the corporate property. A tax on capital stock is not a tax on the whole property." Edwin A. R. Seligman, 5 *Political Science Quarterly*, 438.

**"Capital Stock Employed in the State."**—Under a statute prescribing as the basis of taxation of foreign corporations "the amount of capital stock employed in this state," the value of all goods on hand, and property and money on deposit and employed in business, in the state, may enter into the calculation of the amount, but not sales made by samples at their business offices in the state, to persons out of the state, with delivery from their factory located in another state. *People v. Wemple*, 133 N. Y. 323, reversing 16 N. Y. Supp. 602.

**Capital Stock—Shares of Stock.**—In *State v. Home Ins. Co.* (Tenn. 1892), 19 S. W. Rep. 1042, it was held that when the charter of a corporation



phrase has been defined as the property of the corporation exclusive of its surplus and franchise;<sup>1</sup> as "another property" than the franchise;<sup>2</sup> as all the property, tangible and intangible, including the franchise;<sup>3</sup> as the money or property put into the corporate fund by subscribers;<sup>4</sup> as not only stock subscriptions, but all the actual tangible property;<sup>5</sup> as the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums, or, if losses have been incurred, then it is the residue after deducting such losses;<sup>6</sup> and as the money paid or authorized or required to be paid in as the basis of the business of a bank, and the means of conducting its operations.<sup>7</sup>

b. TAXABILITY OF CAPITAL STOCK.—Capital stock is taxable to the corporation,<sup>8</sup> and in many of the states is taxed after

provides that there shall be a certain state tax "on the amount of capital stock actually paid," its capital stock is exempt from further taxation, but an *ad valorem* tax may be imposed upon its shares of stock.

See generally, as to meaning, in revenue laws, of the phrase "capital stock," *San Francisco v. Mackey*, 21 Fed. Rep. 539; *People v. Badlam*, 57 Cal. 594; *Coatesville Gas Co. v. Chester Co.*, 97 Pa. St. 476; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 558; *Savings Bank v. New London*, 20 Conn. 117; *Bridgeport v. Bishop*, 33 Conn. 187; *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Rome R. Co. v. Rome*, 14 Ga. 275; *Augusta v. Georgia R., etc., Co.*, 26 Ga. 651; *Conwell v. Connersville*, 15 Ind. 150; *Bangor, etc., R. Co. v. Harris*, 21 Me. 533; *Cumberland Marine R. Co. v. Portland*, 37 Me. 444; *Gordon v. Mayor, etc., of Baltimore*, 5 Gill (Md.) 231; *Mayor, etc., of Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; 48 Am. Dec. 531; *Tax Cases of 1841*, 12 Gill & J. (Md.) 117; *Middlesex R. Co. v. Charlestown*, 8 Allen (Mass.) 330; *Salem Iron Factory v. Danvers*, 10 Mass. 515; *Amesbury Woolen, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199; *Mutual Ins. Co. v. Erie Co.*, 4 N. Y. 442; *Smith v. Exeter*, 37 N. H. 556; *Fitchburg R. Co. v. Prescott*, 47 N. H. 62; *Bank of Cape Fear v. Edwards*, 5 Ired. (N. Car.) 516; *New Orleans Gas Light Co. v. Board of Assessors*, 31 La. Ann. 477; *Chicago, etc., R. Co. v. Siders*, 88 Ill. 324; *Quincy R. Bridge Co. v. Adams Co.*, 88 Ill. 621; *Belo v.*

*Forsyth Co.*, 82 N. Car. 415; 33 Am. Rep. 688.

1. *People v. Coleman*, 126 N. Y. 437.

**Surplus Profits.**—A corporation taxable on its capital is not taxable for its surplus profits remaining on hand and undivided. *Sun Mut. Ins. Co. v. Mayor, etc., of N. Y.*, 8 Barb. (N. Y.) 454; *Mutual Ins. Co. v. Erie Co.*, 4 N. Y. 447; *People v. Board of Assessors*, 16 Hun (N. Y.) 98; *People v. Niagara Co.*, 4 Hill (N. Y.) 20; *People v. New York*, 18 Wend. (N. Y.) 605.

2. *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133.

3. *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Pacific Hotel Co. v. Lieb*, 83 Ill. 610; *New Haven v. City Bank*, 31 Conn. 109.

4. *San Francisco v. Spring Valley Water Works*, 54 Cal. 575.

5. *State v. Hamilton*, 5 Ind. 317; *Floyd Co. v. New Albany, etc., R. Co.*, 11 Ind. 570; *McKane v. State*, 11 Ind. 195; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 384; *Louisville, etc., R. Co. v. State*, 25 Ind. 181; 87 Am. Dec. 358; *Whitesell v. Northampton Co.*, 49 Pa. St. 526; *State v. Branin*, 23 N. J. L. 484.

6. *People v. Com'rs of Taxes, etc.*, 23 N. Y. 219. Undivided surplus earnings were held not to be included in capital by the court in *Mechanics', etc., Bank v. Townsend*, 5 Blatchf. (U. S.) 315.

7. *Farrington v. Tennessee*, 95 U. S. 686; *People v. Com'rs of Taxes*, 2 Wall. (U. S.) 208; *Jones v. Davis*, 35 Ohio St. 477.

8. *Redfield on Railways* (3d ed.), vol. 2, p. 453; *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206; *Ill-*

various methods.<sup>1</sup> No lien for capital stock taxes attaches

nois Railroad Tax Cases, 92 U. S. 578; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 209; 13 Am. & Eng. Corp. Cas. 356; Western Union Tel. Co. v. Atty. Gen'l, 125 U. S. 552; Mohawk, etc., R. Co. v. Clute, 4 Paige (N. Y.) 384; Oswego Starch Factory v. Dollo-way, 21 N. Y. 449; People v. Com'r of Taxes, 23 N. Y. 192; Bank of Republic v. Hamilton Co., 21 Ill. 54; People v. Bradley, 39 Ill. 144; Porter v. Rockford, etc., R. Co., 76 Ill. 561; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; New Orleans City Gas Light Co. v. Board of Assessors, 31 La. Ann. 475.

When a corporation is organized in a state, its capital stock is taxable in that state, though the owners are non-residents. Faxton v. McCosh, 12 Iowa 527.

Capital stock may be taxed as to amount, by a prior act, and as to the rate, by a subsequent act, and the latter is not a repeal of the former. Com. v. Erie R. Co., 98 Pa. St. 127.

Taxation of the excess in value of the capital stock of a corporation, over that of its tangible property subjected to taxation, is not prohibited by a statutory provision that when the tangible property of a corporation is listed and assessed for taxation, its shares of capital stock shall not be. Hyland v. Central Iron, etc., Co., 129 Ind. 68.

**Decision of Auditor-General—Pennsylvania.**—As to the power of the Auditor-General and State Treasurer to correct the decision of their predecessors, that a corporation is not liable, under its charter, to a tax on its capital stock, see Com. v. Pennsylvania Co., 145 Pa. St. 266.

**Personal Property.**—Capital stock is personal property, and taxable as such. St. Charles Street R. Co. v. Assessors, 31 La. Ann. 852; Louisiana Oil Co. v. Assessors, 34 La. Ann. 618; State v. Creveling, 39 N. J. L. 465; State v. Jersey City, 45 N. J. L. 480; St. Louis Mut. L. Ins. Co. v. Charles, 47 Mo. 462; Jones v. Davis, 35 Ohio St. 474; State v. Morgan, 108 Ill. 326; Quincey R. Bridge Co. v. Adams Co., 88 Ill. 615; State Bank v. Richmond, 79 Va. 113; People v. Brooklyn Assessors, 16 Hun (N. Y.) 196; Whittaker v. Brooks (Ky. 1890), 13 S. W. Rep. 355; U. S. v. Marquette, etc., R. Co., 17 Fed. Rep. 719; State v. Hornbaker, 41 N. J. L. 519; Watson's Ford Bridge Co. v. Com.,

117 Pa. St. 265; Com. v. Erie R. Co., 98 Pa. St. 127; McKeen v. Northampton County, 49 Pa. St. 519; Whitesell v. Northampton County, 49 Pa. St. 526; Kansas Mut. L. Assoc. v. Hill, 51 Kan. 636; People v. Tax Com'rs, 28 Hun (N. Y.) 261; People v. Home Ins. Co., 29 Cal. 533; Maltby v. Reading, etc., R. Co., 52 Pa. St. 140; Life Assoc. of America v. Board of Assessors, 49 Mo. 512.

1. In *Alabama* and *Nebraska*, the capital stock not invested in property otherwise listed, is taxed against the corporation at its market value. *Alabama* Civil Code, 1887, § 453 (8), 478; *Nebraska* Comp. Stat. 1887, pp. 590, 591.

In *Delaware*, a tax of one-half of one per cent. of the cash value of the capital stock is assessed against the corporation, in addition to specific taxes on property, and a tax on earnings. *Delaware* Code 1874, p. 42.

In *Georgia*, all corporations excepting banks, where there is not a different mode of taxation specially prescribed, pay the same rate per cent. upon the whole amount of their capital stock paid in, as is levied on other capital. *Georgia* Code 1882, § 816.

In *Illinois*, the capital stock of all corporations incorporated by the state is assessed at its value, including the franchise less the assessed value of its tangible property. *Illinois* Rev. Stat. 1889, ch. 120, §§ 1, 3. This law, which further provides that the capital stock of certain classes of corporations shall be assessed by the state board of equalization and of other corporations, by the local assessors, is not in conflict with *Illinois* Const., art. 9, § 1, which empowers the legislature to tax "persons or corporations owning or using franchises or privileges, in such manner as it shall direct by general law, uniform as to the class upon which it operates." *Sterling Gas. Co. v. Higby*, 134 Ill. 557; 32 Am. & Eng. Corp. Cas. 348; *Ottawa Gas Light, etc., Co. v. People* (Ill. 1891), 27 N. E. Rep. 924.

In *Indiana*, corporations not taxed by special provisions of the statute, are taxed on all property, including franchises and excess of capital stock over property otherwise taxed. *Indiana* Acts 1891, p. 203, § 12.

In *Kansas*, the capital stock of corporations is assessed at its true value

to the realty of the taxed corporation.<sup>1</sup> As elsewhere explained in this article, the tax, if laid on the capital stock at its par value, is generally held to be in effect a charge on the franchise; if laid on the capital stock at an assessed value, it is a property tax.<sup>2</sup> If it appears that the latter has been laid, exemption must be made of so much of the capital stock as is invested in non-taxable property.<sup>3</sup>

in money, less the value of corporate realty and personalty in the state. *Kansas* Gen. Stat. 1889, § 6858.

In *Michigan*, the capital stock of corporations shall not be taxed as such. *Michigan* Acts 1891, p. 173.

In *Minnesota*, the capital stock and franchises of corporations, except as otherwise provided, shall be listed for taxation where the principal office of the corporation is located. *Minnesota* Stat. 1891, § 1432.

In *Mississippi*, corporations are taxed on their capital stock at their principal place of business. *Mississippi* Rev. Code, § 473.

In *Missouri*, capital stock is taxed as personalty. *Missouri* Rev. Stat. 1889, § 7510. Stock in banks and insurance companies is not taxed to the owner, but is returned by the president of the company. *Missouri* Acts 1891, p. 195. Not only the original, but also the subsequently acquired, capital stock of a corporation, is liable to taxation. *St. Louis Mut. Ins. Co. v. Charles*, 47 Mo. 462.

In *New Jersey*, manufacturing, mining, etc., corporations, organized under the Act of April 7th, 1875, are taxed on their capital stock at its actual value, and on their surplus. *Sup.* to *New Jersey* Rev. 1886, p. 161.

In *New York*, the capital stock, and surplus exceeding ten per cent. of the capital, less the value of the real estate and shares of stock actually owned by the corporation in other corporations paying a tax on capital in the state, is assessed at its actual value, and is taxed in the same manner as other personal and real property. *New York* Rev. Stat. 1889 (Birdseye), p. 2954, § 19.

In *Nebraska*, the capital stock of all domestic corporations is assessed for taxation at the market value of all the shares of stock, less the assessed value of the real and personal property otherwise taxed. *Nebraska* Comp. Stat. 1887, pp. 590, 591.

In *Nevada* and *Arkansas*, capital stock is taxed as personalty. *Nevada*

Gen. Stat. 1885, § 1081; *Arkansas* Rev. Stat. 1884, § 5585.

In *Oregon*, corporations are taxed on such part of their capital stock as is liable to taxation and is not invested in real estate. *Oregon* Gen. Stat. 1887, § 2731.

In *Pennsylvania*, all corporations excepting manufacturing companies, pay a tax on their capital stock, varying from three mills on each \$1 of the actual value of the capital stock of insurance companies to eight mills on each \$1 of the par value of shares in banks. *Pennsylvania* Laws 1891, p. 238, §§ 21-25.

In *South Carolina*, corporations are taxed on their capital stock in proportion to the amount of tangible property which they have in the state, representing that capital. *South Carolina* Gen. Stat. 1882, § 194.

In *Vermont*, the statute taxing the capital stock of corporations, allows for the exemption of so much thereof as may be invested in property otherwise taxed. *Vermont* Rev. Laws, § 288. And when the stock of a corporation does not exceed in value the property which it represents, all of which is assessed to the corporation, it should not be assessed to the stockholders under the provisions of the *Vermont* statute providing for the deduction from the value of the stock, of the value of the real and personal property of the corporation represented by the stock, and itself taxed. *Willard v. Pike*, 59 Vt. 202.

1. *Cooper v. Corbin*, 105 Ill. 224; 13 Am. & Eng. Corp. Cas. 394. The capital stock tax becomes a lien on the corporation's personalty only from the issue of the warrant for its collection. *Saup v. Morgan*, 108 Ill. 326.

2. See *supra*, this title, *Distinguished from Property Tax*.

3. As to federal securities, see *People v. Com'rs of Taxes*, etc., 2 Wall. (U. S.) 200; *Bank of Commerce v. New York*, 2 Black (U. S.) 620; Monographic note, *People v. Com'rs of Taxes*, 3 Am. L. Reg. 558; *Maguire v. Board of*

c. CAPITAL STOCK OF INTERSTATE CORPORATIONS.—A corporation chartered by two states is taxable on its capital stock in each.<sup>1</sup> Farther, a state may tax such proportion of the whole capital stock of a foreign sleeping car company as the number of miles over which its cars are operated within the state bears to the whole number of miles over which its cars are operated, though such cars run into, through and out of the state.<sup>2</sup>

d. VALUATION OF CAPITAL STOCK.—The market value of the shares of stock does not alone furnish a proper basis for the valuation of the capital stock.<sup>3</sup> It may be considered, as may the indebtedness and the general condition of the corporation.<sup>4</sup>

Revenue, 71 Ala. 401; 6 Am. & Eng. Corp. Cas. 452; *Weston v. Charleston*, 2 Pet. (U. S.) 449; *People v. Com'rs of Taxes, etc.*, 2 Black (U. S.) 620; *People v. Com'rs of Taxes, etc.*, 2 Wall. (U. S.) 200; *Whitney v. Madison*, 23 Ind. 331. As to state bonds, see *State v. Stonewall Ins. Co.*, 89 Ala. 335; 8 Ry. & Corp. L. J. 308, where the court, by Clopton, J., said, in construing *Alabama Civil Code*, 1887, § 453 (9): "Regarded as a tax upon property, the question then is, whether, under the revenue law, the corporation is entitled to a deduction from the assessed value of its capital stock of such portion as is invested in the bonds of the state. It is contended that no deduction can be made under the statute, except of such portions as may be invested in property otherwise taxed. The argument is, that the capital stock includes everything in which it is invested, and that expressly excepting the portion of its investments in property otherwise taxed is the exclusion of such portions as may be invested in property non-taxable. . . . Unless a deduction from the assessed value of the capital stock of the portion invested in bonds of the state is allowed, then there exists the anomaly of taxing, in the form of capital stock, investments expressly exempted from all taxation. If a part of the money capital of an individual be invested in state bonds, it will be conceded that such part is not liable to taxation; why then should it be held that the portion of the capital of corporations so invested is taxable?"

1. *Quincy R. Bridge Co. v. Adams Co.*, 88 Ill. 615. See *INTERSTATE COMMERCE*, vol. II, p. 548; *Michigan, etc., R. Co. v. Auditor Gen'l*, 9 Mich. 448.

2. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 46 Am. & Eng. R. Cas. 236, *aff'd* 107 Pa. St. 156. From

this decision *Bradley, Field and Harlan, JJ.*, dissented, contending that it was inconsistent with the case of *State Freight Tax*, 15 Wall. (U. S.) 232.

Where a part of the capital stock of a domestic corporation represents the value of a leasehold interest in a railroad entirely without the state, the amount thereof should be deducted, in computing the valuation of the capital stock as a basis for taxation. *Com. v. Delaware, etc., R. Co.* (Pa. 1891), 22 Atl. Rep. 157; 44 Alb. L. J. 279.

3. *Van Allen v. Assessors*, 3 Wall. (U. S.) 584; *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 178. See *supra*, this title, *Definition of Capital Stock*.

4. *Indebtedness May Be Considered.*—*People v. Coleman*, 49 Hun (N. Y.) 607.

Where commissioners of taxes are to determine the assessed value of the capital stock of a corporation, the thing to be taxed is the capital of the company, and not the shares of the stockholders. Such capital and surplus must be assessed at its own value, and, when that is correctly known and determined, no other value can be substituted for it. When its amount and value are undisclosed and unknown, the assessors may consider the market value of the share stock and the general condition of the company, as indicative of surplus or deficiency, and of the probable amount of either. They may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof. Where the corporation presents to the assessors a sworn statement of its assets and liabilities, the truth of which is not questioned or doubted by the assessors, they have no discretion to assess the value of the capital stock

at a larger sum independently of the established facts. *People v. Coleman*, 126 N. Y. 433.

A leading case on this subject is *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561, in which the following rules, adopted by the state board of equalization, were under consideration: "First, the market or fair cash value of the shares of capital stock and the market or fair cash value of the debt, excluding such indebtedness for current expenses, shall be combined or added together, and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchises respectively of such companies and associations. Second, from the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property respectively of such companies and associations, such equalized or assessed valuation being taken in each case, as the same may be determined by the equalization or assessment of property by this board, and the amount remaining in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess respectively against companies and corporations now or hereafter created under the laws of this state." The foregoing rules were upheld, and the case was affirmed and the rules approved in *State Railroad Tax Cases*, 92 U. S. 578.

When the tax is upon the market value of the capital stock, evidence of the value of the shares when they have been withdrawn from the market may be ascertained from other sources; and, when they have been exchanged for securities, the value fixed upon them in the exchange is a proper basis for the assessment. *Planters' Crescent Oil Co. v. Jefferson Parish*, 41 La. Ann. 1137.

Where a bridge owned by a corporation was duly declared a county bridge, the surplus of the damages assessed over the amount of capital stock, which was divided among the stockholders, was in the nature of profits, and a proper measure of the tax upon the capital stock. *Matson's Ford Bridge Co. v. Com.*, 117 Pa. St. 265; 20 Am. & Eng. Corp. Cas. 604.

In estimating the value of the capital stock, the assessed value of the real estate should be deducted. *People v.*

*Com'rs of Taxes*, 46 How. Pr. (N. Y.) 227.

An assessment of the stock of a corporation is not illegal because its value is determined by including realty in another state in which the company has invested part of its capital. *American Coal Co. v. Alleghany Co.*, 59 Md. 187.

When the law requires the appraisal of stock to be made between the 1st and the 15th of November, at its cash value, "not less, however, than the average price for which it sold during the year," it means that the valuation shall be the November selling price, unless the average selling price during the year shall exceed that sum, in which case the latter shall govern. *Pennsylvania R. Co. v. Com.*, 94 Pa. St. 474; 13 Am. & Eng. R. Cas. 666.

The stock should be assessed at its actual, and not par, value. *People v. Com'rs of Taxes*, 64 How. Pr. (N. Y.) 405. However, an assessment at par will be valid if the evidence shows the market value to be higher than the par value. *St. Charles St. R. Co. v. Board of Assessors*, 31 La. Ann. 852.

A law making the market value the basis of assessment is constitutional. *New Orleans, etc., R. Co. v. Board of Assessors*, 32 La. Ann. 19.

In *People v. Com'rs of Taxes*, 104 N. Y. 240, it is held that in *certiorari* to correct an assessment of the capital stock of a corporation made by the commissioners of taxes, it is incumbent upon the company, before it is entitled to call upon the board to correct the assessment by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish data showing that the actual value exceeded the sum fixed by the commissioners.

**Deduction of Foreign Realty.**—In several states the value of the corporation's realty is deducted from the amount of the assessment of the capital stock. The following decisions bear on the ascertainment of the value of foreign realty for the purpose of deduction.

If the realty be situated in a foreign state, and the valuation assessed there can be ascertained, it will be adopted in *New York*, on the ground that to take the assessed value of real property in another state, where it is practicable and convenient to ascertain the facts, as the actual value, in the absence of some controlling circumstance which

Under a statute providing that in taxing certain corporations the aggregate value of the shares of the capital stock shall be taken as the basis of assessment, it was held that proposed but unissued new shares could not be included in estimating the value, although such shares are paid for and have a market value.<sup>1</sup>

4. **Income Tax**—*a.* DEFINITIONS OF INCOME, GROSS RECEIPTS, ETC.—In the subjoined note definitions of the terms "income," "gain," "earnings," "net earnings," "profits," "gross receipts," etc., are given.<sup>2</sup>

*b.* NET INCOME.—Taxes upon corporations may be proportioned to their net income.<sup>3</sup>

*c.* GROSS RECEIPTS.—Gross receipts furnish a much more gen-

shows to the contrary, is more apt to work substantial justice than any other mode. *People v. Coleman*, 52 Hun (N. Y.) 93. "But if the real estate should be in another state or country, or if for any other reason its assessed value cannot be obtained, then, as the best and nearest substitute for it, the price paid, as the presumed value, in the absence of proof, or any other standard, may be taken as the assessable value." *Dictum* in *People v. Com'rs of Taxes*, 95 N. Y. 554. See also *People v. Com'rs of Taxes*, 104 N. Y. 240.

1. *Boston, etc., R. Co. v. Com.*, 157 Mass. 68. See also *Pratt v. American Bell Teleph. Co.*, 141 Mass. 225.

2. In *Alabama* and *Pennsylvania*, it has been held that income, gain or net earnings means the whole product of the business, deducting nothing but expenses. *Montgomery Co. v. Montgomery Gas Light Co.*, 64 Ala. 269; *Com. v. Penn Gas Coal Co.*, 62 Pa. St. 241. Section 7 of the Revenue Act of 1879 (Pa.) (P. L. 112), imposes a tax on the gross receipts of railroad companies "for tolls and transportation."

In *Com. v. New York, etc., R. Co.* (Pa. 1891), 48 Am. & Eng. R. Cas. 633, the defendant was a foreign corporation operating a railroad through one of the counties of *Pennsylvania*. It leased and operated a branch railroad within *Pennsylvania*, which branch connected with the railroad of a canal company. The payments of the canal company to the defendant for the transportation by the canal company of coal over the branch road, were held not to be receipts for transportation within the meaning of the act. Said payments were, however, held to be receipts for tolls.

The *Minnesota* courts have held that "earnings" means only receipts from operation, and does not include the amount received by a railroad from another company for the right to run its trains over the road. *State v. St. Paul, etc., R. Co.*, 30 Minn. 311; 13 Am. & Eng. R. Cas. 663.

In *New York*, under a peculiarly phrased statute, it has been held that "income" means gross income, and that "profits" means gross, not clear, profits. *People v. Niagara Co.*, 4 Hill (N. Y.) 20; *People v. New York, 18 Wend.* (N. Y.) 605.

In *South Carolina*, the gross receipts of an express company upon which it is taxed, has been held not to include such sums as it collects for forwarding goods over connecting lines, as agents for such lines, nor such sums as the company are compelled to pay to the railroad and steamship companies over which it does business. *Southern Express Co. v. Hood*, 15 Rich. (S. Car.) 66; 94 Am. Dec. 141.

In *Virginia*, the net income of corporations is ascertained by "deducting from the gross receipts the costs of operation, repairs, and interest on indebtedness." *Virginia Laws of 1883-84*, ch. 450, § 20.

The interstate commerce commission distinguishes between earnings and income, by including in earnings only receipts from transportation, and designating as income the receipts from property owned but not operated. The aggregate it calls total earnings and income. Report on the Statistics of Railways in the *United States* to the Interstate Commerce Commission, 1889.

3. See *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206, where this rule is laid down.

erally adopted basis for the assessment of taxes against corporations,<sup>1</sup> and one which has been frequently approved.<sup>2</sup>

*d. INCOME FROM INTERSTATE COMMERCE.*—The imposition of a tax upon gross receipts from the transportation of persons or property between different states, is unconstitutional, because a regulation of interstate commerce, which the states are prohibited from imposing.<sup>3</sup>

1. The following states tax corporations on their gross receipts: *Arkansas, Connecticut, Delaware, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.*

2. State Tax on Railroad Gross Receipts, 15 Wall. (U. S.) 284; State *v. St. Paul, etc.*, R. Co., 30 Minn. 311; 13 Am. & Eng. R. Cas. 663; Com. *v. Buffalo, etc.*, R. Co., 2 Pearson (Pa.) 376; State *v. Philadelphia, etc.*, R. Co., 45 Md. 361; Philadelphia, etc., R. Co. *v. Com.*, 4 Brew. (Pa.) 222; Buffalo, etc., R. Co. *v. Com.*, 3 Brew. (Pa.) 386; Kneeland *v. Milwaukee*, 15 Wis. 454; Little Miami, etc., R. Co. *v. U. S.*, 108 U. S. 277; 13 Am. & Eng. R. Cas. 330; State *v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; State *v. St. Paul, etc.*, R. Co., 30 Minn. 311; 13 Am. & Eng. R. Cas. 663; Worth *v. Wilmington, etc.*, R. Co., 89 N. Car. 291; 13 Am. & Eng. R. Cas. 286; 45 Am. Rep. 679; State Treasurer *v. Auditor Gen'l*, 46 Mich. 224; 13 Am. & Eng. R. Cas. 296; Fargo *v. Auditor Gen'l*, 57 Mich. 598; 22 Am. & Eng. R. Cas. 216; Fargo *v. Stevens*, 121 U. S. 230; 31 Am. & Eng. R. Cas. 452; Sioux City, etc., R. Co. *v. U. S.*, 110 U. S. 205; 17 Am. & Eng. R. Cas. 480; note following Morgan's Louisiana, etc., R., etc., Co. *v. Board of Reviewers* (La.), 33 Am. & Eng. R. Cas. 448; State *v. St. Paul Union Depot Co.*, 42 Minn. 142; 41 Am. & Eng. R. Cas. 636; Baltimore Union Pass. R. Co. *v. Mayor, etc.*, of Baltimore, 71 Md. 405; 41 Am. & Eng. R. Cas. 646; note following Detroit *v. Detroit City R. Co.*, 76 Mich. 421; 39 Am. & Eng. R. Cas. 542; State *v. District Court* (Minn. 1893), 55 N. W. Rep. 816; Fargo, etc., R. Co. *v. Brewer* (N. Dak. 1892), 53 N. W. Rep. 177.

A tax on the receipts of a corporation for transportation only, is not an income tax. Philadelphia, etc., Steamship Co. *v. Pennsylvania*, 122 U. S.

326. But see Osborne *v. Mobile*, 16 Wall. (U. S.) 481.

Taxes assessed upon the gross earnings of a railroad are taxes upon the property of such road, within the rule which requires the lessor, and not the lessee, to pay such taxes. Vermont, etc., R. Co. *v. Vermont Cent. R. Co.*, 63 Vt. 1; 46 Am. & Eng. R. Cas. 646.

A tax upon a railroad's gross receipts cannot be evaded by the fact that the railroad is a foreign corporation and has sent such receipts to its home office, so that they are not physically within Pennsylvania. Delaware, etc., Canal Co. *v. Com.*, 2 Inters. Com. Rep. 222; 1 L. R. A. 232.

A tax on gross receipts simply fixes a basis for assessment or valuation, and is in reality a tax on the franchise, and therefore constitutional. Society for Savings *v. Coite*, 6 Wall. (U. S.) 594; Provident Inst. *v. Massachusetts*, 6 Wall. (U. S.) 611; State Tax on Railroad Gross Receipts, 15 Wall. (U. S.) 284; State *v. Philadelphia, etc.*, R. Co., 45 Md. 361; 24 Am. Rep. 511. But see Philadelphia, etc., Steamship Co. *v. Pennsylvania*, 122 U. S. 326.

3. See INTERSTATE COMMERCE, vol. 11, p. 548. Some of the earlier cases on the taxation of gross receipts from interstate commerce are: Southern Express Co. *v. Hood*, 15 Rich. (S. Car.) 66; 94 Am. Dec. 141; Walcott *v. People*, 17 Mich. 68; Western Union Tel. Co. *v. Mayer*, 28 Ohio St. 531; Insurance Co. of N. A. *v. Com.*, 87 Pa. St. 173; 30 Am. Rep. 352. The leading case was State Tax on Gross Receipts, 15 Wall. (U. S.) 284, until the decision of Philadelphia, etc., S. S. Co. *v. Com.*, 122 U. S. 326, in which it was held that the imposition of a tax, under the acts of Pennsylvania passed March 20th, 1877, and June 7th, 1879, upon a steamship company incorporated under the laws of Pennsylvania, upon the gross receipts of such company, derived from the transportation of persons and property by sea between different states, and to and from foreign countries, is a regulation of interstate and foreign commerce, in conflict with the exclu-

sive powers of Congress under the constitution of the *United States*. The court, by Bradley, J., said: "The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the constitution to Congress. The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels, which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. . . . If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning. . . . If this case (*State Freight Tax*, 15 Wall. (U. S.) 232) stood alone, we should have no hesitation in saying that it would entirely govern the one before us; for, as before said, a tax upon fares and freights received for transportation is virtually

a tax upon the transportation itself. But at the same time that the case of *State Freight Tax* was decided, the other case referred to, namely, that of *State Tax on Railway Gross Receipts*, was also decided, and the opinion was delivered by the same member of the court. *Philadelphia, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 281. This was also a case of a tax imposed upon the *Reading Railroad Company*. It arose under another act of assembly of *Pennsylvania* passed in February, 1866, by which it was enacted that, 'in addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this commonwealth, and not liable to the tax upon income under existing laws, shall pay to the commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually.' Under this statute the accounting officers of *Pennsylvania* stated an account against the *Reading Railroad Company* for tax on gross receipts of the company for the half year ending December 31st, 1867. These receipts were derived partly from the freight of goods transported wholly within the state, and partly from the freight of goods exported to points without the state, which latter were discriminated from the former in the reports made by the company. It was the tax on the latter receipts which formed the subject of controversy. The same line of argument was taken at the bar as in the other case. This court, however, held the tax to be constitutional. The grounds on which the opinion was based, in order to distinguish this case from the preceding one, were two: *First*, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, and incorporated into the general mass of its property, possibly expended in improvements, or otherwise invested. The case is likened, in the opinion, to that of taxing goods which have been imported after their original packages have been broken, and after they have been mixed with the mass of property in the country, which, it was said, are conceded in *Brown v. Maryland* to be taxable. This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as is suggested? When the



**5. Indebtedness Tax.**—A corporation cannot be taxed on the value of the debts which it owes; <sup>1</sup> but it may be made to deduct a state tax from interest paid to its bond-holders, if the latter are within the state's jurisdiction.<sup>2</sup>

latter become mingled with the general mass of property in the state, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the state, they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in *Welton v. Missouri*, 91 U. S. 275, that goods brought into a state for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the state, or because they are the products of another state. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed, and caused to be accounted for, by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed, not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything

decided in *Brown v. Maryland*; but, on the contrary, that the reasoning in that case is decidedly against it." See also *Fargo v. Stevens*, 121 U. S. 230; 31 Am. & Eng. R. Cas. 452.

Where the tax is based upon the receipts, and such receipts are derived partly from interstate commerce and partly from internal commerce, only receipts that are clearly derived from internal commerce are to be considered, for the purposes of assessment. *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; 21 Am. & Eng. Corp. Cas. 1; *State Freight Tax*, 15 Wall. (U. S.) 232; *Western Union Tel. Co. v. Texas*, 105 U. S. 460.

1. In *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140, it was held that where corporate loans are evidenced by bonds, the bonds so far resembled stocks as to be taxable, even in the hands of non-resident holders. See also *Pittsburg, etc., R. Co. v. Com.*, 66 Pa. St. 77; but in a later case decided on the authority of *Maltby v. Reading R. Co.*, 52 Pa. St. 140, appealed from the supreme court of *Pennsylvania* to the Supreme Court of the *United States*, and reported as *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300, the latter court reversed the decision of the supreme court of *Pennsylvania*, Justices Davis, Clifford, Miller and Hunt dissenting. The court, by Mr. Justice Field, said: "The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. . . . It is a law which impairs the obligation of the contract between the parties." To the same effect are *Com. v. Chesapeake, etc., R. Co.*, 27 Ohio St. 344; *San Francisco v. Mackey*, 22 Fed. Rep. 602; *De Vignier v. New Orleans*, 4 Woods (U. S.) 206.

2. *Fox's Appeal*, 112 Pa. St. 337; 14 Am. & Eng. Corp. Cas. 356; *Com. v.*

**6. Dividend Tax**—*a.* DEFINITION OF DIVIDENDS.—The dividends contemplated in revenue laws need not have been actually declared; it is sufficient if they have been passed to the shareholders. They may consist either of money or of its equivalent in shares.<sup>1</sup>

*b.* TAXABILITY OF DIVIDENDS.—The tax on dividends is generally held to be a tax on the franchise to which corporations are liable;<sup>2</sup> and even if the corporation be non-taxable, the shareholder is liable to a tax on dividends received.<sup>3</sup>

**7. Railroads**—*a.* GENERAL METHOD OF TAXING.—In a leading case in the *United States* Supreme Court<sup>4</sup> it was held to be

Delaware Div. Canal Co., 123 Pa. St. 594; Com. v. Lehigh Valley R. Co., 129 Pa. St. 429; Com. v. New York, etc., R. Co., 129 Pa. St. 463; 15 Am. St. Rep. 724; Com. v. Pennsylvania Salt Mfg. Co. (Pa. 1891), 22 Atl. Rep. 215.

1. But a mere change in form of the capital stock by which the shares are increased, but the profits not increased, is not a dividend subject to assessment. Com. v. Pittsburg, etc., R. Co., 74 Pa. St. 83.

Neither is it a dividend where the corporation sells its own stock to its own stockholders at a fixed price per share to be paid in cash, unless it is a mere pretense to cover up the dividends. Com. v. Erie, etc., R. Co., 74 Pa. St. 94.

A tax may be based upon the dividends exceeding a certain per cent. declared by a corporation during the year, in which case it means the aggregate dividends during such period. Philadelphia v. Ridge Ave. R. Co., 102 Pa. St. 190; 13 Am. & Eng. R. Cas. 341.

2. See *supra*, this title, *Measurement of Franchise Taxes*. See also Chicago, etc., R. Co. v. Page, 1 Biss. (U. S.) 461; Haight v. Pittsburgh, etc., R. Co., 6 Wall. (U. S.) 15; Northern Cent. R. Co. v. Jackson, 7 Wall. (U. S.) 262; U. S. v. Baltimore, etc., R. Co., 17 Wall. (U. S.) 322; People v. Albany Ins. Co., 92 N. Y. 458; 1 Am. & Eng. Corp. Cas. 466; Pennsylvania Bank Assignee's Acct., 39 Pa. St. 103; Second, etc., St. Pass. R. Co. v. Philadelphia, 51 Pa. St. 465; Philadelphia v. Philadelphia Ferry R. Co., 52 Pa. St. 177.

"Dividends Earned or Declared."—Under a statute making certain corporations liable to a franchise tax at a percentage calculated (1) upon gross receipts and (2) upon dividends "earned or declared," it was held that the earnings fairly used for the betterment of

the plant were not "dividends earned or declared," within the meaning of the statute. State v. New Jersey, 54 N. J. L. 135.

3. State v. Petway, 2 Jones Eq. (N. Car.) 396; Atty. Gen'l v. Bank of Charlotte, 4 Jones Eq. (N. Car.) 287.

In State v. Tax Collector, 2 Bailey (S. Car.) 668, it was held that a tax of one per cent. on dividends arising from stock in the Bank of the *United States*, owned by citizens of *South Carolina*, was valid, although the bank stock was exempt from taxation. The court, by O'Neill, J., said: "It appears absurd to contend that income, derived from an institution not taxable, after it has been separated from it, and is in the pocket of a citizen amenable to the taxing power of a state, and having no other safeguard against its abuse than the discretion of his representative, is still not liable to taxation."

If dividends have been declared or earned, but not divided, they are to be assessed against the corporation. Montgomery Co. v. Montgomery Gas Light Co., 64 Ala. 269.

A company paying a tax imposed by a statute which provided that the capital stock of all companies should pay a tax at the rate of one-half mill for each one per cent. of dividend declared by such company; and in case of no dividend being declared, then three mills upon a valuation of the capital stock, was held liable to pay a tax imposed upon the annual net earnings of all companies "not paying a tax to the state upon dividends under existing laws." The court held that the company paid a "tax on capital graduated by the dividends," but did not "pay a tax to the state upon dividends." Phoenix Iron Co. v. Com., 59 Pa. St. 104.

4. Illinois Railroad Tax Cases, 92 U. S. 575.

neither in conflict with the constitution of *Illinois*, nor inequitable, that the entire taxable property of a railroad company should be ascertained by the state board of equalization, and that the state, county, and city taxes should be collected within each municipality on this assessment, in the proportion which the length of the road within such municipality bore to the whole length of the road within the state. The method thus approved has been very generally adopted by statute in many states.<sup>1</sup>

(1) *Realty*—(a) *Roadway—Right of Way—"Railroad Track."*<sup>2</sup>—Under the foregoing terms all of a railroad company's realty, exclusive

1. See the statutes of the following states: *Alabama* Civil Code 1886, §§ 498, 503, 505, 508; *California* Pol. Code 1885, §§ 3663-3665; *Colorado* Acts 1891, p. 290; *Florida* Laws 1887, p. 18; *Idaho* Rev. Stat. 1887, § 1463; *Indiana* Acts 1891, p. 229; *Iowa* Rev. Code 1888, §§ 1317-1322; *Kansas* Gen. Stat. 1889, §§ 6872-6884; *Kentucky* Gen. Stat. 1887, p. 1042 *et seq.*; *Missouri* Rev. Stat. 1889, §§ 7718-7720; *Montana* Laws 1891, p. 76, § 11; *Nebraska* Gen. Stat. 1887, p. 592; *New Hampshire* Pub. Stat. 1891, ch. 64; *Ohio* Rev. Stat. 1890, §§ 2770-2774; *Oklahoma* Stat. 1890, § 6161; *South Carolina* Gen. Stat. 1882, §§ 180-187; *South Dakota* Acts 1891, pp. 47, 49; *West Virginia* Code 1891, p. 183 *et seq.*

In *Franklin Co. v. Nashville, etc.*, R. Co., 12 Lea (Tenn.) 521; 17 Am. & Eng. R. Cas. 445, it was held that no better mode than this of determining the value of the portion of the roadway of a railroad company in any one county for taxation, and of the value of the franchise, rolling stock, and other property without a *situs*, for that part of the roadway, has been devised. See also *Applegate v. Ernst*, 3 Bush (Ky.) 648; 96 Am. Dec. 272; *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210; *Smith v. Leavenworth*, 9 Kan. 296; *Missouri River, etc., R. Co. v. Blake*, 9 Kan. 489; *State v. Hamilton*, 5 Ind. 310; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380; *Toledo, etc., R. Co. v. Lafayette*, 22 Ind. 262; *Georgia v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 434; *State v. Severance*, 55 Mo. 378; *Davenport v. Mississippi, etc., R. Co.*, 16 Iowa 348; *Iowa Homestead Co. v. Webster Co.*, 21 Iowa 221; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513.

**The Old Method.**—As illustrative of the old method of assessing railroads in each county through which they

run, see *Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176; *Providence, etc., R. Co. v. Wright*, 2 R. I. 459; *Sangamon, etc., R. Co. v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497; *State v. Illinois Cent. R. Co.*, 27 Ill. 64; 79 Am. Dec. 396; *Wilson v. Weber*, 96 Ill. 454; 5 Am. & Eng. R. Cas. 112; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Albany, etc., R. Co. v. Osborn*, 12 Barb. (N. Y.) 223; *Albany, etc., R. Co. v. Canaan*, 16 Barb. (N. Y.) 244; *People v. McCreery*, 34 Cal. 459; *People v. Placer-ville, etc., R. Co.*, 34 Cal. 656.

**2. Definitions.**—"The roadbed is the foundation on which the superstructure of a railroad rests." Webster's Dict. The roadway is the right of way, which has been held to be the property liable to taxation. *Appeal of North Beach, etc., R. Co.*, 32 Cal. 499. The rails in place constitute the superstructure resting upon the roadbed." *San Francisco, etc., R. Co. v. State Board*, 60 Cal. 34; 13 Am. & Eng. R. Cas. 248; *San Francisco v. Central Pac. R. Co.*, 63 Cal. 469; 13 Am. & Eng. R. Cas. 664; *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394; 24 Am. & Eng. R. Cas. 523.

Fences cannot be regarded as a part of the roadway for purposes of taxation, but are "improvements" assessable only by the local authorities in the mode required in the case of depots, station grounds, shops and buildings owned by the company, and the part of the taxes assessed against the fences not being separable from the other part, the whole assessment is invalid. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394; 24 Am. & Eng. R. Cas. 523.

The track of a street railway consisting of stringers, ties, and rails affixed to the land, is "land" within the meaning of a statute imposing a tax, and

of that unnecessary to the operation of the road, is assessed for taxation, in most of the states, after the method given in the next preceding section.<sup>1</sup>

declaring that the term "land" shall be construed to "include the land itself, and all buildings, and all other articles erected upon or affixed to the same." *People v. Cassity*, 46 N. Y. 49.

The foundations, columns, and superstructure of an elevated railway are included in the words "lands" and "real estate," as defined in the statute, and the company may be assessed therefor although the fee of the land is in another. *People v. Com'rs of Taxes*, 82 N. Y. 459; 2 Am. & Eng. R. Cas. 343, *aff'g* 19 Hun (N. Y.) 460. See also *People v. Tax Com'rs*, 101 N. Y. 322, *reversing* 23 Hun (N. Y.) 687.

Town lots, over which a railroad company has the right of way, may be taxed as right of way, but this precludes them from being also taxed as town or city lots. *Chicago, etc., R. Co. v. Miller*, 72 Ill. 144.

In *Chicago, etc., R. Co. v. People* (Ill. 1891), 27 N. E. Rep. 200, it was held that under *Illinois* Rev. Stat., ch. 120, § 42, which defines the "railroad track," which must be assessed by the state board of equalization, as the "right of way, including the superstructure of main, side, and second track and turn-outs, and the station and improvements of the railroad company on such right of way," city lots which have been bought by a railroad company with the intention of using them as a site for its station, when it should acquire title to other adjoining lots, but which it has held for four or five years without attempting to acquire title to such other lots, form no part of its "railroad track." The court said: "It seems to us to be very clear that whatever appropriation the appellant intends to make, or may hereafter make, of said lots, when it has succeeded in acquiring title to the residue to its proposed depot grounds, said lots cannot now be said to be, in any proper sense, a part of its 'railroad track.' They are not, and never have been, actually appropriated by the appellant as a part of its right of way, and so do not come within its definition of 'railroad track,' as given by said section 42 of the revenue law. Even if the title to the residue of the site for the proposed passenger station had been acquired and the station built,

that alone would not necessarily constitute the lots in question a part of appellant's 'railroad track.' Where stations and other improvements are erected on the 'right of way' of a railroad company, they may be regarded as a part of the 'railroad track,' within the meaning of section 42 of the revenue law; but section 46 clearly contemplates the possibility of stations and other buildings and structures of railroad companies not being on their right of way, and therefore not a part of their 'railroad track.' No railroad tracks have ever been constructed upon the lots in question here, and there is no proof in the record that the appellant contemplates the construction of any of its tracks thereon. It is not easy to see, then, how the construction by the appellant of its passenger station on a piece of land adjoining this right of way will *ipso facto* have the effect of constituting said land a part of the right of way. But there has so far been no appropriation of said lots as a site for a passenger station. The evidence merely shows an intention to make such appropriation whenever the complainant succeeds in obtaining title to the residue of the property necessary for the purpose. That may or may not happen, and, until it does, the lots which the appellant now holds cannot be regarded as having been definitely appropriated to any railroad purpose. There is no view of the case, then, in which said lots can now be regarded as a part of the appellant's 'railroad track.'"

1. *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176; *People v. Barker*, 48 N. Y. 70; *Buffalo, etc., R. Co. v. Erie Co.*, 48 N. Y. 93; *New Haven v. Fair Haven, etc., R. Co.*, 38 Conn. 422; 9 Am. Rep. 399; *Providence, etc., R. Co. v. Wright*, 2 R. I. 459; *Burlington, etc., R. Co. v. Lancaster Co.*, 7 Neb. 33; *People v. Com'rs of Taxes*, 82 N. Y. 459; 2 Am. & Eng. R. Cas. 343; *Union Trust Co. v. Weber*, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583; *Alexandria Canal, etc., Co. v. District of Columbia*, 1 Mackey (D. C.) 217; 7 Am. & Eng. R. Cas. 325; *Burlington, etc., R. Co. v. Lancaster Co.*, 15 Neb. 254; 13 Am. & Eng. R. Cas. 664.

In some cases it has been held that

(b) **Unessential Realty.**—So much of a railroad company's realty as is unessential to the operation of the railroad is assessed for taxation in the same manner as the realty of natural persons.<sup>1</sup>

the real estate belonging to railroad companies, which is essential to their proper operation, cannot be taxed, as the company is supposed to be taxed upon its entire capital, including real estate, in some other manner. *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564; *Boston, etc., R. Co. v. Cambridge*, 8 Cush. (Mass.) 237; *Wayland v. Middlesex Co.*, 4 Gray (Mass.) 500; *Charlestown v. Middlesex County*, 1 Allen (Mass.) 199; *Com. v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75; *Railroad Co. v. Berks Co.*, 6 Pa. St. 70; *State v. Middle Tp.*, 38 N. J. L. 270; *Wisconsin Cent. R. Co. v. Taylor*, 52 Wis. 37; 1 Am. & Eng. R. Cas. 532; *Northampton Co. v. Lehigh Coal, etc., Co.*, 75 Pa. St. 464.

Under *Illinois* Rev. Stat., ch. 120, § 109, which provides that railroad property shall be assessed by the state board of equalization as "railroad track" and "rolling stock," and the amount of such assessment certified to the county clerks, and by them distributed among the several municipalities entitled thereto, it is sufficient in the lists of property upon which road taxes are levied, to describe railroad property as "railroad track," "proportion of rolling stock," "rolling stock main line," and "main track." *Wabash R. Co. v. People* (Ill. 1891), 27 N. E. Rep. 456.

In assessing railroad property, there must be a separate assessment of real and personal property. An assessment of "twenty miles of railroad" mingles the two, and is void accordingly. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 17 Am. & Eng. R. Cas. 364. A railroad track within a county cannot be valued for assessment, by apportioning to that county the product of the mileage within it, and the average value per mile of the railroad track in all counties through which it runs. This cannot be done even though each county's portion is equally valuable per mile. *Sangamon, etc., R. Co. v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497.

**Tracks in Streets.**—The tracks of a railway company may be assessed as real estate, though laid down in a highway where the company has no title. *People v. Cassity*, 46 N. Y. 46; *New Haven v. Fair Haven, etc., R. Co.*, 38

Conn. 422; 9 Am. Rep. 399; *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112; *Appeal of North Beach, etc., R. Co.*, 32 Cal. 499; *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509; 40 Am. Rep. 99; *Chicago v. Baer*, 41 Ill. 306; *Parmelee v. Chicago*, 60 Ill. 267; *Chicago City R. Co. v. Chicago*, 90 Ill. 573; 32 Am. Rep. 54; *Appeal Tax Court v. Western Md. R. Co.*, 50 Md. 274; *People v. Com'r's of Taxes*, 23 Hun (N. Y.) 687.

1. *Osborn v. Hartford, etc., R. Co.*, 40 Conn. 498; *Toledo, etc., R. Co. v. Lafayette*, 22 Ind. 262; *Chicago, etc., R. Co. v. Paddock*, 75 Ill. 616; *Applegate v. Ernst*, 3 Bush (Ky.) 648; 96 Am. Dec. 272; *Franklin Co. v. Nashville R. Co.*, 12 Lea (Tenn.) 521; 17 Am. & Eng. R. Cas. 445.

A farm purchased for a supply of gravel, by a railway company, and a branch built from their main line  $1\frac{3}{4}$  miles long, leading to it, are, like other property, subject to taxation, though its charter may provide that such company shall pay into the treasury of the state yearly, a tax on its capital stock, and that no other tax shall be imposed on said company. *State v. Hancock*, 33 N. J. L. 315.

A strip of land (100x400 feet) purchased by a railroad company in anticipation of future need for a branch road, occupied in part (35x400 feet) by a trestle work supporting railroad tracks, is taxable by the state (under *New Jersey* Act April 10th, 1884, p. 142), for the thirty-five feet in actual use, and by local assessment for the remaining sixty-five feet lying vacant for many years. *United New Jersey R., etc., Co. v. Jersey City* (N. J. 1891), 22 Atl. Rep. 59.

See generally, as to what realty is assessable as that of natural persons, and what is assessable as roadway, *St. Louis, etc., R. Co. v. Williams*, 53 Ark. 58; 45 Am. & Eng. R. Cas. 20, note 25; *Red Willow Co. v. Chicago, etc., R. Co.*, 26 Neb. 660; 39 Am. & Eng. R. Cas. 556; *Chicago, etc., R. Co. v. People*, 129 Ill. 571; 41 Am. & Eng. R. Cas. 629; *Com. v. Louisville, etc., R. Co. (Ky.)*, 37 Am. & Eng. R. Cas. 418; *Oregon, etc., R. Co. v. Yeates* (Idaho, 1888), 33 Am. & Eng. R. Cas. 481; *California v. Central Pac. R. Co.*,

(2) *Rolling Stock*—(a) *Generally*.—A railroad company's rolling stock is personality,<sup>1</sup> and, in the absence of contrary legislation, its taxation is controlled by the fiction that personality follows the owner's domicile, subject to the abandonment of the fiction when it becomes necessary, for the purposes of justice, to examine the actual *situs*.<sup>2</sup> But, like other personality, it may, for the purposes of taxation, be by the legislature separated from its owner and taxed wherever it is found.<sup>3</sup> The legislature may, too,

127 U. S. 1; 33 Am. & Eng. R. Cas. 451; Peoria, etc., R. Co. v. Goar, 118 Ill. 134; 29 Am. & Eng. R. Cas. 189; Pfaff v. Terre Haute, etc., R. Co., 108 Ind. 144; 29 Am. & Eng. R. Cas. 181; People v. Chicago, etc., R. Co., 116 Ill. 181; 24 Am. & Eng. R. Cas. 612; Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394; 24 Am. & Eng. R. Cas. 523; Anderson v. Chicago, etc., R. Co., 117 Ill. 26; 25 Am. & Eng. R. Cas. 522; Chicago, etc., R. Co. v. Sabula, 19 Fed. Rep. 177; 13 Am. & Eng. R. Cas. 443; San Francisco Co. v. Central Pac. R. Co., 63 Cal. 467; 13 Am. & Eng. R. Cas. 664; note following Atchison, etc., R. Co. v. Wilson, 35 Kan. 175; 24 Am. & Eng. R. Cas. 627.

1. And constitutes no part of its realty. Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57; Boston, etc., R. Co. v. Gilmore, 37 N. H. 410; 22 Am. Dec. 336; Randall v. Elwell, 52 N. Y. 521; 11 Am. Rep. 747; Hoyle v. Plattsburgh, etc., R. Co., 54 N. Y. 315; 13 Am. Rep. 595; Meyer v. Johnston, 53 Ala. 237; Teaff v. Hewitt, 1 Ohio St. 511; 59 Am. Dec. 634; Coe v. Columbus, etc., R. Co., 10 Ohio St. 372; 75 Am. Dec. 518; Chicago, etc., R. Co. v. Fort Howard, 21 Wis. 45; 91 Am. Dec. 458; State Treasurer v. Somerville, etc., R. Co., 28 N. J. L. 21; Williamson v. New Jersey Southern R. Co., 29 N. J. Eq. 311; Sangamon, etc., R. Co. v. Morgan Co., 14 Ill. 163; 56 Am. Dec. 497. It must, therefore—no statute to the contrary—be taxed at the corporate residence. Green v. Van Buskirk, 7 Wall. (U. S.) 150; St. Louis v. Wiggins Ferry Co., 11 Wall. (U. S.) 425; Kirtland v. Hotchkiss, 100 U. S. 497; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 208; 13 Am. & Eng. Corp. Cas. 365; Baltimore, etc., R. Co. v. Allen, 22 Fed. Rep. 379; 17 Am. & Eng. R. Cas. 461; Hayes v. Pacific Mail Steamship Co., 17 How. (U. S.) 596; Orange, etc., R. Co. v. Alexandria, 17 Gratt. (Va.) 176; Louisville, etc., R. Co. v. State, 25 Ind. 177; 87

Am. Dec. 358; Appeal Tax Court v. Western Md. R. Co., 50 Md. 274; Appeal Tax Court v. Pullman Palace Car Co., 50 Md. 452; Philadelphia, etc., R. Co. v. Appeal Tax Court, 50 Md. 397; Appeal Tax Court v. Northern Cent. R. Co., 50 Md. 417; Mohawk, etc., R. Co. v. Clute, 4 Paige (N. Y.) 384; Western Transp. Co. v. Scheu, 19 N. Y. 408; Randall v. Elwell, 52 N. Y. 521; 11 Am. Rep. 747; People v. McLean, 80 N. Y. 251; Union Steamboat Co. v. Buffalo, 82 N. Y. 351; Pacific R. Co. v. Cass Co., 53 Mo. 17; State v. Severance, 55 Mo. 378; Kennedy v. St. Louis, etc., R. Co., 62 Ill. 395; St. Louis v. Wiggins Ferry Co., 11 Wall. (U. S.) 425; Dubuque v. Illinois Cent. R. Co., 39 Iowa 56; Porter v. Rockford, etc., R. Co., 76 Ill. 561; Irvin v. New Orleans, etc., R. Co., 94 Ill. 105; Portland, etc., R. Co. v. Saco, 60 Me. 196; State v. Person, 32 N. J. L. 134; Pelton v. Transportation Co., 37 Ohio St. 450.

2. The maxim *mobilia sequuntur personam* has been, as observed by Justice Gray in Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; 46 Am. & Eng. R. Cas. 236, yielding more and more to the *lex situs*, the law of the place where the property is kept and used. See also Green v. Van Buskirk, 5 Wall. (U. S.) 307; Green v. Van Buskirk, 7 Wall. (U. S.) 139; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664; Harkness v. Russell, 118 U. S. 679; Story Confli. Laws, § 550; Wharton Confli. Laws, §§ 297-311.

3. Lane Co. v. Oregon, 7 Wall. (U. S.) 77; Cleveland, etc., R. Co. v. Pennsylvania, 15 Wall. (U. S.) 328; Cleveland, etc., R. Co. v. Peniston, 18 Wall. (U. S.) 29; Tappan v. Merchants' Nat. Bank, 19 Wall. (U. S.) 499; Illinois Railroad Tax Cases, 92 U. S. 607; Brown v. Houston, 114 U. S. 622; Coe v. Errol, 116 U. S. 524; 11 Am. & Eng. Corp. Cas. 456; Marye v. Baltimore, etc., R. Co., 127 U. S. 123; McLaughlin v. Chadwell, 7 Heisk. (Tenn.) 389;

provide that the rolling stock shall be considered real estate and assessed with the road as a whole,<sup>1</sup> or that it shall be distributed for taxation among the counties, cities and towns through which the road runs proportionally to the length of the road.<sup>2</sup>

(b) *In Interstate Commerce.*—Rolling stock engaged in interstate commerce may be taxed by the states in which it is found.<sup>3</sup>

*Bedford v. Mayor, etc., of Nashville, 7 Heisk. (Tenn.) 40.*

1. *Sangamon, etc., R. Co. v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497; *Maus v. Logansport, etc., R. Co.*, 27 Ill. 77; *Louisville, etc., R. Co. v. State*, 25 Ind. 177; 87 Am. Dec. 358; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Bangor, etc., R. Co. v. Harris*, 21 Me. 533; *Cumberland Marine R. Co. v. Portland*, 37 Me. 444; *State v. Severance*, 55 Mo. 378.

Under such a statute, it was held that a company was not taxable in a county wherein it ran its cars over a leased track. *Cook Co. v. Chicago, etc., R. Co.*, 35 Ill. 460.

Rolling stock which is declared by statute to be real estate, is nevertheless personal property for the purpose of sale to collect delinquent taxes. *Chicago, etc., R. Co. v. Fort Howard*, 21 Wis. 44; 91 Am. Dec. 458.

2. *State v. Severance*, 55 Mo. 378; *Cook Co. v. Chicago, etc., R. Co.*, 35 Ill. 460; *Union Trust Co. v. Weber*, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583; *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443; 5 Am. & Eng. R. Cas. 101; *Richmond, etc., R. Co. v. Alamance*, 84 N. Car. 504; 7 Am. & Eng. R. Cas. 339.

The following cases bear on miscellaneous points in the taxation of rolling stock: *State v. St. Louis Co.*, 84 Mo. 234; 29 Am. & Eng. R. Cas. 192; *Pullman Palace Car Co. v. State*, 64 Tex. 274; 29 Am. & Eng. R. Cas. 194; note following *Atchison, etc., R. Co. v. Wilson*, 35 Kan. 175; 24 Am. & Eng. R. Cas. 627; *Vicksburg, etc., R. Co. v. State*, 62 Miss. 105; 23 Am. & Eng. R. Cas. 729; *Fargo v. Auditor Gen'l*, 57 Mich. 598; 22 Am. & Eng. R. Cas. 216; *Comstock v. Grand Rapids*, 54 Mich. 641; 17 Am. & Eng. R. Cas. 457; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380; *Com. v. Chesapeake, etc., R. Co.*, 27 Ohio St. 344; *Archer v. Terre Haute, etc., R. Co.*, 102 Ill. 493; 7 Am. & Eng. R. Cas. 249; *Baltimore, etc., R. Co. v. Allen*, 22 Fed. Rep. 376; 17 Am. & Eng. R. Cas. 461, note, 466; *Raleigh, etc., R. Co. v. Wake Co.*, 87 N. Car. 414; 17

Am. & Eng. R. Cas. 466; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; 17 Am. & Eng. R. Cas. 398, note, 405; *Atlantic, etc., R. Co. v. Yavapai County (Arizona, 1889)*, 39 Am. & Eng. R. Cas. 543; *Atlantic, etc., R. Co. v. Lesueur (Arizona, 1888)*, 37 Am. & Eng. R. Cas. 368, note, 374.

3. The law as to the taxation of rolling stock engaged in interstate commerce may be said to have been settled, after much confusion, by the decision in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 46 Am. & Eng. R. Cas. 236, affirming 107 Pa. St. 156. It was there held, *Bradley, Field and Harlan, JJ.*, dissenting, that a state may tax the cars of a foreign sleeping car company employed in interstate commerce, and which run into, through, and out of such state, and may ascertain the proportion of the property of such company upon which the tax should be placed, by taking as a basis of assessment, such proportion of the capital stock of the company as the number of miles over which it runs cars within the state, bears to the whole number of miles in that and other states over which its cars are run. *Followed* in *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36; *Denver, etc., R. Co. v. Church*, 17 Colo. 1.

Some of the earlier cases on this subject are *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Pittsburgh, etc., R. Co. v. Com.*, 66 Pa. St. 73; *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206; 2 Abb. (U. S.) 323; *Indiana v. Pullman Palace Car Co.*, 11 Biss. (U. S.) 561; 13 Am. & Eng. R. Cas. 307; *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587; *Minot v. Philadelphia, etc., R. Co.*, 7 Phila. (Pa.) 555; *Bain v. Richmond, etc., R. Co.*, 105 N. Car. 363; 41 Am. & Eng. R. Cas. 574; 18 Am. St. Rep. 912.

In the valuation of a railroad, based upon its rolling stock, if the railroad extends to two or more states, the valuation should be distributed in the proportion that the line in each state bears to the entire line. *State Treas-*

(c) *Sleeping Cars*.—Under the usual contract<sup>1</sup> between railroad companies and sleeping-car companies, the possession, control, and community of interest which the former have and exercise, give to the sleeping cars hired by them from foreign corporations having no place of business in the taxing state, the same *situs* as ordinary cars operated by the same railroad companies.<sup>2</sup> Farther, the community of interest in the sleeping cars is such that they are to be deemed as "belonging" to the railroad companies for the purposes of taxation.<sup>3</sup>

(3) *Railroads are Units*.—Under the generally adopted method of taxing railroads, it is held that each, from one end to the other, is an entirety, and as a whole only may be subject to taxation or coercive sale.<sup>4</sup>

(4) *Their Residence*.—For purposes of taxation, the corporation is to be deemed a resident of each town and county through

urer *v.* Auditor Gen'l, 46 Mich. 224; 13 Am. & Eng. R. Cas. 296; State *v.* Housatonic R. Co., 48 Conn. 44; 7 Am. & Eng. R. Cas. 238.

1. By the usual contract of the Pullman Palace Car Company, the railroad company is required to keep the cars in good running order and repair, and to bear such running expenses, including light, fuel, lubricating material and ice, and also to bear the expense of all repairs rendered necessary by accident and casualty. The Pullman Company agrees to provide the cars, keep the carpets, upholstery, and bedding in good cleanly condition; furnish necessary employes to preserve order in the cars, collect berth and coach fares, and take proper charge and care of the inside of the cars. It also agrees to furnish to the railroad company for a term of fifteen years a sufficient number of cars to meet the requirements of travel over all lines of railway owned or operated by the railroad company.

2. Carlisle *v.* Pullman Palace Car Co., 8 Colo. 320; 54 Am. Rep. 553.

3. Kennedy *v.* St. Louis, etc., R. Co., 62 Ill. 395; Fargo *v.* Stevens, 121 U. S. 240; 31 Am. & Eng. R. Cas. 452. But see Union Trust Company *v.* Weber, 96 Ill. 346; 3 Am. & Eng. R. Cas. 583. On the other hand, where, by a Missouri statute, it was provided that all railroads in that state, "and all other property, real, personal or mixed, owned by any railroad or corporation in this state," should be assessed and taxed in the method prescribed by the act, it was held that under this statute, cars belonging to the Pullman Palace Car Company were not owned by the

railroad within the meaning of the statute, and were not to be assessed against it. State *v.* St. Louis Co., 84 Mo. 234; 29 Am. & Eng. R. Cas. 192.

A statute of Wisconsin, required the owners of drawing-room, palace and sleeping cars to return annually to the railroad commissioner a "statement of the gross earnings made by the use of such cars between points within the State of Wisconsin," and to pay a license fee of two per cent. upon such earnings. It was held that the statute only required a statement to be returned of the earnings derived from the use of such cars in transporting passengers, who both got on and off at points within the state. The court did not decide whether the statute, if otherwise construed, would have been unconstitutional. State *v.* Pullman Palace Car Co., 64 Wis. 89.

Where Pullman sleeping cars are run wholly within a state, the business may be taxed as a privilege. Gibson Co. *v.* Pullman South. Car Co., 42 Fed. Rep. 572.

See, as to sleeping cars generally, the note following Bain *v.* Richmond, etc., R. Co., 41 Am. & Eng. R. Cas. 578; Atty. Gen'l *v.* London, etc., R. Co., 6 Q. B. Div. 216; 1 Am. & Eng. R. Cas. 578, *aff'g* 5 Exch. Div. 247. See also SLEEPING CARS, vol. 22, p. 796.

4. Applegate *v.* Ernst, 3 Bush (Ky.) 648; 96 Am. Dec. 272; Graham *v.* Mt. Sterling Coal-road Co., 14 Bush (Ky.) 425; Franklin Co. *v.* Nashville, etc., R. Co., 12 Lea (Tenn.) 521; 17 Am. & Eng. R. Cas. 445, and note p. 456; *In re* Railroad School Tax, 78 Mo. 596; 17 Am. & Eng. R. Cas. 491.



which its road passes;<sup>1</sup> and its lands, therefore, are not assessable as non-resident lands.<sup>2</sup>

(5) *Valuation*.—In the absence of prescribed methods of valuation, any may be adopted which tends to the ascertainment of the value of the property for the purposes for which it is used. Personal inspection, inquiry of experts, testimony of witnesses, consideration of income, competition, earning capacity, situation with reference to markets and trunk lines—consideration, in short, of all the elements which constitute railroad value; all these are proper methods of arriving at a valuation for assessment.<sup>3</sup>

b. NATIONAL ROADS.—Lands granted by Congress to aid the construction of a railroad cannot be taxed by the state until the company, having complied with the conditions of the grant, is entitled to a patent.<sup>4</sup>

1. *Sherwood v. Saratoga, etc., R. Co.*, 15 Barb. (N. Y.) 650; *People v. Beardsley*, 52 Barb. (N. Y.) 105; *Glaize v. South Carolina R. Co.*, 1 Strobb. (S. Car.) 70.

2. *People v. Cassity*, 46 N. Y. 46; *People v. Fredericks*, 48 Barb. (N. Y.) 173.

3. *Chattanooga v. Nashville, etc., R. Co.*, 7 Lea (Tenn.) 561.

A statute providing that appraisers, in estimating the value of a railroad for taxation, should take into consideration the location of the road for business, the competition of other roads, its earnings, etc., was held to be constitutional in *Louisville, etc., R. Co. v. State*, 25 Ind. 177; 87 Am. Dec. 358.

The cost of acquisition is not an absolute criterion of the value, but is an important element to be considered, under the circumstances upon which the value is to be formed. *Illinois Cent. R., etc., Co. v. Stookey*, 122 Ill. 358; 31 Am. & Eng. R. Cas. 479.

Branch roads owned or leased by a company, though constituting but one system, should be assessed and valued separately from the main line; counties through which such branch roads run are only entitled to the tax on the branches according to their respective values. *Louisville, etc., R. Co. v. Bates*, 12 Lea (Tenn.) 573; 17 Am. & Eng. R. Cas. 494.

The valuation placed upon railroad property by the corporation authorities, where they are required to report such value, is not conclusive on the state board. *Chicago, etc., R. Co. v. Paddock*, 75 Ill. 616; *Chicago, etc., R. Co. v. Raymond*, 97 Ill. 213; 13 Am. & Eng. R. Cas. 663.

The board must act on their own

judgment and knowledge. *Porter v. Rockford, etc., R. Co.*, 76 Ill. 564; *St. Louis, etc., R. Co. v. Surrell*, 88 Ill. 537.

But they may properly refer to the reports of the company required by law to be made, in order to ascertain the earning capacity of the road. *People v. Hicks*, 105 N. Y. 198, *affirming* 40 Hun (N. Y.) 598.

The evidence which a board may hear in order to determine the value of a road for taxation, need not be confined to that which would be competent before a court. *State v. St. Louis, etc., R. Co.*, 8 Mo. App. 583; 1 Am. & Eng. R. Cas. 632.

In estimating the value of railroad property, the inquiry should be directed to what it is worth for the purposes for which it is designed, and not for other purposes to which it might be applied. *Buffalo, etc., R. Co. v. Erie Co.*, 48 N. Y. 93; *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 663; *State v. Illinois, etc., R. Co.*, 27 Ill. 64; 79 Am. Dec. 396. Nor should its land be assessed as mere farming land. *People v. Fredericks*, 48 Barb. (N. Y.) 174. Improvements are to be taken into consideration. *Chicago, etc., R. Co. v. Lee County*, 44 Ill. 248.

4. *Central Pac. R. Co. v. Howard*, 51 Cal. 229. Compare *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *California v. Central Pac. R. Co.*, 127 U. S. 1; 33 Am. & Eng. R. Cas. 451; *Southern Pac. R. Co. v. California*, 118 U. S. 109; 25 Am. & Eng. R. Cas. 525; *Allen v. Texas, etc., R. Co.*, 25 Fed. Rep. 513; 24 Am. & Eng. R. Cas. 18; *Santa Clara v. Southern Pac. R. Co.*, 9 Sawy. (U. S.) 200; note following *Memphis, etc., R. Co. v. Loftin*, 13 Am. & Eng. R. Cas. 377.

c. INTERSTATE ROADS.—The usual method of valuing for taxation the portion within a given state of an interstate road, is by consideration of the proportion between the mileage within and the mileage without the state and of the value of the whole.<sup>1</sup>

d. CONSOLIDATED ROADS.—The consolidation of the rights, privileges, franchises, and purposes of two or more railroad companies into one, where there is no provision of the statute or constitution to the contrary, leaves the portions of the roads thus formed subject to the same rules of taxation that existed before the consolidation.<sup>2</sup>

1. *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Illinois Railroad Tax Cases*, 92 U. S. 575; *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443; 5 Am. & Eng. R. Cas. 101; *State Auditor v. Jackson Co.*, 65 Ala. 142; 7 Am. & Eng. R. Cas. 273; *Buffalo, etc., R. Co. v. Com.*, 3 Brew. (Pa.) 374; *Buffalo, etc., R. Co. v. Com.*, 3 Brew. (Pa.) 386; *Nichols v. New Haven, etc., Co.*, 42 Conn. 103; *State v. Housatonic R. Co.*, 48 Conn. 44; 7 Am. & Eng. R. Cas. 238.

The capital stock and bonds of an interstate railway are liable to state taxation in the proportion that the length of road in the state bears to the entire length of road. *Pittsburg, etc., R. Co. v. Com.*, 66 Pa. St. 73.

A tax on the franchise may be assessed on this basis. *Buffalo, etc., R. Co. v. Com.*, 3 Brew. (Pa.) 386; and so may a tax on the interest on the loans. *Buffalo, etc., R. Co. v. Com.*, 3 Brew. (Pa.) 386. So also may a tax on the rolling stock. *Richmond, etc., R. Co. v. Alabama*, 84 N. Car. 504; 7 Am. & Eng. R. Cas. 339. This method is, however, liable to difficulties which might defeat the just assessment of roads whose value per mile within the state is less than that without.

In *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206, the court, by Field, J., said: "Assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in *Delaware* to the value of the whole property of the company be less than that which the length of the road in *Delaware* bears to its entire length, and such is admitted to be the fact, a tax imposed upon the property in *Delaware*, according to the ratio of the length of its road to the length of the whole road, must necessarily fall upon property outside of the state. The length of the whole road is in round numbers one hundred miles. The

length in *Delaware* is twenty-four miles. The tax upon the property estimated according to this ratio would be in *Delaware* 24-100 or 6-25 of the amount of the tax upon the whole property. But the value of the property in *Delaware* is not 6-25 of the value of the whole property, but much less than this proportion would require. We repeat, therefore, that upon the assumption made by the appellant, there would be great difficulty in sustaining the tax."

2. *State v. Keokuk, etc., R. Co.*, 99 Mo. 30; *State v. Seaboard, etc., R. Co.*, 52 Fed. Rep. 450; *Natchez, etc., R. Co. v. Lambert*, 70 Miss. 779.

Under the *New York* statute authorizing any railroad company organized under *New York* laws . . . to merge and consolidate its capital stock, franchise, and property with the capital stock, etc., of any other railroad company or companies organized under the laws of this state, or under the laws of this state and any other state, or under the laws of any state or states, and providing for the conversion of the stock of the consolidated companies into that of the new corporation, it was held that where a *New York* company consolidated with companies organized under the laws of other states with a capital stock equal to the aggregate of the stock of the consolidated companies, such consolidation created a new corporation, which was required to pay the organization tax on the total amount of its capital stock, as required by the *New York* Act of 1886, ch. 143, § 1. *People v. New York, etc., R. Co.* (Supreme Ct.), 15 N. Y. Supp. 635.

The Quincy Railroad Bridge Company, owning a bridge across the Mississippi river at Quincy, originally chartered as two distinct companies, by the legislatures of *Illinois* and *Missouri*, and consolidated by articles which were confirmed and approved by the legisla-

*e.* LEASED ROADS.—Taxes assessed upon the gross earnings of a railroad have been held to be taxes upon the property of such road, within the provision of a statute requiring the lessor of a railroad, and not the lessee, to pay such taxes—especially, where the rent to be paid is a certain proportion of the gross earnings, and the statute directs the lessee to pay the taxes and deduct them from the rent.<sup>1</sup>

*f.* UNION STATIONS.—Payment of a percentage on their gross earnings by the railway companies which own all the stock and use the terminal facilities of a union depot company constitutes payment of taxes on all the property of the latter.<sup>2</sup>

*g.* COUNTY AID.—A railroad company cannot be taxed to pay the amount of a county's subscription to aid in building the road.<sup>3</sup>

**8. Foreign Corporations**—*a.* GENERAL PRINCIPLES.—Corporations are not "citizens" within the meaning of the clause of the federal constitution, guaranteeing to the "citizens" of each state the enjoyment of all the privileges and immunities of citizens of the several states. Accordingly, it is no infringement of the privileges and immunities of citizens of other states for a state to impose upon corporations, of which such citizens are stockholders, such taxes, etc., as it may deem fit and proper, as a condition to their carrying on business within its borders.<sup>4</sup>

ture of *Illinois*, is an association incorporated under *Illinois* laws, in the sense of the revenue law of that state authorizing the taxation of its capital stock. *Quincy R. Bridge Co. v. Adams Co.*, 88 Ill. 615. See also CORPORATIONS, vol. 4, p. 274.

1. A law which requires the lessee of a railroad to deduct the taxes levied on the road, from the rent stipulated to be paid under the lease, and pay the same to the state, is not void, even with reference to existing leases as impairing the obligation of a contract, where both lessor and lessee and the rent due are proper subjects of taxation. *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1; 46 Am. & Eng. R. Cas. 646.

2. *State v. St. Paul Union Co.*, 42 Minn. 142; 41 Am. & Eng. R. Cas. 636; 6 L. R. A. 234.

3. *Applegate v. Ernst*, 3 Bush (Ky.) 648.

In *Elizabethtown, etc., R. Co. v. Carter Co.* (Ky. 1892), 18 S. W. Rep. 370, it appeared that the defendant county, being unable to pay certain bonds issued by it in aid of a railroad, procured a legislative enactment, whereby it was able to compromise with the bondholders, and secure a re-

duction of the indebtedness. The act authorizing the compromise also authorized, for the payment of the said bonds, a regular *ad valorem* tax, to be levied from year to year, "according to the assessment lists . . . reported by the assessor." It was held that, although the mode of ascertaining the property to be assessed was thus prescribed, and the assessment of railroad property was not by an assessor, but by a board created for that purpose, the act evidently contemplated that the property of the railroad, as well as all other property in the county subject to taxation, should be assessed; and whether or not it had constituted any part of the basis of credit, was immaterial.

4. FOREIGN CORPORATIONS, vol. 8, p. 369. See TAXATION—Occupation, Business, and Privilege Taxes; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 586; *Runyon v. Coster*, 14 Pet. (U. S.) 129; *LaFayette Ins. Co. v. French*, 18 How. (U. S.) 407; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Doyle v.*

The only limitations are that corporations employed by the federal government or engaged strictly in interstate commerce can be interfered with by no exactions.<sup>1</sup>

The tax may be either a gross sum in the nature of a license

Continental Ins. Co., 94 U. S. 535; Philadelphia Fire Assoc. v. New York, 119 U. S. 110; Warren Mfg. Co. v. Etna Ins. Co., 2 Paine (U. S.) 516; Railroad Tax Cases, 13 Fed. Rep. 747; Phoenix Ins. Co. v. Com., 5 Bush (Ky.) 68; 96 Am. Dec. 331; Gill v. Kentucky Gold, etc., Min. Co., 7 Bush (Ky.) 635; Ducat v. Chicago, 48 Ill. 179; 95 Am. Dec. 529; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85; 8 Am. Rep. 626; Western Union Tel. Co. v. Lieb, 76 Ill. 172; Tatem v. Wright, 23 N. J. L. 429; Erie R. Co. v. State, 31 N. J. L. 531; Slaughter v. Com., 13 Gratt. (Va.) 767; People v. Imlay, 20 Barb. (N. Y.) 68; British, etc., L. Ins. Co. v. Com'rs of Taxes, 31 N. Y. 32; People v. Fire Assoc., 92 N. Y. 324; 1 Am. & Eng. Corp. Cas. 1; 44 Am. Rep. 380; Matthews v. Theological Seminary, 2 Brew. (Pa.) 542; Fire Department v. Noble, 3 E. D. Smith (N. Y.) 440; Buffalo, etc., R. Co. v. Com., 3 Brew. (Pa.) 386; Wheeden v. Camden, etc., R. Co., 2 Phila. (Pa.) 23; Leavenworth v. Booth, 15 Kan. 627; Fire Department v. Helfenstein, 16 Wis. 136; Com. v. Milton, 12 B. Mon. (Ky.) 212; 54 Am. Dec. 522; Home Ins. Co. v. Davis, 29 Mich. 238; State Treasurer v. Auditor Gen'l, 46 Mich. 224; 13 Am. & Eng. R. Cas. 296; Farmers', etc., Ins. Co. v. Harrah, 47 Ind. 236; American Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 26; 42 Am. Rep. 90; State v. Western Union Tel. Co., 73 Me. 525; *Ex p. Cohn*, 13 Nev. 426.

A foreign country is "another state," within the meaning of a law exempting stockholders in one state from a tax on their shares of a foreign corporation, if the stock is taxed where the corporation is situated. *Foster v. Stevens* (Vt. 1891), 13 L. R. A. 166.

Such a tax is not obnoxious to a constitutional requirement that taxes shall be equal and uniform, because it discriminates in favor of domestic companies. *State v. Lathrop*, 10 La. Ann. 398; *State v. Fosdick*, 21 La. Ann. 434; *People v. Thurber*, 13 Ill. 554; *Fire Department v. Noble*, 3 E. D. Smith (N. Y.) 453; *Firemen's Ben. Assoc. v. Lounsbury*, 21 Ill. 511; 74 Am. Dec. 115; *Fire Department v. Helfenstein*, 16 Wis. 137; *Paul v. Virginia*, 8 Wall.

(U. S.) 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566. In *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521, the court sustains a tax on the gross receipts of foreign telegraph companies doing business in the State of *Ohio*, although the domestic corporations of that state are not so taxed. Foreign insurance companies may be taxed additionally upon all premiums collected by them, the taxes to be paid into a fund for the use of the fire department. *Walker v. Springfield*, 94 Ill. 364.

1. FOREIGN CORPORATIONS, vol. 8, p. 371; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 12; *Pembina, etc., Min., etc., Co. v. Pennsylvania*, 125 U. S. 181; 22 Am. & Eng. Corp. Cas. 542. The cases of *People v. Fire Assoc.*, 92 N. Y. 311; 1 Am. & Eng. Corp. Cas. 1; 44 Am. Rep. 380, and *Doyle v. Continental Ins. Co.*, 94 U. S. 540, seem to hold that, if a state should impose on a corporation, a condition as to its entry within the state or as to its continuance within the state, which is repugnant to the state or federal constitution, the corporation would have either to comply with the condition and waive its constitutional privileges, or to take the consequences of remaining without or departing from the state. These decisions do not, however, seem to be harmonious with *Baron v. Burnside*, 121 U. S. 186; 17 Am. & Eng. Corp. Cas. 222, and *San Francisco v. Liverpool, etc., Ins. Co.*, 74 Cal. 113; 18 Am. & Eng. Corp. Cas. 464; 5 Am. St. Rep. 425. See also *Erie R. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226. See also on this subject: *Angell & Ames on Corporations*, § 486, a; *St. Clair v. Cox*, 106 U. S. 350; 1 Am. & Eng. Corp. Cas. 19; *Com. v. Milton*, 12 B. Mon. (Ky.) 212; 54 Am. Dec. 522; *Phoenix Ins. Co. v. Com.*, 5 Bush (Ky.) 68; 96 Am. Dec. 331; *State v. Fosdick*, 21 La. Ann. 434; *Tatem v. Wright*, 23 N. J. L. 429; *Fire Department v. Noble*, 3 E. D. Smith (N. Y.) 440; *Fire Department v. Wright*, 3 E. D. Smith (N. Y.) 453; *Slaughter v. Com.*, 13 Gratt. (Va.) 767; *Fire Department v. Helfenstein*, 16 Wis. 136.

The terms on which foreign corporations are permitted to enter a state,

fee;<sup>1</sup> or a percentage of the business done;<sup>2</sup> or a percentage of the par value of the capital stock;<sup>3</sup> or such other charge as the legislature may see fit to lay.

b. DEFINITION OF "DOING BUSINESS."—Occasional and isolated transactions do not render concerns liable to taxes laid upon foreign corporations "doing business" within the state.<sup>4</sup>

c. "RETALIATORY LEGISLATION."—In some of the states there are statutes imposing upon foreign corporations seeking to do business therein the same taxes, licenses, fees, and conditions exacted by the home state of such corporations from the corporations of the former seeking to do business in the latter. The constitutionality of this legislation has been attacked upon

may be changed after entry. *Philadelphia Fire Assoc. v. New York*, 119 U. S. 119.

1. *State v. Lathrop*, 10 La. Ann. 398; *State v. Fosdick*, 21 La. Ann. 434; *Leavenworth v. Booth*, 15 Kan. 627; *Slaughter v. Com.*, 13 Gratt. (Va.) 767.

2. *People v. Thurber*, 13 Ill. 554; *Fire Department v. Helfenstein*, 16 Wis. 137; *Com. v. Milton*, 12 B. Mon. (Ky.) 212; 54 Am. Dec. 522; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Phoenix Ins. Co. v. Com.*, 5 Bush (Ky.) 68; 96 Am. Dec. 331; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566.

3. In *Portland Bank v. Apthorp*, 12 Mass. 252, and in *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 298, the corporations taxed on their franchises were creations of the taxing power. In *Atty. Gen'l v. Bay State Min. Co.*, 99 Mass. 148; 96 Am. Dec. 717, the court went further, holding that a franchise tax might be imposed on the capital stock of a foreign corporation. "It is not merely the creation of corporate functions and privileges," the court said, "or the conferring of rights and franchises by the legislature, which entitles the state to tax the possessor of such privileges and rights." See also *State v. Sioux City, etc., R. Co.*, 43 Minn. 17.

4. Laws imposing such taxes are not intended to withdraw absolutely the comity which enables foreign companies to bring suits and make contracts. In the case of the *Standard Underground Cable Co. v. Atty. Gen'l*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394, the court said: "The appellant is a corporation incorporated under the laws of this state; it is a manufacturing company; it has an office in this state, and

procures from other manufacturing corporations in the state much of the material used by it; but the manufacture of its special product, into which these materials enter, is carried on in the State of *Pennsylvania*. It must, therefore, under the rulings in this court, be held to be a company not transacting its business in this state, within the meaning of this law. *American Glucose Co. v. State*, 43 N. J. Eq. 280; 15 Am. & Eng. Corp. Cas. 112."

A *New Jersey* manufacturing corporation, which has its principal business office there, but which manufactures and sells a portion of its wares in *New York*, and has mills, warehouses, and large bank deposits in that state, is a foreign corporation "doing business" there within the meaning of Laws N. Y. 1881, ch. 361, and subject to taxation thereunder. *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Horn Silver Min. Co.*, 105 N. Y. 76; 18 Am. & Eng. Corp. Cas. 210; *People v. Wemple* (N. J. 1892), 29 N. E. Rep. 812.

A foreign manufacturing company which maintains an established location, and an agent in *New York City* for the purpose of selling its products or facilitating their sale, and which keeps funds in *New York City* to maintain its place of business and to enable its agent to carry on his operations, is "doing business within the state," within the meaning of Laws N. Y. 1885, chapters 359, 501, which provide that every foreign corporation "doing business with the state" shall be subject to a tax on its corporate franchise or business, to be computed on the basis of the amount of capital stock employed within the state. *Southern Cotton Oil Co. v. Wemple*, 44 Fed. Rep. 24. See also *People v.*

various grounds, but in the main it has been upheld.<sup>1</sup> This subject has been fully treated elsewhere in this work, to which reference is now made.<sup>2</sup>

**III. TAXATION OF THE SHAREHOLDER—1. Direct Tax—*a*. RESIDENT SHAREHOLDER—(1) *In Domestic Corporations.*—The taxation of shares of stock in a corporation is governed by the rules which govern the taxation of other *choses in action*.<sup>3</sup> They are taxable to the owner at his residence;<sup>4</sup> unless the state has given, as it may give, them a special *situs* for the purpose of taxation.<sup>5</sup> They are thus taxable notwithstanding either the fact that the corporation has paid a tax on its property or its capital stock or both;<sup>6</sup> or the fact that the corporation's property is**

American Bell Telephone Co., 117 N. Y. 241.

1. *People v. Fire Assoc.*, 92 N. Y. 311; 1 Am. & Eng. Corp. Cas. 1; 44 Am. Rep. 380; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; 80 Am. Dec. 123; *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110. *Contra*, *Clark v. Mobile*, 67 Ala. 217, and two  *nisi prius*  opinions in 10 Ins. Law J. 361.

2. See FOREIGN CORPORATIONS, vol. 8, p. 329; STATUTES, vol. 23, p. 221 *et seq.*

3. *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300; *Osborn v. New York, etc., R. Co.*, 40 Conn. 491; *Seward v. Rising Sun*, 79 Ind. 351; *Cook v. Burlington*, 59 Iowa 251; 44 Am. Rep. 679; *Griffith v. Watson*, 19 Kan. 23; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Dwight v. Mayor, etc., of Boston*, 12 Allen (Mass.) 316; 90 Am. Dec. 149; *Rockingham, etc., Sav. Bank v. Portsmouth*, 52 N. H. 17; *Belo v. Forsyth Co.*, 82 N. Car. 415; 33 Am. Rep. 688; *McKeen v. Northampton Co.*, 49 Pa. St. 519; 88 Am. Dec. 515; *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Denton v. Livingston*, 9 Johns. (N. Y.) 96, 100; *Planters', etc., Bank v. Leavens*, 4 Ala. 753; *Cooley on Taxation* (2d ed.), p. 22. It is said in 2 Kent's Com., p. 140, note 1 (*Lacy's Rev. ed.* 1889), that this is the American doctrine.

4. *Bradley v. Bauder*, 36 Ohio St. 36; 38 Am. Rep. 547; *State v. Branin*, 23 N. J. L. 484; *Newark City Bank v. Assessors*, 30 N. J. L. 13; *Great Barrington v. Berkshire Co.*, 16 Pick. (Mass.) 572; *Oliver v. Washington*

*Mills*, 11 Allen (Mass.) 268; *Whitesell v. Northampton Co.*, 49 Pa. St. 526; *Desty on Taxation* 366; *Whitney v. Madison*, 23 Ind. 331; *Seward v. Rising Sun*, 79 Ind. 351; 13 Am. & Eng. R. Cas. 315.

In *Conwell v. Connersville*, 15 Ind. 150, the court, by Davidson, J., said: "It is true, we have decided that stocks in railroad companies, are taxable to the corporations. *State v. Hamilton*, 5 Ind. 310. But that decision is based upon a statute, which expressly requires that mode of taxation to be applied to that class of corporations. In the absence of this statute, it is quite evident, that the individual stockholders would be, alone, liable to be taxed for their shares of railroad stock."

**Pledged Stock.**—Shares of stock which have been pledged as collateral for bonus, with power to the pledgee to transfer the shares to his own name, and, in case the bonus is not paid, to sell, but which stand on the books of the company in the name of the pledgor, are taxable in the pledgor's name. *Ratterman v. Ingalls* (Ohio, 1891), 28 N. E. Rep. 168. See also *Tucker v. Aiken*, 7 N. H. 113; and *Waltham Bank v. Waltham*, 10 Met. (Mass.) 334.

**Sale for Non-payment.**—When a corporation's shares are sold for non-payment of taxes, new certificates may be issued to purchasers at the tax sale. *Smith v. Northampton Bank*, 4 Cush. (Mass.) 1.

5. *Cooley on Taxation* (2d ed.), p. 22, citing *American Coal Co. v. Allegheny Co.*, 59 Md. 185; *Mayor, etc., of Baltimore v. Baltimore City Pass. R. Co.*, 57 Md. 31; 7 Am. & Eng. R. Cas. 362. See also *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; *Bradley v. Bauder*, 36 Ohio St. 35; 38 Am. Rep. 547.

6. See 1 Taylor on Private Corpora-

exempt from taxation.<sup>1</sup> This is true because the capital stock and the shares are distinct properties.<sup>2</sup>

(2) *In Foreign Corporations.*—A tax may be levied on shares of stock of foreign corporations, by the state of the owner's resi-

tions (2d ed.), § 477, a; Desty on Taxation (1st ed.), vol. 1, p. 356; *State Bank v. Richmond*, 79 Va. 113; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553; 32 Am. Rep. 532; *Cook v. Burlington*, 59 Iowa 251; 44 Am. Rep. 679.

In *Seward v. Rising Sun*, 79 Ind. 353; 13 Am. & Eng. R. Cas. 315, Bicknell, C. C., said: "In the absence of a statute to the contrary, although a corporation may be taxable for its corporate property, the owners of shares of its stock may be taxed therefor where they reside. *Conwell v. Connersville*, 15 Ind. 150."

1. *Belo v. Forsyth Co.*, 82 N. Car. 415; 33 Am. Rep. 688. In that case, which holds that shares in a railway corporation, whose property is exempted by its charter, may be made to pay an *ad valorem* tax, the court, by Smith, C. J., said: "It is not pretended that the assessment and taxation of the estate of the debtor where he may reside, or his estate may be found, should relieve the security, which the creditor holds, from liability for its share of the common burden. The same principle, and with equal force, may be applied to the stockholder and the corporation. The latter must bear the taxation imposed upon its property, and this may diminish its distributable profits, but the stockholder cannot, any more than the creditor, claim exemption on this account, for his stock, as distinct and separate property in his own hands." *Conwell v. Connersville*, 15 Ind. 150; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Smith v. Exeter*, 37 N. H. 556. And see *Floyd Co. v. New Albany*, etc., R. Co., 11 Ind. 570.

A state may tax shares of capital stock invested in *United States* bonds, against stockholders, although it cannot tax the bonds themselves. *St. Louis, etc., Assoc. v. Lightner*, 47 Mo. 393. *Compare* *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146; *State v. Metz*, 32 N. J. L. 199; *State v. Haight*, 34 N. J. L. 128; *Coite v. Connecticut Mut. L. Ins. Co.*, 36 Conn. 512; *Harrison v. Vines*, 46 Tex. 15; *People v. Com'rs of Assessments*, etc., 32 Barb. (N.Y.) 509.

2. In *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, on page 583, the court, by

Justice Nelson, says: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares. . . . This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him." *Burroughs on Taxation* (1st ed.), § 86; *Cook's Stock, Stockholders, and Corporation Law* (2d ed.), § 563; *Bradley v. Bauder*, 36 Ohio St. 28; 38 Am. Rep. 547; *Porter v. Rockford*, etc., R. Co., 76 Ill. 561; *Danville Banking, etc., Co. v. Parks*, 88 Ill. 170; *State v. Branin*, 23 N. J. L. 484; *Memphis v. Farrington*, 8 Baxt. (Tenn.) 539; *Minot v. Philadelphia*, etc., R. Co., 18 Wall. (U. S.) 206.

In a note to *Com. v. Delaware Div. Canal Co. (Pa.)*, 2 L. R. A. 798, it is said: "The capital stock of a corporation, and the shares of the capital stock, are distinct things. So a tax on the shares of stockholders in a corporation, is a different thing from a tax on the corporation itself or its stock, and may be laid irrespective of any taxation of the corporation when no contract relations exist. *Glen v. Dodge* (D. C. 1885), 3 Cent. Rep. 287; *Tremont Bank v. Boston*, 1 Cush. (Mass.) 142; *State v. Petway*, 2 Jones Eq. (N. Car.) 396; *State v. Thomas*, 26 N. J. L. 181; *Lycoming Co. v. Gamble*, 47 Pa. St. 106; *Whitesell v. Northampton Co.*, 49 Pa. St. 526; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *People v. Bradley*, 39 Ill. 141; *Conwell v. Connersville*, 15 Ind. 150; *Van Allen v. Assessors*, 3 Wall. (U. S.) 584; *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 323; *Cumberland Marine R. Co. v. Portland*, 37 Me. 444; *Nashville Gas Light Co. v. Mayor*, etc., of Nashville, 8 Lea (Tenn.) 406; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553; 32 Am. Rep. 532; *New Orleans v. Canal*, etc., Co., 32 La. Ann. 157; *New Orleans v. Houston*, 119 U. S. 265; *Cook v. Burlington*, 59 Iowa 251; 44 Am.

dence.<sup>1</sup> This rule is not affected by the fact that the corporation has in its state paid taxes on capital stock or property or both.<sup>2</sup> Some of the states, however, exempt such shares from taxation when a tax has been paid on them in the state where the corporation is located.<sup>3</sup>

*b. NON-RESIDENT SHAREHOLDER* — (1) *In Domestic Corporations*.—A state may tax shares of stock in domestic corporations though owned by non-residents, when provision for such tax is made by the law under which the corporation is created.<sup>4</sup>

Rep. 679; Republic L. Ins. Co. v. Pollak, 75 Ill. 292." See also *supra*, this title, *Definition of Capital Stock*.

1. *Worthington v. Sebastian*, 25 Ohio St. 1; *Eastern Bridge v. County*, 9 Pa. St. 415; *McKeen v. Northampton Co.*, 49 Pa. St. 519; 88 Am. Dec. 515; *Worth v. Ashe Co.*, 82 N. Car. 420; 33 Am. Rep. 692; *State v. Branin*, 23 N. J. L. 484; *State v. Bentley*, 23 N. J. L. 532; *Newark City Bank v. Assessor*, 30 N. J. L. 13; *Great Barrington v. Berkshire Co.*, 16 Pick. (Mass.) 572.

In *Seward v. Rising Sun*, 79 Ind. 353; 13 Am. & Eng. R. Cas. 315, *Bicknell, C. C.*, said: "There is no provision in our statutes, which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations. . . . In the absence of any statute to the contrary, although a corporation may be taxable for its corporate property, the owners of shares of its stock may be taxed therefor where they reside."

2. *Dwight v. Mayor, etc.*, of Boston, 12 Allen (Mass.) 316; 90 Am. Dec. 149; *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460, *Bradley v. Bauder*, 36 Ohio St. 28; 38 Am. Rep. 547; *Seward v. Rising Sun*, 79 Ind. 351; 13 Am. & Eng. R. Cas. 315; *Appeal Tax Court v. Gill*, 50 Md. 377.

Such a tax is not opposed to the constitution of the *United States*, nor to a provision in a state constitution that "the burdens of the state ought to be fairly distributed among its citizens." *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460. Nor to a provision that property shall be taxed "by a uniform rule." *Worthington v. Sebastian*, 25 Ohio St. 1; *Bradley v. Bauder*, 36 Ohio St. 28; 38 Am. Rep. 547.

In *Dyer v. Osborne*, 11 R. I. 321; 23 Am. Rep. 460, it was held that a person owning shares in a manufacturing corporation in *Massachusetts*, but residing in *Rhode Island*, was liable to a tax

upon his shares at his place of residence, although they had been assessed under the laws of *Massachusetts* in the city where the corporation was located, and the owner had paid the tax. The court, by *Durfee, C. J.*, said: "The laws of *Rhode Island* are paramount in *Rhode Island*, and all the inhabitants of the state are subject to them without regard to the laws of any other state. . . . It would certainly be going too far to hold that a man of wealth in *Rhode Island* cannot be taxed at all, if his property is invested in the stocks of a manufacturing corporation of another state and there subject to taxation."

See *Worth v. Ashe Co.*, 90 N. Car. 409, where this same point is decided, and this language is quoted with approval.

3. See *Rhode Island* Pub. Stat. 1882, p. 122; *New Hampshire* Pub. Stat. 1891, p. 179; *Vermont* Rev. Laws 1880, § 270.

4. *Stockholders v. Board, etc.* (Va. 1891), 13 S. E. Rep. 407; *Faxton v. McCosh*, 12 Iowa 530. It is said that if one chooses to submit his property to the taxing power of a state by investing in stocks of corporations which are liable to be made to collect a tax from non-resident shareholders, the courts can afford him no relief. *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 500; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600; *Bedford v. Mayor, etc.*, of Nashville, 7 Heisk. (Tenn.) 409; *First Nat. Bank v. Smith*, 65 Ill. 44. *Contra*, *Union Bank v. State*, 9 Yerg. (Tenn.) 490. And see *Cleveland, etc.*, R. Co. v. *Pennsylvania*, 15 Wall. (U. S.) 300.

In *Mayor, etc.*, of Baltimore v. *Hussey*, 67 Md. 112, it was held that stock representing the debt of the city of Baltimore, owned by a resident of *New York*, was not taxable by the State of *Maryland*.

In *Catlin v. Hull*, 21 Vt. 152, and



(2) *In Foreign Corporations.*—As a state's taxing power is limited to persons, property and business within its boundaries, shares of a foreign corporation's stock held by a non-resident cannot, of course, be taxed.<sup>1</sup>

2. **Tax Collected from the Corporation.**—Corporations, even national banks, may be made tax-collectors by being required to reserve for the benefit of the government, deductions from the shareholders' interests.<sup>2</sup>

*Redmond v. Rutherford Co.*, 87 N. Car. 122, it was held that choses in action belonging to a non-resident, in the hands of an agent within the state, may be taxed. This latter case quoted the opinion of Chief Justice Pearson, pronounced in *Alvany v. Powell*, 2 Jones Eq. (N. Car.) 51, to the effect that the doctrine that personal property is deemed to follow the person of the owner "is based upon a fiction which has no application to the question of revenue."

A municipality has no authority to tax shares of stock in corporations within its jurisdiction, owned by persons residing elsewhere, unless such authority is expressly conferred by statute. *Evansville v. Hall*, 14 Ind. 27; *Conwell v. Connorsville*, 15 Ind. 150; *Craft v. Tuttle*, 27 Ind. 332.

In *Griffith v. Watson*, 19 Kan. 23, it was held that shares of stock in a gas company in the city of Lawrence, owned by a resident of Wakarusa Township, could not be taxed by the city of Lawrence where he did not reside. The court said: "Said shares of stock must be considered as personal property . . . and must therefore be taxed, if taxed at all, to the holders thereof where such holders reside."

In *Gordon v. Mayor, etc.*, of Baltimore, 5 Gill (Md.) 231, it was held that a general taxing power, "granted in the most comprehensive terms, and without any limitation as to the objects on which the power is to operate," was a sufficient authority for levying a municipal tax upon the bank stock of a corporation in the city owned by a non-resident.

As to national banks, see NATIONAL BANKS, vol. 16, p. 187.

1. **State Tax on Foreign Held Bonds**, 15 Wall. (U. S.) 300; *Bradley v. Bauder*, 36 Ohio St. 28; 38 Am. Rep. 547; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423; *Cooley's Const. Lim.* (6th ed.) 615; *Appeal Tax Court v.*

*Patterson*, 50 Md. 354; *Great Barrington v. Berkshire Co.*, 16 Pick. (Mass.) 572; *State v. Branin*, 23 N. J. L. 484; *State v. Bentley*, 23 N. J. L. 532; *Whitesell v. Northampton Co.*, 49 Pa. St. 526; *Griffith v. Watson*, 19 Kan. 26; *Griffith v. Carter*, 8 Kan. 571; *Conwell v. Connorsville*, 15 Ind. 150; *Seward v. Rising Sun*, 79 Ind. 353; 13 Am. & Eng. R. Cas. 315.

2. *Ang. & Ames on Corp.*, §§ 556, 557; *Reg. v. Arnaud*, 9 Q. B. 806; 58 E. C. L. 806; *State v. Branin*, 23 N. J. L. 484; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Van Allen v. Assessors*, 3 Wall. (U. S.) 583; *Bradley v. Illinois*, 4 Wall. (U. S.) 459; *Haight v. Pittsburg, etc., R. Co.*, 6 Wall. (U. S.) 15; *First Nat. Bank v. Kentucky*, 9 Wall. (U. S.) 353; *Lionberger v. Rouse*, 9 Wall. (U. S.) 468; *U. S. v. Baltimore, etc., R. Co.*, 17 Wall. (U. S.) 322; *Minot v. Philadelphia, etc., R. Co.*, 18 Wall. (U. S.) 206; *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 156; *Union Bank v. State*, 9 Yerg. (Tenn.) 501; *Richmond v. Daniel*, 14 Gratt. (Va.) 385; *Nashua Sav. Bank v. Nashua*, 46 N. H. 398; *Dwight v. Mayor, etc., of Boston*, 12 Allen (Mass.) 322; 90 Am. Dec. 149; *Com. v. Phoenix Iron Co.*, 1 Pearson (Pa.) 383; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; 13 Am. & Eng. R. Cas. 347; *Delaware, etc., R. Co. v. Com.*, 66 Pa. St. 69; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *New Orleans v. Louisiana Sav. Bank, etc., Co.*, 31 La. Ann. 826; *Barney v. State*, 42 Md. 480; *McVeagh v. Chicago*, 49 Ill. 318; *Mayor, etc., of Baltimore v. Baltimore City Pass. R. Co.*, 57 Md. 31; 7 Am. & Eng. R. Cas. 362; *St. Albans v. National Car Co.*, 57 Vt. 68. Many of the state's tax bank shares to the owner at the location of the bank, and require the bank to pay the tax.

In *Arkansas*, banks are required to pay tax on the shares of stock, but may recover the amount so paid from

**IV. DOUBLE TAXATION.**—While the double taxation of corporations may be unjust,<sup>1</sup> the power of the state to impose it is

the stockholder. *Arkansas* Dig. of Stat. 1884, §§ 5632, 5633.

In *North Carolina*, the cashier of the bank is required to pay the state taxes on shares of stock to the treasurer of the state, and the taxes assessed for school and county purposes to the sheriff of the county in which the bank is situated. *North Carolina* Laws 1891, p. 291, § 4.

In some of the states, non-resident shareholders in all corporations are taxed, and the corporation pays it and collects it from the shareholder. *Connecticut* Gen. Stat. 1888, §§ 3916, 3917; *Maryland* Pub. Gen. Laws 1888, p. 1250.

*Vermont* makes this provision as to stock in all corporations but railroads, telephone, insurance, steamboat, and car and transportation companies, the stock of which companies is exempt from taxation. *Vermont* Rev. Stat. 1880, §§ 283, 284; Acts 1890, p. 16.

In *Massachusetts*, a law requiring all corporations to reserve and pay into the treasury of the commonwealth a certain proportion of all dividends declared by them on shares of non-resident owners has been declared unconstitutional. *Oliver v. Washington Mills*, 11 Allen (Mass.) 268. See a similar rule declared in *New Jersey*. *State v. Thomas*, 26 N. J. L. 181.

"The fact that the tax on the shares is collected from the bank, instead of directly from the stockholders, does not alter the character of the tax. This mode of requiring the officers of corporations to pay the tax on the dividends due the shareholders, or on the shares, is the one practised in New England and some of the other states, and by Congress, and is one which experience shows to be convenient and proper." *Burroughs on Taxation* (1st ed.), § 86. See *First Nat. Bank v. Kentucky*, 9 Wall. (U. S.) 363.

In *Jenkins v. Charleston*, 5 S. Car. 393; 23 Am. Rep. 14, it was held that the city council of Charleston may lawfully tax its own stock, as well that owned by non-residents as that owned by residents of the city, and may enforce payment by deducting the amount of the tax from interest due on the stock.

It was held in *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300, that

the corporation could not be made collector of a tax on bonds in the hands of non-resident owners.

Neither can such a tax be enforced against the corporation's assets after it becomes insolvent, nor against a receiver's assets. *Lionberger v. Rowse*, 43 Mo. 67; *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374; *Cooley on Taxation*, p. 433.

Corporations may, it seems, be compelled by *mandamus* to collect such taxes. *State v. Mayhew*, 2 Gill (Md.) 487; *Barney v. State*, 42 Md. 480; *McVeagh v. Chicago*, 49 Ill. 318.

1. See *CORPORATION*, vol. 4, p. 272c; *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Tax Cases of 1841*, 12 Gill & J. (Md.) 117; *State v. Tunis*, 23 N. J. L. 546; *Cook v. Burlington*, 59 Iowa 251; 44 Am. Rep. 679.

In *Nashua Sav. Bank v. Nashua*, 46 N. H. 389, it was held that the real estate of a bank is taxable in the town where situated, regardless of any assessment that has been made on the capital stock. The court said: "It is a fundamental principle in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly;" but on the next page it adds; "If this were in substance a double tax, it would only show that the statute has in this instance admitted an anomaly in conflict with the general policy of the law, which can only be excused on the ground that, from the nature of the case, the injustice of double taxation cannot be avoided."

In *Lenawee Co. Sav. Bank v. Adrian*, 66 Mich. 273; 18 Am. & Eng. Corp. Cas. 471, in which it was held that the bank fixtures and surplus property held by a bank which had paid a tax on its real estate, and whose shareholders had paid a tax on the value of their shares, after deducting the value of the real estate so taxed to the bank, could not be assessed for taxation under the statute of 1885, the court said, "Whether legally possible to levy double taxes under any circumstances, as it is claimed some authorities justify, there is no doubt they ought not to be levied, and we have no doubt this statute has prevented banks and their shareholders from being subjected to them."

ample.<sup>1</sup> Statutes will be so construed as to prevent double tax-

In *Salem Iron Factory v. Danvers*, 10 Mass. 514, decided in 1813, it was held that a manufacturing corporation is taxable for its real property in the town where it lies, notwithstanding the individual corporators are liable to be taxed for their several shares in the towns where they dwell. But the personal property of the corporation was held not to be taxable; the court observing that, as the shares are articles of personal estate, for which the owners are taxable in their respective towns, "it appears unjust and contrary to the spirit of our laws, that the corporation should also be taxed for the same property."

But see *Tax Cases of 1841*, 12 Gill & J. (Md.) 117, and *Gordon v. Mayor*, etc., of Baltimore, 5 Gill (Md.) 231, where the doctrine is advanced that, "the stock of a bank is the representative of its whole property; and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the company becomes exempt from taxation. To tax both the real or personal property and the stock, would be a double tax, and unjust."

1. *New York*, etc., *R. Co. v. Sabin*, 26 Pa. St. 245; *State v. Newark*, 25 N. J. L. 315; *State v. Branim*, 23 N. J. L. 484; *Jersey City Gas Light Co. v. Jersey City*, 46 N. J. L. 194; *Providence*, etc., *R. Co. v. Wright*, 2 R. I. 559; *U. S. Express Co. v. Ellyson*, 28 Iowa 370.

In *Iron City Bank v. Pittsburgh*, 37 Pa. St. 340, in which it was held that a tax could be assessed against the discount business of a banking corporation which had paid a tax on its capital stock, the court says: "With a firm conviction that bank stocks are taxed beyond any other forms of property in the commonwealth, . . . we are brought, nevertheless, to the conclusion that this tax is legal and constitutional."

In *People v. Home Ins. Co.*, 92 N. Y. 328; 3 Am. & Eng. Corp. Cas. 363, on page 347, the court, by Ruger, C. J., said: "In performing the duty of levying taxes for the support of the government, state legislatures may, in the exercise of their undoubted power, impose double taxes, or lay burdens beyond the financial capacity of the classes taxed, and however impolitic or unwise such a course would be, the courts have no

right to interfere with the legislative discretion."

But see *Angell & Ames on Corporations* (11th ed.), § 461, where it is said: "It appears, then, that the capital stock of a corporation may, in the discretion of the legislature, be taxed as an aggregate, to the corporation, according to its value, or to the stockholders, on account of their separate ownership of it; but cannot be taxed at the same time in both modes." Citing *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199; *Smith v. Burley*, 9 N. H. 423; *Gordon v. Mayor*, etc., of Baltimore, 5 Gill (Md.) 231; *Bank of Cape Fear v. Edwards*, 12 Gill & J. (Md.) 117.

But the cases cited from *Massachusetts* and *New Hampshire* turn on the construction of statutes in those states; the one from *North Carolina* depends upon the provisions of the company's charter, and the *Maryland* cases were decided with direct reference to a provision of the constitution of that state.

A tax may be laid on the net earnings or income of a corporation which is paying a bonus of  $2\frac{1}{2}$  per cent. on its capital stock in lieu of tax on dividends. *Jones*, etc., *Mfg. Co. v. Com.*, 69 Pa. St. 137.

In *Rudderow v. State*, 31 N. J. L. 512, the court, by Elmer, J., said: "Our state constitution contains no restrictions upon the power of taxation, and in the absence of such restrictions, or of restrictions in the Constitution of the *United States*, all persons inhabiting or doing business in the state, whether individual citizens or artificial persons doing business as corporations by virtue of legislative grants, may be taxed, at the discretion of the legislature, to such extent as the public exigencies may require; and such taxation may be universal or limited, discriminating or general, equal or unequal."

In a note to *People v. Worthington*, 21 Ill. 171; 74 Am. Dec. 95, it is said: "Sovereign states undoubtedly possess the power to tax all property within their jurisdiction, and also to determine the mode and limit of such taxation. *Catlin v. Hull*, 21 Vt. 152; *Dundee Mortgage*, etc., *Co. v. School Dist. No. 1*, 19 Fed. Rep. 359; *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300; *Kirtland v. Hotchkiss*, 100 U. S. 491. Mr. Justice Field, in delivering the opinion of the Supreme Court of the *United*

ation, if possible.<sup>1</sup> A tax upon the capital stock, or property of the corporation and an additional tax upon the shares in the

*States* in the case of the State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 319, said: 'Unless restrained by provisions of the federal constitution, the power of the state as to the form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.' In taxing credits, it is sometimes impossible to avoid double taxation, because both the credit and the property mortgaged to secure the debt are taxed. Yet, it is held that there is no constitutional objection to such taxation. *Alabama Gold L. Ins. Co. v. Lott*, 54 Ala. 499; *Lamar v. Palmer*, 18 Fla. 147; *Gold-gart v. People*, 106 Ill. 25; *Appeal Tax Court v. Rice*, 50 Md. 302; *St. Louis Mut. L. Ins. Co. v. St. Louis Co.*, 56 Mo. 503. Double taxation is against the spirit of our laws and should not be imposed if it can be avoided; but the imposition of such taxation is not in excess of the legislative power, and courts will not declare it illegal merely because the same value is taxed twice. *Burroughs on Taxation*, § 49; *Osborn v. New York, etc., R. Co.*, 40 Conn. 491; *Cook v. Burlington*, 59 Iowa 251; 44 Am. Rep. 679; *State v. St. Louis Co. Ct.*, 47 Mo. 594; *State v. Collector of Chambersburg*, 37 N. J. L. 258; *Cooley on Taxation*, p. 158."

The holding of a charter from one state, when the corporate property is located or corporate business transacted in another state, does not relieve the corporation in both or either from taxation, in any form which the legislative power may, under its constitution, adopt. *Standard Underground Cable Co. v. Atty. Gen'l*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394.

In *Toll Bridge Co. v. Osborn*, 35 Conn. 7, it appears that a corporation whose property consisted principally of real estate, was taxed upon its capital stock, and that the shares were taxed in the hands of the stockholders, while a railroad which held most of the stock of the corporation was taxed upon its capital stock and shares at the enhanced value due to this ownership; but the court held that the corporation was liable to pay a tax upon its real estate. The court said: "The instances in which property is taxed more than once are not very infrequent. . . . No doubt it is and ought to be

the general policy of the legislature to avoid double taxation of the same property. But there is also as little doubt that this general policy is not always carried out. And while it may be true that in a case of doubtful construction as to the meaning of the legislature, this policy might be sufficient to authorize the court to give a construction to a statute that would avoid this result, still, in cases where the language is clear, the fact that it imposes double taxation will never justify a court in disregarding it."

In *Pittsburg, etc., R. Co. v. Com.*, 66 Pa. St. 73, the supreme court adopts the opinion of Judge Parson of the court below, in which he says: "Double taxation has never been considered unlawful in this state. On the contrary, it is of frequent occurrence. The real and personal property of a corporation may be taxed, although it pays a tax on the stock which purchased it. *Lackawanna Iron Co. v. Luzerne Co.*, 42 Pa. St. 431. See *Carbon Iron Co. v. Carbon Co.*, 39 Pa. St. 251; *Westchester Gas Co. v. Chester Co.*, 30 Pa. St. 232; *Saving Fund v. Yard*, 9 Pa. St. 361. The power of the legislature is as ample to tax twice as to tax once, 6 Casey 332. And it is done daily, as experience shows, 9 Barr. (Pa.) 361. Equality of taxation is not required by our constitution, 7 Harris 258. The stock may be fully taxed to the institution and also to the stockholders, *Whitesell v. Northampton Co.*, 49 Pa. St. 529; and the stockholder in the corporation of another state is obliged to pay a tax to *Pennsylvania* on his stock, he being a resident here, although the whole property and stock is subject to taxation in the state of its location. *McKeen v. Northampton Co.*, 49 Pa. St. 519; 88 Am. Dec. 515."

1. *American Bank v. Mumford*, 4 R. I. 478; *Providence Institution v. Gardiner*, 4 R. I. 484; *New Orleans v. Houston*, 119 U. S. 265; *People v. Commissioners of Taxes*, 95 N. Y. 554; *Kimball v. Milford*, 54 N. H. 406; *Pennsylvania Co. v. Com.*, 22 W. N. C. (Pa.) 340; *State v. Bentley*, 23 N. J. L. 532; *Jersey City Gas Light Co. v. Jersey City*, 46 N. J. L. 194; *State v. Thomas*, 26 N. J. L. 181; *State v. Tunis*, 23 N. J. L. 546; *State v. St. Louis, etc., R. Co.*, 77 Mo. 202; 13 Am.

& Eng. R. Cas. 426; *Valle v. Ziegler*, 84 Mo. 214; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Lackawanna County v. First Nat. Bank*, 94 Pa. St. 221; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

In *Smith v. Burley*, 9 N. H. 423, the court held that, although the statute under consideration was "broad enough to include shares of stock as subjects of taxation to the owner, if such was the intention of the legislature, we cannot for a moment suppose that such an intention existed, unless we can find that the provision of the act of 1827, for taxing all the property to the corporation, is repealed by the the act of 1833; for, if that still stands, a taxation of the shares at their appraised value would in fact be a double taxation of the property, once to the corporation itself, and again to the corporators, which would be unjust, oppressive, and unconstitutional." Cited and approved in *Cheshire Co. Telephone Co. v. State*, 63 N. H. 167.

In *Pennsylvania Co., etc. v. Com.* (Pa. 1888), 15 Atl. Rep. 456, in which several acts were construed together to avoid a construction of a statute by which the capital stock of a company and the shares held by the stockholders should both be taxed, the supreme court of *Pennsylvania*, by Paxon, J., said: "Conceding the power of the legislature to impose a double tax in this manner, its exercise is never to be presumed. The intent to impose double taxation must be clearly expressed. We are of opinion that, the shares of the defendant company having been taxed in the hands of the shareholders under the act of 1885, its capital stock cannot be taxed under the act of 1879."

In *Montgomery Co. v. Montgomery Gas Light Co.*, 64 Ala. 269, it is held that in view of the legislative policy disclosed by the statutes of the state, not to subject the same property to double taxation, the courts will not so construe a statute as to impose a double tax, unless such construction is required by the express words of the statute, or by necessary implications; but, where a mass of property, subject to taxation, is covered by a general clause in the statute, while it falls partly within and partly without the terms of a special clause, effect will be given to each clause, by holding the general clause applicable only to that portion which does not fall within the special clause.

In *Salem Iron Factory v. Danvers*,

10 Mass. 514, in which it is held that where the shares of stock of a corporation are taxed to the holders, its real estate should be taxed under a general revenue law, while its personal property should be exempt, the court says: "We should not adopt any construction of the laws which would subject the same property to be twice charged for the same tax, unless required by the express words of a statute or by necessary implication." This case is cited with approval in *State Bank v. Savannah*, *Dudley* (Ga.) 130, which holds that a city might tax the shareholders of a bank upon their shares, under a charter empowering it to levy taxes on real and personal estate, but this taxation would by implication exclude the taxation of the bank on its capital stock.

But see *Lycoming Co. v. Gamble*, 47 Pa. St. 106, and *Whitesell v. Northampton Co.*, 49 Pa. St. 526, where a statute imposing a tax upon "all shares of stock in any bank, institution or company now or hereafter incorporated," and in the following section mentioning as a subject for taxation, the "capital stock of the banks, institutions," and companies therein mentioned, was held to authorize a tax on both the capital stock and shares.

In *Tennessee v. Whitworth*, 117 U. S. 137; 29 Am. & Eng. R. Cas. 205, in which the principle is declared that the capital stock and shares of stock are so far distinct that the shares may be taxed even when the capital stock has been taxed or is exempt from taxation, the court holds that in the absence of an express legislative declaration to impose such a tax, it cannot be presumed that the legislature intended to include shares in such a company, when imposing a tax on shares of stock. The court, by Chief Justice Waite, says: "It is no doubt within the power of the state, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. . . . Sometimes tax laws have that effect, but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition."

In *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 560, where it is held that the legislature could not intend to tax the same property in two different

hands of the stockholders, is generally not considered double taxation;<sup>1</sup> neither is a tax on the franchise in addition to a tax on

modes, Napton, J., who delivered the opinion of the court, adds: "A double taxation is an absurdity, at least, where the proceeds of the taxation go in one direction, since it is in effect an increased rate of taxation merely, and could be more plainly and simply expressed by making it so in terms." *State v. Hannibal, etc., R. Co.*, 37 Mo. 265.

In *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 245, the court held that, when the legislature have exercised the taxing power "by taxing all the property of a particular company in a specified manner, and have intimated no design to subject it to any further taxation, we hold the power to be satisfied, and do not add, by judicial implications, burdens which the legislature have not thought fit to impose," and that a railroad company paying an annual franchise tax of \$10,000, and a tax on its capital stock imposed by special acts of the legislature, was not liable to taxation on its property under the general tax law.

1. *State Bank v. Richmond*, 79 Va. 113; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Cook v. Burlington*, 59 Iowa 251; 44 Am. Rep. 679; *State v. Branin*, 23 N. J. L. 484; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406; 39 Am. & Eng. R. Cas. 518; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 555; 32 Am. Rep. 532; *Nashville Gaslight Co. v. Mayor, etc., of Nashville*, 8 Lea (Tenn.) 406; *Lycoming Co. v. Gamble*, 47 Pa. St. 106; *Henkle v. Keota*, 68 Iowa 334. The rule is otherwise in *Maryland*, *Fredrick County v. Farmers', etc., Nat. Bank*, 48 Md. 117; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; *Philadelphia, etc., R. Co. v. Bayless*, 2 Gill (Md.) 355; *State v. Cumberland, etc., R. Co.*, 40 Md. 51; *Tax Cases*, 12 Gill & J. (Md.) 117; and in *California*, *Burke v. Badlam*, 57 Cal. 594.

In *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, it is held that the shares are so far distinct from the capital stock of a corporation that they may be taxed, even where the capital is invested in property exempt from taxation. *Sump-*

*ter Co. v. National Bank*, 62 Ala. 464; *Harrison v. Vines*, 46 Tex. 15.

In *Farrington v. Tennessee*, 95 U. S. 687, it is said: "The capital stock and the shares may both be taxed, and it is not double taxation."

In *Belo v. Forsyth*, 82 N. Car. 417; 33 Am. Rep. 688, the court, holding that the state has authority to lay a tax upon the shares of stock, where the property is either exempt or has paid a tax, says: "The question is scarcely open to debate."

In *Providence, etc., R. Co. v. Wright*, 2 R. I. 459, it is held that the rails, sleepers, bridges, etc., of a railroad corporation, together with their easement in the lands, are real estate and subject to taxation, even where the capital stock has been taxed to the shareholders.

In *Cook v. Burlington*, 59 Iowa 251; 44 Am. Rep. 679, it was held that the legislature of Iowa had the power under the constitution to impose a tax upon the property of a toll bridge company, and also a tax upon the shares of the corporation stock in the hands of the shareholders. The court, by Rothrock, J., said: "It has never been held in this state that what is here denominated duplicate taxation is in excess of the legislative power. The most that can be said of the utterances of this court is, that it should be held in disfavor by courts and legislatures." But it adds: "The taxation of the property of the corporation and also of the stock bears no resemblance to taxing the same tract of land twice to the same person, nor once to A, and again to B. That would be a double taxation, which we suppose would not be allowable in any state in the Union."

In *Frazer v. Siebern*, 16 Ohio St. 614, this form of taxation is commended, and the court, by Welch, J., says: "In a system like ours, where intangible as well as tangible property is taxed, some forms of double taxation are unavoidable; but the object should be to avoid double taxation, wherever it is practicable, and, as nearly as may be, to tax all according to their actual wealth. That object is best attained in the case of a corporation, or joint-stock company, by taxing the stockholders—the persons who own its property—upon the full value of their shares

therein, including, of course, their interest in the franchise or privilege, and in all tangible property owned by the company; and by taxing the corporation also upon the value of such tangible property. The stockholders are thus taxed, as all other individuals who own tangible and intangible property are sometimes unavoidably taxed, once upon all he is worth, and a second time upon that part of his property which is tangible."

But see *State v. Hannibal, etc., R. Co.*, 37 Mo. 265, where it was held that when the shares of stock are taxed, the property of the corporation is exempt. The court said: "If the property of a corporation is taxed in the hands of the stockholders, it cannot be taxed in the hands of the corporation also. A corporation is taxable like a natural person, but it is not to be taxed twice." See also *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *State v. Tunis*, 23 N. J. L. 546.

In *State v. St. Louis, etc., R. Co.*, 77 Mo. 202; 13 Am. & Eng. R. Cas. 426, the court said: "Taxing the shares against the stockholders, and also the capital stock, or the property represented by the capital stock, is duplicate taxation. *State v. Branin*, 23 N. J. L. 484; *First Nat. Bank v. Kentucky*, 9 Wall. (U. S.) 360; *Angell & Ames on Corp.* (8th ed.), §§ 460, 461; *Smith v. Burley*, 9 N. H. 423; *Middlesex R. Co. v. Charlestown*, 9 Allen (Mass.) 330; *Gordon v. Mayor, etc., of Baltimore*, 5 Gill (Md.) 231; *Mayor, etc., of Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288; 48 Am. Dec. 531; *American Bank v. Munford*, 4 R. I. 478; *Burroughs on Taxation* 174." This case is cited with approval in *Valle v. Ziegler*, 84 Mo. 214.

See also *Pennsylvania Co. v. Com.*, 22 W. N. C. (Pa.) 340, where it was held that the shares of a corporation having been taxed under a special act of 1885, its capital stock could not be taxed under the general act for the taxation of all corporations passed in 1879; that such taxation, would be practically double taxation, which will never be presumed where the legislative intent to impose double taxation is not clearly expressed.

In *Cook's Stock, Stockholders and Corporation Law* (2d ed.), § 567, it is said that a double tax exists where either the corporate realty, or personalty, or franchise, or capital is taxed, and a tax is also levied on the shares

of stock without any deduction for the former taxation.

In *Spelling on Private Corporations* (1st ed.), § 1114, it is said that, "When the capital of a corporation is taxed in addition to a tax upon its shares in the hands of the stockholders, or upon the capital which is invested in its property, and also upon the property itself, it is duplicate taxation."

In *Rosenberg v. Weekes*, 67 Tex. 578, the court, by Willie, C. J., said: "Our statutes do not contemplate that real estate belonging to banks shall be taxed at all. All the provisions of these statutes which levy a tax upon any property whatever, except shares in national banks, are wholly inapplicable to these institutions. They apply only to other corporations and individuals. To hold them applicable to national banks would violate not only the act of Congress, but our state constitution, for it would subject national bank shares to double taxation."

In *Gillespie v. Gaston*, 67 Tex. 599, the court, by Stayton, J., said: "To tax the shares of a stockholder in a corporation, when all the property which gives value to such shares is taxed against the corporation, would be in effect double taxation of the same thing, for the certificate and ownership of shares but evidence and give to the shareholder the right to participate in the profits to be derived from the business to be conducted by the corporation so long as it continues in business, and to share in the proceeds of its property on dissolution."

In *Bangor, etc., R. Co. v. Harris*, 21 Me. 533, the court, by Whitman, C. J., said: "The interest in this railroad being personal estate, was not otherwise taxable than as such. Each shareholder was taxable for the amount of his interest in it in the town where he resided, and not elsewhere, and to allow the inhabitants of the towns throughout which it might pass, to tax it, would be subjecting it to a double taxation, which could be tolerated neither by the policy, nor justice of the law, and the legislature never could have designed such a thing."

This case is criticised by the later case of *Cumberland Marine R. Co. v. Portland*, 37 Me. 444, in which the court says: "The case was decided without argument. . . . The statute of 1838 undoubtedly escaped the observation of the court." But impliedly affirms the expression above quoted, and

the property or capital stock.<sup>1</sup> But the taxation both of the capital stock and of the property represented by it is double taxation.<sup>2</sup> This rule, however, does not apply to property unneces-

bases its decision that the real estate of a corporation is taxable as such, upon the ground that the statute provided that "all real estate belonging to any corporation, shall be assessed to such corporation in the town or other place where such real estate or machinery and goods are situated and employed; and, in assessing the stockholders for their shares in any such corporation, their proportional part of the value of such machinery, goods and real estate, shall be deducted from the value of such shares."

1. See *Carbon Iron Co. v. Carbon Co.*, 39 Pa. St. 251; *Lackawanna Iron, etc., Co. v. Luzerne Co.*, 42 Pa. St. 424; *Illinois Railroad Tax Cases*, 92 U. S. 575; *Indianapolis, etc., R. Co. v. Vance*, 96 U. S. 450; *Portland Bank v. Apthorp*, 12 Mass. 259.

In *Com. v. New England Slate, etc., Co.*, 13 Allen (Mass.) 391, which cites *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 208, as an authority, the court, by Wells, J., says: "The fact that the defendant corporation held property, which was subject to the burden of taxation in other ways, does not render this tax upon its franchise illegal. In the practical operation of the powers of taxation, which are given in several forms, it is inevitable that double taxation should occur in some cases. The legislature may relieve against it by allowing deductions, if it sees fit to do so; but the court can only apply the law as it stands."

In *Spring Valley Water Works v. Schottler*, 62 Cal. 69, it is held that the franchise of a corporation is a species of property liable to taxation, and the court adds: "By declaring, as was done in section 3608 (Pol. Code of Cal.) that shares of stock were not to be taxed because they possessed no intrinsic value over and above the value of the property of the corporation which they stand for and represent, and as taxing of the shares and property both, would be double taxation, and therefore the shares should not be assessed, but the property should, no doubt it was their intention to tax everything into the shape of property owned by the corporation; that everything entering into and giving value to the shares should be taxed. It can-

not be doubted that the legislature . . . did not intend to leave the system in relation to so important a matter in such a shape, that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations, should escape taxation."

In *Monroe Sav. Bank v. Rochester*, 37 N. Y. 367, the court, by Fullerton, J., said: "The powers and privileges which constitute the franchises of a corporation, are in a just sense property, and quite distinct and separate from the property which by the use of such franchises the corporation may acquire;" and held that a bank may be taxed upon such franchises, where the capital stock is invested in *United States* bonds, which cannot be taxed.

In *Wilmington, etc., R. R. Co. v. Board, etc.*, 72 N. Car. 10, the state board had apparently valued the franchises of the railroad at the full value of all its property, and it was held that the company was liable to a tax on its real estate. The court said: "The franchise of a corporation is capable of a valuation apart from the property which the corporation may happen to own, and a valuation of the franchise does not necessarily or properly include a valuation of the corporate property."

In *Com. v. New York, etc., R. Co.*, 150 Pa. St. 234, it was held that a tax upon the net earnings or income of trust companies which have no capital stock, and a tax upon certain bonds owned by them, was not double taxation, although the net earnings or income was derived from the interest on such bonds—the former tax being held a tax on the franchise.

2. *Cheshire Co. Telephone Co. v. State*, 63 N. H. 167; *Rice Co. v. Citizens' Nat. Bank*, 23 Minn. 280.

In *State v. Hannibal, etc., R. Co.*, 37 Mo. 265, it is said: "It would seem to be clear that, in contemplation of law, there cannot be any other property of this corporation, over and above the stock held by the shareholders," and the court holds that where the capital stock is taxed, the tangible property of the railroad is exempt. See also *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550.



sary to the operation of the business of the corporation.<sup>1</sup> Some states provide against double taxation by statutes exempting shares of stock from taxation when the corporation itself is taxed on its property and capital stock.<sup>2</sup> Others deduct a proportionate part of the value of the corporate property otherwise taxed, from the value of each share.<sup>3</sup> Others tax the shares and exempt the property or capital stock of the corporation, or both of them, from taxation.<sup>4</sup>

**V. EXEMPTIONS.**—(See CORPORATIONS, vol. 4, p. 272*d*; TAXATION—*Exemptions*.)

In *Scotland Co. v. Missouri, etc.*, R. Co., 65 Mo. 123, it is held that a railroad company whose stock is, by law, exempt from taxation, cannot be taxed on property owned and used by it in the operation of its railway and necessary for that purpose, because the stock is but the representative of the property.

In *Augusta v. Georgia R., etc., Co.*, 26 Ga. 651, where the charter of a company provided that "the stock of said company and its branches shall be exempt from taxation for and during the term of seven years, from and after the completion of the said railroads or any of them; and after that, shall be subject to a tax, not exceeding one-half per cent. per annum, on the net proceeds of their investment," it was held that the city council of Augusta could not impose a tax on the banking part of the capital stock of the company, nor on its real estate situated in Augusta.

In *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 558, it is said that "Capital stock, in its strict significance, exists only nominally; the money or property which it represents is the tangible realty. The one is the representative of the other; and if the stock and the property it represents are both taxed, the taxation is double." *Contra*, *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199; *American Bank v. Mumford*, 4 R. I. 478.

In *Nashville Gas Light Co. v. Mayor, etc.*, of Nashville, 8 Lea (Tenn.) 406, under a statute which enacted that no tax shall hereafter be assessed upon the capital of any joint-stock company of the state, but that the shareholders shall be assessed on the value of their shares of stock therein; with a proviso that this should not be so construed as to exempt from taxation the real estate held or owned by any such corporation, it was held that a company was

liable to pay the tax imposed upon its shareholders, and also upon its real estate purchased with money paid in as capital stock, and used in its business.

1. *State v. Mansfield*, 23 N. J. L. 510; *State v. Newark*, 25 N. J. L. 315; *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452; *Railroad Co. v. Berks Co.*, 6 Pa. St. 70; *Worcester v. Western R. Co.*, 4 Met. (Mass.) 564; *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 195.

2. See various state statutes. The constitution of *California* forbids the double taxation of property. In *Burke v. Bodlam*, 57 Cal. 594, it is said: "A mortgage or trust deed securing a debt is, under the constitution, to be deemed and treated as an interest in the property affected thereby, and assessable to the owner. The property itself is also to be assessed to its owner; but to prevent what would otherwise be double taxation, the constitution requires that, in making the assessment, the value of the security shall be deducted from the value of the incumbered property. So in the case of credits, not secured by mortgage or trust deed, the legislature may provide that there shall be deducted therefrom debts due to *bona fide* residents of the state. Not only does the language of the constitution neither require nor permit double taxation, but we think it may be safely said that neither the framers of the instrument nor those who ratified it ever supposed that under its provisions there could be any such thing; for both in the debates on the floor of the convention which framed it, and in the arguments of those who advocated its adoption before the people, are to be found repeated disclaimers of any such intention."

3. See the statutes of *Connecticut*, *Louisiana*, *Maryland*, *Michigan*, *Texas* and *Vermont*.

4. See the statutes of *Louisiana*, *Tennessee* and *Idaho*.

**TAX TITLES.**—(See also **TAXATION**, vol. 25, p. 5.)

- I. **Definition**, 674.
- II. **Power to Sell Lands for Taxes**  
(See **TAXATION** — *Tax Sales*, vol. 25, p. 367), 674.
- III. **Requisites**, 674.
  1. *Generally*, 674.
  2. *The Deed*, 675.
    - u. Power to Make, and By Whom Executed*, 675.
    - b. Purchaser's Right There-to*, 677.
    - c. Restraining Execution*, 680.
    - d. Requisites*, 681.
      - (1) *In General*, 681.
      - (2) *Recitals*, 683.
      - (3) *Description* (See also **TAXATION** — *The Assessment—Tax Sales*), 686.
      - (4) *Seal*, 688.
    - e. Parties*, 689.
      - (1) *Grantor*, 689.
      - (2) *Grantee*, 690.
    - f. Execution — Acknowledgment*, 691.
    - g. Delivery and Acceptance*  
(See also **DEEDS**, vol. 5, p. 445), 692.
    - h. Recording* (See also **RECORDING ACTS**, vol. 20, p. 527), 693.
    - i. As Evidence*, 694.
      - (1) *At Common Law*, 694.
      - (2) *Under Statutes*, 695.
    - j. As Color of Title* (See also **ADVERSE POSSESSION**, vol. 1, p. 225; **TITLE (REAL PROPERTY)**, vol. 26), 704.
    - k. By What Law Governed*, 706.
- IV. **Who May Acquire**, 706.
  1. *Persons Bound for Taxes*, 706.
  2. *Agent, Attorney, Guardian, Husband, and Wife*, 711.
  3. *Tax Officers*, 712.
  4. *State, County, and Municipality*, 714.
- V. **Nature of Title Acquired**, 716.
  1. *Before Execution and Delivery of Deed* (See also **TAXATION** — *Tax Sales*, vol. 25), 716.
  2. *After Execution and Delivery of Deed*, 717.
- VI. **Rights of Purchasers of Defective Titles**, 719.
  1. *At Common Law*, 719.
  2. *Under Statutes*, 719.
    - a. Return of Purchase-money*, 719.
    - b. Compensation for Improvements*, 725.
- VII. **Actions Concerning Tax Titles**, 726.
  1. *By Tax-title Claimant*, 726.
    - a. To Obtain Possession*, 726.
    - b. To Quiet and Confirm Title*, 727.
  2. *By the Owner*, 730.
    - a. To Set Aside Sale and Deed*, 730.
    - b. To Remove Cloud from Title*, 731.
    - c. Conditions of Relief*, 735.
- VIII. **Limitation of Actions** (See also **LIMITATION OF ACTIONS**, vol. 13, p. 667), 736.

**I. DEFINITION.**—A tax title is the title by which one holds land which he has purchased at a tax sale. It is that species of title which is inaugurated by a successful bid for land at a collector's sale of the same for non-payment of taxes, completed by the failure of those entitled to redeem within the specified time, and evidenced by the deed executed to the tax purchaser, or his assignee, by the proper officer.<sup>1</sup>

**II. POWER TO SELL LANDS FOR TAXES.**—See **TAXATION**—*Tax Sales*, vol. 25, p. 367.

**III. REQUISITES**—1. **Generally.**—All the requisites of a valid tax title, except the deed, have been fully treated elsewhere in this work. They are: power to impose the tax,<sup>2</sup> levy,<sup>3</sup> assessment,<sup>4</sup>

1. Black Law Dict.

2. See **TAXATION**, subd., *The Power to Tax*.

3. See **TAXATION**, subd., *The Levy*.

4. See **TAXATION**, subd., *The Assessment*.

opportunity and failure to pay,<sup>1</sup> return of delinquency,<sup>2</sup> sale,<sup>3</sup> certificate, report, and confirmation of sale,<sup>4</sup> and opportunity and failure to redeem from the sale.<sup>5</sup> Generally speaking, it will be found that any material variance from the statutory prescriptions in reference to any of these matters will be fatal to the tax title. The last act in the execution of the statutory power to sell lands for the non-payment of taxes is the deed.

**2. The Deed**—*a. POWER TO MAKE, AND BY WHOM EXECUTED.*—It is held that authority to make a deed to the lands sold for non-payment of taxes by a county or town must be expressly given or it does not exist; and that the grant of power to levy taxes and to sell lands for their non-payment, does not imply, or give to the corporation, power to convey the lands so sold.<sup>6</sup>

The local statutes name the officer who is to execute the deed, and no other has authority to perform the act.<sup>7</sup>

If the officer is allowed by law to have a deputy, the latter may make the deed, unless its execution is specially enjoined upon the principal; and when the deputy acts in the matter, he should do so for and in the name of his principal.<sup>8</sup>

1. See TAXATION, subds., *Payment*—*Collection*.

2. See TAXATION, subds., *Payment*—*Collection*.

3. See TAXATION, subd., *Tax Sales*.

4. See TAXATION, subd., *Tax Sales*.

5. See TAXATION, subd., *Redemption*.

6. *Smith v. Todd*, 55 Wis. 459; *Knox v. Peterson*, 21 Wis. 247.

In *Doe v. Chunn*, 1 Blackf. (Ind.) 336, the plaintiff in ejectment claimed title under a sale by the collector of a borough tax. The act incorporating the borough authorized the collector to sell lots for the non-payment of taxes, but was silent as to the making of conveyances. It was held that though the previous proceedings were regular, the deed of the collector vested no title in the purchaser.

And in *Sibley v. Smith*, 2 Mich. 487, it was held that the principle that every grant of power carries with it the usual and necessary means for the exercise of that power, and that the power to convey is implied in the power to sell, cannot be admitted in the construction of statutes which are in derogation of the common law, and the effect of which is to divest a citizen of his land. Such statutes, although enacted for the public good, must be construed strictly. But see *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Farrar v. Eastman*, 5 Me. 345; 2 Blackwell on Tax Titles (5th ed.), § 732.

In *Mead v. Nelson*, 52 Wis. 402, it was held that a resolution of the county board instructing the county clerk "to issue a tax deed to the county on all certificates remaining in the county treasurer's office three years from the date of their issue," created a continuing authority in the clerk, until it should be revoked, to execute tax deeds from year to year thereafter, whenever the three years for redemption upon the certificates should expire, and such direction by the county board is authorized by § 146, ch. 18, Taylor's Sts., then in force.

7. *Spurlock v. Dougherty*, 81 Mo. 171.

8. *Huey v. Van Wie*, 23 Wis. 613; *Scheiber v. Kaehler*, 49 Wis. 291; *Ward v. Walters*, 63 Wis. 39; *Whitford v. Lynch*, 10 Kan. 180; *Marx v. Hanthorn*, 30 Fed. Rep. 579.

In *California*, the law authorizing sheriffs to act as tax collectors, does not authorize a sheriff as tax collector to appoint a deputy tax collector; and a tax deed executed by a sheriff as tax collector by his under-sheriff is not admissible in evidence, and vests no title in the grantee. *Lathrop v. Brittain*, 30 Cal. 680.

Under the *Virginia* Stat., Feb. 9th, 1814, the sheriff or any of his deputies may make the sale, but whichever officer does so, that officer alone is competent to convey the land to the purchaser. *Wilsons v. Doe*, 7 Leigh (Va.) 22.

See also *Chapman v. Bennett*, 2

When, however, the deputy is, in case of the absence or disability of his principal, clothed with all the statutory powers of that officer, and required to perform his duties, it seems that he may, when the circumstances contemplated by the law exist, execute the deed by describing himself, and signing it, as deputy, without naming the principal.<sup>1</sup> And the presumption in favor of the correctness of official action applies, in the absence of any direct showing that the circumstances existed which authorized the deputy to act.<sup>2</sup>

The general rule is that the officer who sells may not, after the expiration of his term, execute a deed to the purchaser; that act must be performed by the incumbent of the office when the deed is due.<sup>3</sup>

Under most of the statutes the officer has no authority to make the deed to the purchaser within the time allowed for redemption, and a deed so made passes no title.<sup>4</sup>

Leigh (Va.) 229; Rockbold v. Barnes, 3 Rand. (Va.) 474; Hobbs v. Shumates, 11 Gratt. (Va.) 516.

1. Gilkey v. Cook, 60 Wis. 133. In this case, Cole, C. J., for the court, referring to the observation made by himself in Huey v. Van Wie, 23 Wis. 613, that "the power to make the deed is vested in the officer, and when the deputy acts, he should do so in the name of his principal," says: "I refer to the general rule that any ministerial duty may be performed by deputy, and add that the deputy should proceed in the name of his principal. This general remark is doubtless open to the just criticism passed upon it by council, that it was not necessary for the decision there made, and fails to make the proper distinction between an act performed by an agent on behalf of his principal, and an act performed by a deputy who is authorized by law to do the act in question. In the one case, the agent derives his authority to act from his principal for whom he acts. In the other, the deputy derives his authority from the law which clothes him with all the power of the clerk in the given case, or rather makes him the officer to perform that duty for the occasion. The distinction is well founded in reason and should not be overlooked."

Under How. Sts. (Mich.), § 283, the deputy auditor general may sign the deed in his own name, when his chief is sick or necessarily absent. Here, the court took judicial notice that the statute empowering the deputy auditor general to act in his principal's stead, had

long been construed in the office of the auditor general as authorizing the deputy to act in his own name when the circumstances arose which enabled him to act at all. Westbrook v. Miller, 56 Mich. 148; Drennan v. Herzog, 56 Mich. 467.

In Davis v. Living, 32 W. Va. 174, it was held that under the provisions of the West Virginia Code of 1868, a tax deed executed in 1870 by a deputy recorder, and duly acknowledged by him in his own name as such deputy, is admissible in evidence in ejectment for the land embraced in the deed.

2. Westbrook v. Miller, 56 Mich. 148. See also Huey v. Van Wie, 23 Wis. 613.

3. Hoffman v. Bell, 61 Pa. St. 444; Cuttle v. Brockway, 32 Pa. St. 45; Donnel v. Bellas, 34 Pa. St. 157; Den v. Allen, 67 N. Car. 346. See also Miller v. Williams, 15 Gratt. (Va.) 213.

In Tennessee, prior to the Act of 1856, ch. 91, § 3, a sheriff who had sold land for taxes had no power, after the expiration of his term, to execute a deed to the purchaser. Hightower v. Freedle, 5 Sneed (Tenn.) 312.

But in Kentucky, it is held that the power to sell and convey is entire, and the officer who sold may lawfully convey after he is out of office. Graves v. Hayden, 2 Litt. (Ky.) 61.

Under the Illinois Rev. Law of 1839, the deed may be made either by the officer making the sale, or his successor. Bestor v. Powell, 7 Ill. 119.

4. See TAXATION—Redemption; Ward v. Phillips, 89 N. Car. 215; Farrah v. Eastman, 10 Me. 191; Neal v. Spooner, 20 Fla. 38; Annan v. Baker, 49

Where the deed does not conform in its recitals to the facts, the officer is authorized to execute a second and corrected deed; but he has no power to execute a second deed which shall misstate the facts respecting any proceedings prior to its execution, and such a deed is void.<sup>1</sup>

In some of the states, the production of the tax certificate is a condition precedent to the authority of the officer to execute the deed.<sup>2</sup>

*b. PURCHASER'S RIGHT THERETO.*—After the expiration of the period of redemption, the purchaser at the tax sale is entitled to receive a tax deed, upon the performance by him of all the conditions precedent imposed by the law;<sup>3</sup> and the right may be

N. H. 161; *Bowman v. Wettig*, 39 Ill. 416; *McGavock v. Pollack*, 13 Neb. 535.

The *Minnesota* Act of 1862, has been construed to authorize the execution of the deed before the expiration of the time of redemption. *Baker v. Kelley*, 11 Minn. 480.

In *Connecticut*, the deed is to be executed immediately after the sale, but it is to lie in the town clerk's office twelve months, unrecorded, for the purpose of giving notice to the tax debtor that he may redeem. *Ives v. Lynn*, 7 Conn. 505.

1. *McCready v. Sexton*, 29 Iowa 356; 4 Am. Rep. 214; *Parker v. Sexton*, 29 Iowa 421; *Hurley v. Street*, 29 Iowa 429; *Genther v. Fuller*, 36 Iowa 604; *Johnson v. Chase*, 30 Iowa 308; *Gray v. Coan*, 30 Iowa 536; *Gould v. Thompson*, 45 Iowa 450; *Finley v. Brown*, 22 Iowa 538; *Woodman v. Clapp*, 21 Wis. 350.

Neither the power nor the duty of the clerk is exhausted by the execution of an irregular and imperfect deed. *Douglas v. Nuzum*, 16 Kan. 515.

If the proceedings, up to the execution of the deed, are invalid for want of a sufficient description of the premises sold, and the deed conforms to this description, the county clerk has not the authority to cure such defective description by the execution of a second deed containing another and different description than that set forth in the certificate and the proceedings upon which it is issued. *Hewitt v. Storch*, 31 Kan. 488; *Bowman v. Cockrill*, 6 Kan. 311; *Corbin v. Bronson*, 28 Kan. 532.

In *Nebraska*, a county treasurer has no authority to issue a second deed upon a canceled certificate in the clerk's office. *Baldwin v. Merriam*, 16 Neb. 199; *Reed v. Merriam*, 15 Neb. 323; *Thompson v. Merriam*, 15 Neb. 498.

Where the treasurer has executed to

the purchaser a valid deed in compliance with the statute and the sale, he cannot divest, or in any way affect the title thus conveyed, by the execution of a second deed. *Bulkley v. Callanan*, 32 Iowa 464.

2. *Reed v. Merriam*, 15 Neb. 323; *Silliman v. Frye*, 6 Ill. 664. In this latter case, it being said that, as the law authorizes the assignment of the certificate, and the execution and delivery of the deed to the assignee, it cannot be determined to whom the deed shall be made until the presentation of the certificate to the officer.

3. *Forqueran v. Donnelly*, 7 W. Va. 114.

The purchaser, under *Wisconsin* Laws of 1854, ch. 66, or Laws of 1859, ch. 22, is entitled to a deed at the end of three years from the date of sale, in all cases where the lands are unredeemed at that time, although the lands of minors, married women, etc., are subject to redemption after the delivery of the deed. *Wright v. Wing*, 18 Wis. 45. See also *Woodbury v. Shackelford*, 19 Wis. 59.

**Second Sale—Postponement of Right to Deed.**—In *Illinois*, if the purchaser allows the land to be again sold within two years, whether for the same class of taxes, or for other taxes properly assessed, his right to a deed is postponed for two years from the date of the second sale, and a deed obtained within the limitation from the second sale is void and inoperative. *Denike v. Rourke*, 3 Biss. (U. S.) 39.

**Conditions Precedent—Production of Tax Certificate.**—In *Nebraska*, the presentation by the purchaser of a tax certificate is a condition precedent to his right to demand a deed. *Reed v. Merriam*, 15 Neb. 323.

**Payment of Legal Fees.**—In *Wisconsin*,

enforced by *mandamus*.<sup>1</sup> Further, as the right of the purchaser is to a good and perfect deed, if the officer makes an imperfect deed, he may be compelled by *mandamus* to issue a second and

the purchaser must pay all legal fees that have accrued since the issuance of the certificate. *State v. Strahl*, 17 Wis. 146.

**Affidavit of Non-occupancy.**—In *Wisconsin*, where the land is unoccupied, proof must be filed with the officer issuing the deed that such land has not been occupied or possessed for the period of thirty days or more at any time within the six months immediately preceding the time when application for the tax deed is made. The period of thirty days means thirty consecutive days. Such affidavit may be made by a person other than the owner and holder of the certificate. *Howe v. Genin*, 57 Wis. 268.

Under this statute, an affidavit of non-occupancy made March 9th, and filed with the county clerk on the next day, stating that "the lots and pieces or parcels of land enumerated and described below are not now and have not been within the last six months in the possession or occupancy of any person for a period of thirty days," shows with sufficient certainty that no one of the parcels described has been occupied for a period of thirty days within the six months immediately preceding March 10th. *Dreutzer v. Smith*, 56 Wis. 292.

**Report of Surveyor.**—In *West Virginia*, the purchaser is required to have a report made by the surveyor of lands for the county in which the same are situated, specifying the metes and bounds of the land sold, giving such description thereof as will identify them, and the county clerk, unless there be some valid objection to the report, shall order the same to be recorded in his office, and a record thereof shall be made accordingly. *Orr v. Wiley*, 19 W. Va. 150.

**Notice to Redeem.**—The necessity for giving to the tax debtor notice to redeem has been treated elsewhere. See *TAXATION—Redemption*.

1. *Jones v. Welsing*, 52 Iowa 220. In this case, after the sale by the treasurer, the deputy collector received the taxes from the owner and gave his receipt therefor, both being ignorant of the fact of sale. Upon a discovery of the mistake, the treasurer offered to return to the purchaser the amount of his bid, with ten per cent. interest, which was refused. The time for redemption had

expired. It was held that the purchaser was, nevertheless, entitled to a writ of *mandamus* to compel the issuance to him of the deed.

**Mandamus Denied.**—But *mandamus* will not lie when actions are pending in other courts to have the tax proceedings adjudged void, *State v. Patterson*, 11 Neb. 266; nor where the assessment was invalid, or the petition fails to aver an assessment and levy, and that the taxes were unpaid, *Bosworth v. Webster*, 64 Cal. 1; nor where the purchaser fails to comply with the requirements of the statute relating to the giving of notice to redeem. *State v. Gayhart*, 34 Neb. 192. See also *TAXATION—Redemption*.

In *Michigan*, *mandamus* will not lie to compel the county treasurer to issue deeds of lands for which the petitioner had paid, where that officer's return shows that the money paid was tendered to, and accepted by, him the same day, and that the lands had been conveyed to other parties before he again tendered the money. *Atcheson v. Huebner* (Mich. 1892), 51 N. W. Rep. 634.

Where, under the statute, the tax deed was conclusive of certain facts, and *prima facie* proof of others, and A, part owner of the tract, not having paid the taxes on his part before the sale, had purchased the certificate of sale to the whole tract, and refusing the redemption money offered by B, the other part owner, on the ground that he could only redeem the whole, sought to compel the issue to him of the tax deed; it was held that he had neither a legal nor equitable right to the deed, and his petition for *mandamus* was denied. *State v. Williston*, 20 Wis. 228.

In *People v. New York*, 10 Wend. (N. Y.) 395, the statute authorized the corporation of the city of New York to sell lands for taxes, and to execute a lease of the same to the purchaser, if the owner failed to redeem within a specified time. The corporation failed to publish the notice, required to be published after the sale and before the expiration of the time of redemption, calling upon the owner to come in and redeem. The time for redemption had expired. The court declined to grant

corrected one.<sup>1</sup> So, also, may his successor in office, who has the same means of correcting the errors.<sup>2</sup> But it seems that *mandamus* will not lie to compel the issuance of a second deed in order to relieve the applicant from the consequences of his own mistakes or omissions in obtaining the first deed,<sup>3</sup> nor to compel the officer to execute a second deed containing recitals which would be contradicted by his return of the tax sale.<sup>4</sup>

A statute requiring the owner of a certificate, made before the enactment of the law, to give notice to the occupant of the premises of his application for a deed, does not impair the obligation of the contract;<sup>5</sup> but such a statute cannot be applied to cases where the right to the deed became absolute before its passage.<sup>6</sup>

Under some of the statutes, the owner of the tax certificate is required to demand a deed thereon, or to commence an action for the foreclosure of the same, within a specified time after the sale, or the expiration of the period of redemption, and, failing in this, he loses all rights under his purchase and certificate.<sup>7</sup>

And, although there may be no statutory limitation upon the

a *mandamus* requiring the corporation to execute the lease.

1. *Second and Corrected Deed*.—Clippinger v. Tuller, 10 Kan. 377; Grimm v. O'Connell, 54 Cal. 522; Ide v. Finneran, 29 Kan. 569; Maxcy v. Clabaugh, 6 Ill. 26; Klokke v. Stanley, 109 Ill. 192; State v. Winn, 19 Wis. 323.

2. Maxcy v. Clabaugh, 6 Ill. 26.

3. Klokke v. Stanley, 109 Ill. 192.

4. Hewell v. Lane, 53 Cal. 213.

5. Curtis v. Whitney, 13 Wall. (U.S.) 68; Oullahan v. Sweeney, 79 Cal. 537.

Under § 898 of the Iowa Code, the notice required by §§ 894 and 895 to be given to the owner and occupant before the execution of the deed, is not necessary, where the sales were made before the passage of those provisions. Robinson v. First Nat. Bank, 48 Iowa 354.

6. Rollins v. Wright, 93 Cal. 395.

Chapter 113, Wisconsin Laws of 1867, requiring, under certain circumstances, three months' notice to be given of the application for a deed, cannot be applied to a case where the owner of the certificate was entitled to a deed before the passage of the act, or in less than three months thereafter. Kearns v. McCarville, 24 Wis. 457; Curtis v. Morrow, 24 Wis. 664; State v. Hundhausen, 23 Wis. 508.

7. Wheeler v. Jackson, 137 U.S. 245; LaRue v. King, 74 Iowa 288; Innes v. Drexel, 78 Iowa 253.

In Nebraska, a deed issued more than five years after the date of the tax certificate is invalid, and creates no lien

upon the land. Alexander v. Wilcox, 30 Neb. 793; Fuller v. Colfax, 33 Neb. 716. See also Hephrey v. Redick, 21 Neb. 80; Parker v. Matheson, 21 Neb. 546; D'Gette v. Sheldon, 27 Neb. 829.

In Illinois, the time the purchaser is prevented from taking out his deed by injunction or order of any court, or by a refusal of the court to make the same, is to be excluded from the computation of the limitation prescribed; but the courts are not authorized to extend the exceptions to other cases than those named in the statute. Gage v. Reid, 118 Ill. 35.

In Wisconsin, the record made by the proper officers of the assignment of the certificate by the county at a certain time, is conclusive of the fact that the ownership of the certificate passed from the county at that time, and a deed issued upon such a certificate more than six years thereafter is, under Revised Statutes of that state, § 1182, void, notwithstanding any ownership of the certificate acquired by the county after such assignment. Hiles v. Cate, 75 Wis. 91.

The owner of a certificate upon occupied premises, who elects, under Wisconsin Revised Statutes, § 1181, to foreclose the same by action instead of taking a deed, although he is not required to give the notice called for by section 1175, must still commence his action while he is in a position to demand and obtain a deed; that is, before the time to give the notice has expired. Goffe v. Bond, 69 Wis. 366.

right to demand a deed, yet, when the purchaser delays for a long time to apply for one, a presumption of abandonment of his claim under the purchase may arise in favor of a *bona fide* grantee of the tax debtor.<sup>1</sup> When the certificate of sale is assignable, an assignment in due form passes to the assignee the right to the deed.<sup>2</sup>

c. RESTRAINING EXECUTION.—Elsewhere in this article it is shown that equity will, in a proper case, entertain a bill to remove a cloud upon the title occasioned by a tax deed.<sup>3</sup>

The jurisdiction to avert a cloud, when there was no other remedy, is a corollary of the conceded power to remove it; accordingly, chancery will restrain the issuance of a deed to lands illegally sold for taxes, when it would constitute a cloud upon the owner's title.<sup>4</sup> But equity will not interfere when the danger is merely speculative and potential—it must be made to appear that there is a determination to create the cloud;<sup>5</sup> nor at the instance of one who does not show an interest in the lands.<sup>6</sup>

1. *Ockendon v. Barnes*, 43 Iowa 615. Here a delay of more than eleven years was held sufficient to give rise to such presumption.

2. This subject is treated elsewhere. See TAXATION—*Tax Sales*; also *infra*, this title, *Parties*.

3. See *infra*, this title, *Actions Concerning Tax Titles*.

4. *Hare v. Carnall*, 39 Ark. 106; *Foote v. Milwaukee*, 18 Wis. 284; *Marsh v. Brooklyn*, 59 N. Y. 280, *distinguishing* *Scott v. Onderdonk*, 14 N. Y. 9; 67 Am. Dec. 106. As to what constitutes a cloud upon title, see *infra*, this title, *Actions Concerning Tax Titles*.

In *Kansas*, it is held that equity will not interfere to restrain the sale, or enjoin the execution of the deed when the property is subject to taxation, the tax legal, and the valuation not excessive, merely on the ground of irregularities in the tax proceedings. *Hudson v. Atchison County*, 12 Kan. 146; *Johnson County v. Ogg*, 13 Kan. 206; *Lawrence v. Killam*, 11 Kan. 499.

In *Perley v. Dolloff*, 60 N. H. 504, it was held that a bill in equity to set aside the sale and enjoin the officer from executing a deed, on the ground of an invalid assessment merely, will be dismissed for want of equity, where it appears that the tax assessed upon the plaintiff was no more than his proportionate share; nor, in such case will the court abate the tax, upon a petition for that purpose.

5. *Sanders v. Yonkers*, 63 N. Y. 492; *Mann v. Utica*, 44 How. Pr. (N. Y.)

337; *Crooke v. Andrews*, 40 N. Y. 551; *Hanlon v. Westchester County*, 57 Barb. (N. Y.) 392.

Where, therefore, an action was instituted against the comptroller, within a month after the execution by him of a tax certificate, to restrain him from executing a deed, on the ground that the taxes were illegally laid, it was held that, as by the statute (*New York Laws of 1855*, ch. 427, § 83) the comptroller is prohibited from conveying, and is directed to cancel the sale, whenever he discovers prior to the conveyance that the sale was invalid, in the absence of any allegation or proof of a demand upon the defendant to cancel the sale, and a refusal, or that he threatened or intended to make a deed in pursuance of the certificate, the action is not maintainable. *Clark v. Davenport*, 95 N. Y. 477.

6. *Johnson v. Brett*, 64 Iowa 162.

Where the sale was for a tax extended upon a void assessment, execution of a deed will be enjoined at the instance of a party whose title, though acquired after the assessment, will be clouded by the deed. *Siegel v. Outagamie County*, 26 Wis. 70.

Where the petition in such an action showed upon its face that plaintiff had sold the land before the institution of the suit, it was held that the burden was upon him to show such interest in the property as to entitle him to the relief asked, and that a demurrer on the ground that the petition did not show him entitled to the relief asked, was properly sustained. *Harlow v. Gow*, 44 Iowa 533.



The issuance of the deed has been enjoined where there was no valid assessment;<sup>1</sup> where the collector and bidders were guilty of fraud at the sale;<sup>2</sup> and where the owner was prevented from redeeming by the fraudulent misrepresentation of the purchaser.<sup>3</sup>

The officer authorized by law to issue the deed, and the holder of the tax certificate, should be made parties defendant in such an action.<sup>4</sup>

As a general rule, relief will be granted only upon condition that the applicant pay to the tax purchaser the taxes chargeable upon the lands, interest, and legal costs.<sup>5</sup>

*d. REQUISITES—(1) In General.*—Where the statute prescribes no form for a tax deed, the deed must be so drawn as to be sufficient according to the rules of the common law to transfer the title of a former owner and vest the estate in the purchaser.<sup>6</sup> In some cases the form prescribed by statute has been held to be mandatory and to be strictly pursued,<sup>7</sup> but in the majority of cases a substantial compliance has been held sufficient.<sup>8</sup> A deed

1. *Marsh v. Clark County*, 42 Wis. 502; *Brooks v. Howland*, 58 N. H. 98.

2. *Gage v. Graham*, 57 Ill. 144. In this case a combination was entered into by the collector and the principal bidders, to prevent competition in the bidding, and that the land should be struck off to one of the parties for the sums charged to the respective tracts, and bidding was thus prevented. The court enjoined the collector from making a deed to a party to the fraud.

3. *Koon v. Snodgrass*, 18 W. Va. 320. Here the purchaser fraudulently misrepresented to the owner that the land purchased was a different tract of land and one in which the owner had no interest, with a view of preventing him from redeeming within the required time, and it was, for that reason, not redeemed; the purchaser was perpetually enjoined from obtaining a deed to the land.

4. *Siegel v. Outagamie County*, 26 Wis. 70; *Sanders v. Yonkers*, 63 N. Y. 489.

When the tax purchaser is not a party to the action, and does not appear therein, he is not bound by the decree. *Helphrey v. Redick*, 21 Neb. 80. See also *Fuller v. Colfax*, 33 Neb. 716.

5. See *infra*, this title, *Actions Concerning Tax Titles*; *Stewart v. Meyer*, 54 Md. 454; *Hart v. Smith*, 44 Wis. 213. In *Rowe v. Peabody*, 102 Ind. 198, a complaint to restrain the execution of the deed, was held bad on demurrer, because it failed to aver a tender, and to make an offer to pay the lawful taxes.

6. *Einstein v. Gay*, 45 Mo. 62; *State v. Mantz*, 62 Mo. 258.

The deed must show upon its face the amount of taxes, interest, and costs due upon the tract sold. *Guffey v. O'Reiley*, 88 Mo. 418.

7. *Hubbell v. Campbell*, 56 Cal. 527; *Grimm v. O'Connell*, 54 Cal. 522; *Russell v. Mann*, 22 Cal. 131; *Williams v. McLanahan*, 67 Mo. 499; *Wellshear v. Kelley*, 69 Mo. 353; *Hopkins v. Scott*, 86 Mo. 140. Although it is said that the deed need not recite literally the language of the statute. *Pearce v. Tittsworth*, 87 Mo. 639.

In *Arkansas*, a tax deed in "the usual form" is a deed which substantially recites the material steps required to constitute a valid tax sale, including a proper description of the land, the price paid, and words granting the lands to the purchaser. *Bonnell v. Roane*, 20 Ark. 114.

8. *Martin v. Garrett*, 49 Kan. 131; *McCauslin v. McGuire*, 14 Kan. 248; *Bowman v. Cockrill*, 6 Kan. 311; *Haynes v. Heller*, 12 Kan. 381; *Mack v. Price*, 35 Kan. 134; *McQuesten v. Swope*, 12 Kan. 32; *Kinney v. Beverley*, 2 Hen. & M. (Va.) 318; *Doe v. Hileman*, 2 Ill. 323; *Gabe v. Root*, 93 Ind. 256; *Sutton v. Stone*, 4 Neb. 319; *Haller v. Blaco*, 10 Neb. 38.

The omission of the words "time and," when the statutory form prescribed the expression "and whereas at the time and place aforesaid," was held not to be a substantial departure from the statutory form where the time to be referred to was plainly shown by other

which shows upon its face that the requirements of the law have not been followed is void.<sup>1</sup> But a deed made in strict conformity with a particular form prescribed by statute, however, is good, though it does not show on its face that it was executed under, and in pursuance of, the special power given by statute.<sup>2</sup> Where

parts of the deed. *Haynes v. Heller*, 12 Kan. 381.

In *Sullivan v. Donnell*, 90 Mo. 278, it was held that a tax deed omitting the word "publicly," prescribed in the statutory form to indicate the manner of making the sale, was void.

In *Knowlton v. Moore*, 136 Mass. 32, it was held that the requirement that the deed "shall state the place of residence of the grantee" was not merely directory, and a failure to comply with the requirement was a fatal defect. See also *Harrington v. Worcester*, 6 Allen (Mass.) 576.

The absence of a recital of a date of execution or order authorizing the sale, is held to be fatal to the validity of the deed. *Williams v. McLanahan*, 67 Mo. 499. And where the statutory form required a recital of the year for which the taxes were sold, the deed in which the year was misrecited was held to be void. *Maxcy v. Clabaugh*, 6 Ill. 226. But see *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189.

The deed of resident lands in form required for non-resident lands, is void. *Jacks v. Dyer*, 31 Ark. 334.

In *Wisconsin*, the statute prescribing the form for a deed provides that it shall be "in substantially the form given," or "in other equivalent form." As to what has been held a compliance with the statute, see *Lybrand v. Haney*, 31 Wis. 230; *Marshall v. Bepson*, 48 Wis. 558; *Austin v. Holt*, 32 Wis. 478; *Falkner v. Dorman*, 7 Wis. 388; *Krueger v. Knab*, 22 Wis. 429; *Lain v. Cook*, 15 Wis. 446; *Cutler v. Hurlbut*, 29 Wis. 152; *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Cousins v. Allen*, 28 Wis. 232.

**The Date.**—A date is not essential to the validity of a tax deed, but it takes effect from the delivery. Where a tax deed did not mention the date of its execution, but the acknowledgment was fully dated and the deed recorded on that date, the Statute of Limitations was held to run from such time. *McMichael v. Carlyle*, 53 Wis. 504. Nor is the certificate of acknowledgment, if good

in other respects, invalidated by the absence of the date. *Irving v. Brownell*, 11 Ill. 402.

The time of the execution of a tax deed, as in ordinary deeds, may be shown by parol evidence. *Thompson v. Schuyler*, 7 Ill. 271.

**Official Signature.**—A deed which in other respects is in the form prescribed, is not affected by the fact that it is signed by the sheriff and tax collector, and not by the latter only, as required. *Bell v. Gordon*, 55 Minn. 45.

Any description of the officer executing the tax deed, which identifies him and shows his official relation, is sufficient. *Knox v. Huidekoper*, 21 Wis. 527. And see *Bulger v. Moore*, 67 Wis. 430.

The signature by the county clerk of a tax deed, as clerk of the board of supervisors, does not invalidate the deed under *Wisconsin* statutes, nor is it invalidated by the failure to mention the name of the county in such signature, where it is correctly stated in the attesting clause. *Scheiber v. Kaehler*, 49 Wis. 291.

**Mandamus to Compel the Execution of a Deed in the Statutory Form.**—If through mistake or inadvertence, the statutory form be departed from, the officer required to make the deed may be compelled by *mandamus* to execute a deed in the correct and statutory form. *Douglass v. Muzum*, 16 Kan. 515; *Corbeir v. Bronson*, 28 Kan. 532. See also *supra*, this title, *Purchaser's Right Thereto*.

1. *Boardman v. Bourne*, 20 Iowa 134; *Moore v. Brown*, 4 McLean (U. S.) 211.

2. *Falkner v. Dorman*, 7 Wis. 388; *Hobson v. Dutton*, 9 Kan. 477; *Bowers v. Chambers*, 53 Miss. 259. See also *McIntyre v. White*, 5 How. (Miss.) 298; *Amos v. Allnutt*, 2 Smed. & M. (Miss.) 215.

The deed in the form prescribed is sufficient, even if it fails to show for what year the taxes were sold, *Marshall v. Benson*, 48 Wis. 558; or does not state that the land was sold at public auction at the proper place, if it was in fact so sold, *Davis v. Harrington*, 35 Kan. 196; or omits to state the name

the conditions of the sale are such that to follow the statutory form would recite an untruth and show an illegal sale, the form must be modified to suit the facts.<sup>1</sup>

The form prescribed may be made applicable to a deed for a sale which took place before the passage of the act as well as for a subsequent sale.<sup>2</sup>

(2) *Recitals*.—As a general rule, the omission or misrecital of particular facts required by statute to be recited in the deed, will invalidate it.<sup>3</sup> Thus, the failure to recite the notice or advertisement;<sup>4</sup> the cause of the sale, as the delinquency of

of the owner. *Bell v. Gordon*, 55 Minn. 45.

1. *Magill v. Martin*, 14 Kan. 67; *McCauslin v. McGuire*, 14 Kan. 234; *Sullivan v. Donnell*, 90 Mo. 278; *Skinner v. Williams*, 85 Mo. 489.

2. *Lain v. Shepardson*, 18 Wis. 60; *Gardenhire v. Mitchell*, 21 Kan. 83. See also *Robinson v. Howe*, 13 Wis. 347.

3. *Moore v. Harris*, 91 Mo. 621; *Duff v. Neilson*, 90 Mo. 93; *Spurlock v. Allen*, 49 Mo. 178; *McEntire v. Brown*, 28 Ind. 347; *Doe v. Hileman*, 2 Ill. 323; *Wambole v. Foote*, 2 Dakota 1; *Lawrence v. Zimpleman*, 37 Ark. 693; *McDermott v. Scully*, 27 Ark. 226; *Harrington v. Worcester*, 6 Allen (Mass.) 576; *Wakeley v. Mohr*, 18 Wis. 136; *Bender v. Dugan*, 99 Mo. 126.

It has been held that the misrecital of the consideration for the deed, *Hubbell v. Campbell*, 56 Cal. 527; or the failure to state that the sale was publicly held, *Daniels v. Case*, 45 Fed. Rep. 843; *Sullivan v. Donnell*, 90 Mo. 278; or to state for what year the lands were assessed, and for what amount, and that the tracts were assessed separately, *Spain v. Johnson*, 31 Ark. 314; *Jacks v. Dyer*, 31 Ark. 334; *Buchanan v. Reynolds*, 4 W. Va. 681; *Maxcy v. Claibough*, 6 Ill. 26, will invalidate the deed. But see *Wetherbee v. Dunn*, 32 Cal. 106.

A sheriff's deed is void if it does not recite the judgment, where the statute requires it to be recited. *Dufour v. Camfranc*, 11 Martin (La.) 607; 13 Am. Dec. 360.

In *Allen v. Buckley*, 94 Mo. 158, the deed, which did not recite that the lands were sold separately, when required to be so sold, was held to be void. But in *Waddington v. Dickson*, 17 Colo. 223, it was held that a tax deed conveying title to several tracts, which shows that they were advertised separately, is sufficient to show that they were sold separately.

In *Duff v. Nielson*, 90 Mo. 93, it was

held that a tax deed which did not recite the date of the issue of the special execution under which the property was sold, was void.

In *Virginia*, under a statute requiring all the circumstances of the sale to be recited in the deed, it was held that it must appear on the face of the deed that the sale was had at the time and place prescribed, but that it was not necessary to recite all the steps which preceded such sale, such as advertisement of the time and place. See *Flanagan v. Grimmet*, 10 Gratt. (Va.) 421. But see *Buchanan v. Reynolds*, 4 W. Va. 681.

**Omission in Deed of Recitals of Certificate of Sale.**—A recital in the deed that the certificate of sale contained the matter required by law, is not a sufficient recital of such matters. *Hughes v. Cannedy*, 92 Cal. 382; *DeFrieze v. Quint*, 94 Cal. 653. The failure to recite in the deed the recital in the certificate of sale as to when the purchaser will be entitled to a deed, is held to vitiate the deed. *Anderson v. Hancock*, 64 Cal. 455; *Grimm v. O'Connell*, 54 Cal. 522. But in *Doland v. Mooney*, 79 Cal. 137, it was held that the fact that the amount of taxes and costs recited in the certificate of sale was fifty cents less than that recited in the tax deed, did not affect the validity of the deed or sale.

4. *Wiggin v. Temple*, 73 Me. 382; *Abbott v. Doling*, 49 Mo. 302; *Moore v. Harris*, 91 Mo. 616.

A tax deed which recites simply the posting of written advertisements when printed ones are required, is void. *Laguer v. Rains*, 48 Mo. 536.

In *Yankee v. Thompson*, 51 Mo. 234, a tax deed which contained no further recital of notice of sale than that the lands "were advertised according to law," was held to be void on its face. See also *Jones v. Miracle* (Ky. 1893), 21 S. W. Rep. 241.

the tax;<sup>1</sup> or the time<sup>2</sup> or place<sup>3</sup> of the sale, has been held to invalidate the tax deed, when such recitals were required by

In *Ladd v. Dickey*, 84 Me. 190, where the collector was required to recite the time when he gave notice, the recital that nine months had elapsed before he gave notice of sale, or that he gave notice at least six weeks before the time of sale, was held insufficient. It was held that he should also state where he posted the notices.

**Adjourned Sale.**—In *Hill v. Atterbury*, 88 Mo. 114, it was held that although the statutory form required the recital of the advertisement of the time of the original sale, it did not require the recital of sales adjourned from day to day.

1. *Hubbard v. Johnson*, 9 Kan. 632; *Gilfillan v. Chatterton*, 38 Minn. 335. The recital that the tax was chargeable, is not equivalent to a statement that it was delinquent, *Sheehy v. Hinds*, 27 Minn. 259; nor does the recital that the tax was due, show it to be delinquent. *Sherburne v. Rippe*, 35 Minn. 540.

In *Heil v. Redden*, 38 Kan. 255, the omission of the word "remaining," where it should have been stated that "the land was offered for sale for the payment of taxes then due and remaining unpaid," did not affect the validity of the deed.

In *Massachusetts*, the deed is required to state the cause of the sale, and not only the demand on the person taxed, but also that payment was not made within fourteen days thereafter, and the failure to make such recital will invalidate the deed. See *Langdon v. Stewart*, 142 Mass. 576. *Harrington v. Worcester*, 6 Allen (Mass.) 546; *Lunenburg v. Heywood, Chair Co.*, 118 Mass. 540; *Adams v. Mills*, 126 Mass. 278.

In *Maine*, a tax deed is required to recite that it was necessary to sell the whole of the land to pay the taxes and charges, and that no person would pay the same for a smaller quantity of land. *Lovejoy v. Lunt*, 48 Me. 377; *Loomis v. Pingree*, 43 Me. 311; *Briggs v. Johnson*, 71 Me. 236; *French v. Patterson*, 61 Me. 203; *Allen v. Morse*, 72 Me. 502; *Brookings v. Woodin*, 74 Me. 222; *Whitmore v. Learned*, 70 Me. 276.

In *Indiana*, it is held that where a tax deed fails to show that the personal property of a delinquent has been exhausted before the sale of his real estate, or that he had no such property, such deed, unless accompanied by proper

evidence of the fact, is inadmissible as evidence of title. *Ward v. Montgomery*, 57 Ind. 276.

2. *Haynes v. Heller*, 12 Kan. 381; *Mason v. Crowder*, 85 Mo. 526; *Thompson v. Lawrence*, 2 Baxt. (Tenn.) 415.

In *Hill v. Atterbury*, 88 Mo. 114, it was held that a recital of a deed of sales as of a date other than the time for which the statute required the sale to be advertised, did not affect the validity of the deed. See also *Easton v. Savery*, 44 Iowa 654; *Love v. Welch*, 33 Iowa 192; *Stafford v. Laurer*, 49 Kan. 690.

In *Brigins v. Chandler*, 60 Miss. 862, it was held that a misrecital of a date of the sale did not preclude the party claiming title thereunder from showing *aliunde* that the sale was made at the proper time.

**Misrecital of the Time of the Sale.**—In *Hurlbut v. Dyer*, 36 Iowa 474, it was held that a tax deed which recited the sale as having been on the 26th of February, when in fact it was on the 26th of January, did not render the deed invalid; especially, it was said, as the sale might legally have been made on the 26th of February.

In *Callanan v. Hurley*, 93 U. S. 387, it was held that where the sale of land for delinquent taxes was continued for several days, the recital of a sale as made on the first day of the sale, although actually made later, did not affect the validity of the deed.

In *Harris v. Curran*, 32 Kan. 580, it was held that a tax deed was not void because it recited that the sale was made on May 6th, 1870, at a sale begun on the first Tuesday of May, 1870, when in fact, May 6th, 1870, was Friday, and the first Tuesday was the third day of the month. So in *Shell v. Duncan*, 31 S. Car. 547, the recital of the time of the sale as on the first Monday in March, the fourth day thereof, when it was in fact the seventh, did not affect the validity of the deed.

3. *Haller v. Blaco*, 10 Neb. 36; *Howard v. Lamaster*, 11 Neb. 582; *Thompson v. Merriam*, 15 Neb. 498; *Baldwin v. Merriam*, 16 Neb. 199; *Shelley v. Towle*, 16 Neb. 194; *Towle v. Holt*, 14 Neb. 221; *Thompson v. Lawrence*, 2 Baxt. (Tenn.) 415.

In *Frentz v. Klotzsch*, 28 Wis. 312, it was held that a recital that the land was sold at the county seat, was suffi-

statute. A recital of the conclusions resulting from facts required to be stated is not sufficient, the facts must be recited.<sup>1</sup>

Whether expressly required or not, it is essential to the validity of the deed that it recite enough of the previous proceedings to show the authority to sell the lands, and to make the deed.<sup>2</sup> But it is held to be not necessary that the deed shall show that everything has been done that the law requires.<sup>3</sup> The misrecital of facts not required to be stated will not vitiate the deed, when it does not appear that there has been an actual violation of the law.<sup>4</sup> Such recitals may be corrected by evidence

cient, and that it was not necessary to further define the place as at the courthouse.

1. *Spurlock v. Allen*, 49 Mo. 178; *Large v. Fisher*, 49 Mo. 307; *Duncan v. Gillette*, 37 Kan. 156; *Ladd v. Dickey*, 84 Me. 190; *May v. Wright*, 17 Vt. 97; *Jones v. Miracle* (Ky. 1893), 21 S. W. Rep. 241. But see *O'Grady v. Barnhisel*, 23 Cal. 287.

In *Landregan v. Peppin*, 86 Cal. 122, it was held that a recital of a specific date will control a recital that notice was given as required by law.

A recital in a tax deed that certain facts appear from the records of the auditor's office, is not equivalent to a recital that they exist. *White v. Flynn*, 23 Ind. 46.

2. *Woodward v. Sloan*, 27 Ohio St. 592; *Turney v. Yeoman*, 14 Ohio 208; *Hobbs v. Shumates*, 11 Gratt. (Va.) 516; *Madland v. Benland*, 24 Minn. 372; *O'Mulcahy v. Florer*, 27 Minn. 449; *Smith v. Ryan*, 88 Ky. 636; *Jones v. Miracle* (Ky. 1893), 21 S. W. Rep. 241; *Sibley v. Smith*, 2 Mich. 486. And see *Perkins v. Dibble*, 10 Ohio 433; 36 Am. Dec. 97.

The omission in the deed to recite that the sale was made in pursuance of an order required, renders the deed void. *McDermott v. Scully*, 27 Ark. 226. In *Call v. Dearborn*, 21 Wis. 504, a deed which did not recite or refer to the judgment or order of court under which the sale was made, was held invalid.

In *Bedgood v. McLain*, 89 Ga. 793, where the tax *fi. fa.* under which the land was sold was misdescribed in the deed, it was held that parol evidence was admissible to prove such mistake.

In *Buchanan v. Reynolds*, 4 W. Va. 681, it was held that a deed which did not recite by whom the sale was made, was void.

In *Nebraska*, where lands offered for sale and not sold for want of bidders,

are permitted to be sold at private sale, a tax deed issued in such case must recite the facts authorizing such sale. *Ludden v. Hansen*, 17 Neb. 354. And see *State v. Helmer*, 10 Neb. 25.

**Authority for Adjourned Sale.**—In *Gregg v. Jesberg*, 113 Mo. 34, it was held that where the tax deed discloses the fact that the tax sale was an adjourned one, it must contain a recital showing that the adjournment did not exceed the period prescribed by law, or it will be void.

**Lost Deed.**—A second deed made to replace a former one, which has been lost or destroyed, must recite the loss or destruction of the first deed, and is not admissible in evidence in support of the tax title unless it does so. *Burroughs v. Goff*, 64 Mich. 464.

3. *Pleasant v. Scott*, 21 Ark. 370; 76 Am. Dec. 403; *Morss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *O'Grady v. Barnhisel*, 23 Cal. 287; *Bank of Utica v. Mesereau*, 3 Barb. Ch. (N. Y.) 538; 49 Am. Dec. 189. And see *State v. Mantz*, 62 Mo. 258; *Walker v. Taylor*, 43 Ark. 543.

No invalidity appearing upon the face of the deed, it is to be presumed that the sale was conducted in the manner required by law. *McCoy v. Michew*, 7 W. & S. (Pa.) 386; *Smith v. Easton*, 37 Iowa 584; *Griffin v. Tuttle*, 74 Iowa 219.

Where the tax deed recites that the grantee held the tax certificate as assignee of the treasurer, it must be presumed that the treasurer bid off the land for the county as authorized. *Frentz v. Klotzsch*, 28 Wis. 312.

In *Brien v. O'Shaughnesy*, 3 Lea (Tenn.) 724, it was held that a tax deed was not void which failed to recite that in selling the land the officer followed the statute, by offering first to sell a less quantity than the whole to whoever would bid the amount of the taxes.

4. Matter not required to be recited

*aliunde*.<sup>1</sup> As to the power generally to correct erroneous recitals, and to issue new and corrected deeds, see note 2.

(3) *Description*.—(See also TAXATION—*The Assessment—Tax Sales*).—A valid tax deed must contain such a description as will, without the aid of extraneous facts, designate with reasonable certainty the property sought to be conveyed,<sup>3</sup> which description

may be treated as surplusage, and does not affect the validity of the deed. *Harper v. Rowe*, 55 Cal. 132.

In *Hickman v. Kempner*, 35 Ark. 505, it was held that the false recital that the land was assessed in the name of an unknown owner, did not vitiate the sale.

1. *Brigins v. Chandler*, 60 Miss. 862; *Longfellow v. Quimby*, 33 Me. 457.

**Deed in Evidence.**—Where a tax deed has sufficient recitals to justify its introduction as evidence, the omission of other recitals may be supplied by oral proof. *Budd v. Bettison*, 21 Ark. 582.

In *Grimm v. O'Connell*, 54 Cal. 522, it was held that one claiming under his deed, in which there is a misrecital as to whom the property was assessed, is precluded from proving by evidence *aliunde* that the assessment was not made as recited, and that the assessment not being according to law the deed is void. See also *Brady v. Dowden*, 59 Cal. 51.

2. See *supra*, this title, *Power to Make, and By Whom Executed*.

3. As to the sufficiency of the description, the following cases may be consulted: *Thibodaux v. Thibodaux*, 29 La. Ann. 508; *Wilson v. Marshall*, 10 La. Ann. 327; *Schattler v. Cassinelli*, 56 Ark. 172; *Greene v. Lunt*, 58 Me. 519; *Griffin v. Crippin*, 60 Me. 270; *Harber v. Dyches* (Tex. 1890), 14 S. W. Rep. 580; *Wofford v. McKinna*, 23 Tex. 36; 76 Am. Dec. 53; *Flanagan v. Boggess*, 46 Tex. 330; *Kilpatrick v. Sisneros*, 23 Tex. 113; *Claiborne v. Elkins*, 79 Tex. 380; *Libby v. Mayberry*, 80 Me. 137; *Roberts v. Deeds*, 57 Iowa 320; *Brechey v. English*, 129 Ill. 646; *Head v. James*, 13 Wis. 641; *Mecklem v. Blake*, 19 Wis. 419; *Annan v. Baker*, 49 N. H. 161; *Bosworth v. Danzien*, 25 Cal. 296; *Brunn v. Murphy*, 29 Cal. 326; *Newby v. Brownlee*, 23 Fed. Rep. 320.

In *Campbell v. Packard*, 61 Wis. 88, a description of the property as lying in a certain county, but failing to designate it as lying in a town in which it was situated, was held to invalidate the deed.

But in *Haynes v. Heller*, 12 Kan. 381,

the failure to state the county and state in which the land sought to be conveyed was situated, did not invalidate the deed, as in another part thereof the same land as the property sold was accurately described; and in *Keeper v. Force*, 86 Ind. 81, it was held that where section, township, and range were given by number, it was not necessary that the county should also be given.

A description of the land as bounded by the land of a third person, does not render the deed uncertain on its face. *Scheiber v. Kaehler*, 49 Wis. 291; *Brunn v. Murphy*, 29 Cal. 326.

A description is not defective which calls for a certain quantity of land bounded on three sides by well-known streets, upon a plat of a city laid out, surveyed, and platted, and on the other by the unsurveyed lands. *Garwood v. Hastings*, 38 Cal. 216.

In *Hill v. Mowry*, 6 Gray (Mass.) 552, a deed which fixed the boundary on the north and west, and described the property as bounded on the east by land by which it was in fact bounded only in part, and as bounded on the south by land from which it was in fact separated, was void for uncertainty.

In *Quinby v. North American Coal, etc., Co.*, 2 Heisk. (Tenn.) 596, a description of the property as "eleven tracts of land, containing twenty-three thousand acres, lying in 13th district of White County, sold as the property of ————," shall not be a sufficient identification.

The description as "the north part of the northeast quarter of section No. 10, township No. 15, range No. 23, east, containing 100 acres in the county of Johnson, State of Kansas," was deemed sufficiently certain and definite. *Martz v. Newton*, 29 Kan. 331.

In *Wisconsin*, under a statute which provides that any description which shall indicate the land intended, with ordinary and reasonable certainty, will be sufficient, the description as "a certain specified lot in block No. 19, to the village," instead of *in* the village, was held sufficient, although it was said that prior to the passage of this

must conform in all essentials to that employed in the previous proceedings.<sup>1</sup>

The property may be described by the name by which it is commonly known,<sup>2</sup> or by the use of well-known abbreviations.<sup>3</sup> But the description of a lot as part of a certain tract, is not sufficient, and will vitiate the deed, although the larger tract be

statute it would probably have been invalid for uncertainty. *Delorme v. Ferk*, 24 Wis. 201. See also *Reinhart v. Oconto County*, 69 Wis. 352; *Meade v. Gilfoyle*, 64 Wis. 18.

In *Louisiana*, the name of the owner of land is required to be given as descriptive of the land assessed, when the title of the owner is of record, and an error in this respect is fatal to the title under the sale. *Sutton v. Calhoun*, 14 La. Ann. 205.

**Reference to Plat.**—Lands may be described by reference to town plats, if actually recorded, though not legally. *Johnstone v. Scott*, 11 Mich. 232; *Simmons v. Johnson*, 14 Wis. 523.

**Description as in a Certain Shape.**—In *Newby v. Brownlee*, 23 Fed. Rep. 320, it was held that lands described as a certain portion of a certain quarter-section, without showing that the part sold is square, are sufficiently described, where the statute fixes the shape.

In *Ammons v. Dwyer*, 78 Tex. 639, it was held that a tax deed which conveys four thousand acres of land, lying in the shape of a square, is void, where it appears that it was impossible to lay off from the property sold four thousand acres in the form of a square.

A description, as two hundred and seventy (270) acres in the north-east corner of a certain section, is not an insufficient description, as the land is presumed to lie in the form of a square. *Hooper v. Clayton*, 81 Ala. 391. See also *Dolan v. Trelevan*, 31 Wis. 147.

**Description Defective as to Part.**—In *Watkins v. Inge*, 24 Kan. 612, it was held that an insufficient description of one tract in a deed will not invalidate the deed as to the other tracts of property sufficiently described. See also *Hunt v. Chapin*, 42 Mich. 124.

**Reformation by Action.**—A deed which by mistake of the county auditor erroneously describes the land, cannot be reformed by action. Judicial sales, as a general proposition, are not subject to correction by reforming the deed. *Keeper v. Force*, 86 Ind. 81. And see *Rogers v. Abbot*, 37 Ind. 138; *Miller v. Kolb*, 47 Ind. 220.

1. *Lowe v. Ekey*, 82 Mo. 286. And see *Boon v. Simmons*, 88 Va. 259; *O'Neil v. Tyler* (N. Dak. 1892), 53 N. W. Rep. 434.

In *Blair Town Lot, etc., Co. v. Scott*, 44 Iowa 143, where the description of the property in the assessment roll and that of the deed did not necessarily contemplate the same parcels, it was held that, in the absence of evidence *aliunde* showing them to be the same, the deed was void for uncertainty.

A deed for part of a tract, where the report of the sale showed that an entire tract was sold, is void. *Jones v. Dils*, 18 W. Va. 759.

Where there was an insufficient description of the property sold at the tax sale, and a deed conforms to this defective description, the county clerk has no power to cure such defect by the execution of a subsequent deed containing a different description than that set forth in the tax certificate and proceedings upon which it was issued. *Hewitt v. Storch*, 31 Kan. 488; *Bowman v. Cockrill*, 6 Kan. 311.

In *Kansas*, if a description in the deed does not conform to the description of the property in the assessment roll, such prior description, if imperfect, avoids the deed, although the description of the deed itself is sufficient and complete. *Stout v. Mastin*, 139 U. S. 151; *Hewitt v. Storch*, 31 Kan. 488. A deed, the description of which follows the description of the assessment, which was made in disregard of the statute then in force, is invalid. *Bruce v. McBee*, 23 Kan. 379.

2. See *People v. Crockett*, 33 Cal. 153; *Anderson v. Hancock*, 61 Cal. 88; *High v. Shoemaker*, 22 Cal. 371.

A description as "Commencement Plantation," consisting of thirteen hundred and thirty acres, situated in — county, — state, was held sufficient in *Vaughan v. Swayzie*, 56 Miss. 704.

3. *Humphries v. Huffman*, 33 Ohio St. 395; *Winkler v. Higgins*, 9 Ohio St. 599; *Lafferty v. Byers*, 5 Ohio 458; *Wilkins v. Tourtellott*, 28 Kan. 825; *Poindexter v. Doolittle*, 54 Iowa 52; *Shackleford v. Bailey*, 35 Ill. 387; *John-*

accurately designated.<sup>1</sup> Parol evidence cannot be resorted to for the purpose of supplying the defective description.<sup>2</sup> And, unlike deeds between individuals, tax deeds cannot be aided by intentment.<sup>3</sup> But a latent ambiguity may be removed by evidence *aliunde*.<sup>4</sup>

(4) *Seal*.—The statutes usually require in terms that a tax deed shall be under seal. Statutes requiring an instrument in

son *v.* Ashland Lumber Co., 52 Wis. 458; Hintrager *v.* Nightingale, 36 Fed. Rep. 847; Yandell *v.* Pugh, 53 Wis. 295; McCready *v.* Lansdale, 58 Miss. 877.

In Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, the description as  $\frac{1}{2}$  of lot No. 491, was insufficient. And in Larrabee *v.* Hodgkins, 58 Me. 412, the deed containing a description of property as " $\frac{1}{4}$  No. 5, R. 8, W. E. L. S.," was held to be void. So in Smith *v.* Blackiston, 82 Iowa 240, a description as the undivided acres of a certain section, was too indefinite. See also Griffith *v.* Utley, 76 Iowa 292; Ellsworth *v.* Nelson, 81 Iowa 56.

In Bosworth *v.* Farenholz, 3 Iowa 84, a description as "40 feet of lot No. 2, in block No. 2," was void for uncertainty.

A deed which recites that a certain section of land was offered for sale, and that B. purchased thirty-five acres thereof, and conveys the said land to him, is void for uncertainty. Jacks *v.* Chaffin, 34 Ark. 534.

In Wetherbee *v.* Dunn, 32 Cal. 106, a description as "Block, No. 25, less a lot belonging to —, 70 by 137 $\frac{1}{2}$ , in the southeasterly corner," was sufficient.

**Parol Evidence.**—In Barton *v.* Anderson, 104 Ind. 578, it was held that parol evidence is admissible to explain the abbreviations allowed.

**Location by Purchaser.**—In *Pennsylvania*, a treasurer's deed may define the quantity, but not the location, of a part of a tract of land sold for taxes, and the sale will be valid, the grantee being permitted to locate such part for himself. Cox *v.* Blanden, 11 Watts (Pa.) 533; 26 Am. Dec. 83; McCord *v.* Bergautz, 7 Watts (Pa.) 490. And see McCullough *v.* McCall, 10 Watts (Pa.) 374. But see Hart *v.* Hawkins, 3 Bibb (Ky.) 502; 6 Am. Dec. 666.

1. In Bowers *v.* Chambers, 53 Miss. 259, a description, "14 A's off N. E. cor. East  $\frac{1}{2}$ , S. E.  $\frac{1}{4}$ , sec. 20," was held sufficient. So in Taylor *v.* Wright, 121 Ill. 455, a description, "W. side, N.  $\frac{1}{2}$  S. E. N. W. 10 acres, sec. 8, T. 23, R. 10," was held sufficiently certain. And in

Selden *v.* Coffee, 55 Miss. 41, a description "frl. N.  $\frac{1}{2}$  sec. 14," was held to be sufficient. But the description "bal. frl. sec. 11," etc., was held to be void, as containing a patent ambiguity.

But in Lowe *v.* Ekey, 82 Mo. 286, a description with abbreviations as follows: "U. N. E. N. Union R. W. A., and P. R. R.," was insufficient, although the use of the following abbreviations, "T. for township, R. for range, L. for lot, B. for block," and abbreviations for the points of the compass were expressly authorized by statute.

2. Roberts *v.* Deeds, 57 Iowa 320; Keane *v.* Canovon, 21 Cal. 302; 82 Am. Dec. 732; People *v.* Mahoney, 55 Cal. 286; Orono *v.* Veazie, 61 Me. 431; Bowers *v.* Andrews, 52 Miss. 596; McGuire *v.* Stevens, 42 Miss. 724.

So in Curtis *v.* Brown County, 22 Wis. 167, where there was a description of property as in A's addition, parol evidence could not be received to show that A's second addition was meant, where the town in which the land lay contained the two additions.

3. Nelson *v.* Brodhack, 44 Mo. 596; 100 Am. Dec. 328; Orton *v.* Noonan, 23 Wis. 102; Tallman *v.* White, 2 N. Y. 66; Griffin *v.* Creppin, 60 Me. 270; Curtis *v.* Brown County, 22 Wis. 167. See also Dike *v.* Lewis, 4 Den. (N. Y.) 237.

But in Thompson *v.* Ela, 60 N. H. 562, it was held that a manifestly erroneous statement of a course or boundary, which is immaterial, might be rejected. See also Ives *v.* Kimball, 1 Mich. 308. And in Huey *v.* Van Wie, 23 Wis. 613, it was held that, where a tax deed recites that the land is situated in a certain village and county, naming the wrong county, the court will take judicial notice of the village in the proper county.

4. Brown *v.* Walker, 11 Mo. App. 226; Marsh *v.* Nelson, 101 Pa. St. 51; Stewart *v.* Colter, 31 Minn. 385; Jenkins *v.* Sharpf, 27 Wis. 472. But see Wofford *v.* McKenna, 23 Tex. 36.

When the description is not uncertain on its face, but is made so by averment,



writing under seal, in order to convey an estate in lands, are applicable to tax deeds. In either of these cases, the absence of the seal will invalidate the deed.<sup>1</sup> Unless otherwise provided, the private seal of the officer executing the tax deed is sufficient.<sup>2</sup>

*e. PARTIES*—(1) *Grantor*.—Where the deed is required to be made in the name of the state or the municipality for whose taxes the land is sold, a deed executed in the name of the officer making the sale conveys no title to the grantee.<sup>3</sup> Where the deed is in the name of the sheriff or collector as grantor, as required in some of the old statutes, covenants of warranty required to be inserted are not personal but official.<sup>4</sup>

the uncertainty will be removed by evidence *aliunde*. *Selden v. Coffee*, 55 Miss. 41.

1. *Doty v. Beasley*, 2 Bibb (Ky.) 14; *Shortridge v. Catlett*, 1 A. K. Marsh. (Ky.) 587; *Sutton v. Stone*, 4 Neb. 321; *King v. Hyatt*, 51 Kan. 504.

Where the required seal is omitted, time will not cure the defect. *Reed v. Morse*, 51 Kan. 141.

In *Mississippi*, under the code of 1871, a conveyance by a tax collector was not required to be under seal, *Bowers v. Chambers*, 53 Miss. 259; but the exception did not apply to a conveyance made by the auditor or other officers not expressly mentioned in the statute creating the exception. *Day v. Day*, 59 Miss. 318.

**Cannot Be Corrected in Equity.**—In *Altes v. Hinkler*, 36 Ill. 265; 85 Am. Dec. 406, it was held that a bill in chancery cannot be maintained to correct an error of the officer making the deed in neglecting to affix the seal to it.

2. *Eaton v. North*, 20 Wis. 449; *Sturdevant v. Mather*, 20 Wis. 576; *Huston v. Foster*, 1 Watts (Pa.) 477; *Herron v. Murphy* (Pa. 1888), 13 Atl. Rep. 958.

In *Watts v. Gilgore*, 2 Yeates (Pa.) 330, it was held that a commissioners' deed under their common seal, is void. See *McCoy v. Dickinson College*, 5 S. & R. (Pa.) 254.

In *Nebraska*, although private seals are abolished by statute, the requirement of an official seal to the tax deed is not dispensed with, and the deed without such a seal is void. *Bendixen v. Fenton*, 21 Neb. 184; *Sullivan v. Merriam*, 16 Neb. 157; *Shelley v. Towle*, 16 Neb. 194; *Baldwin v. Merriam*, 16 Neb. 199; *Seaman v. Thompson*, 16 Neb. 546; *Hendrix v. Boggs*, 15 Neb. 469; *Deputron v. Young*, 134 U. S. 241.

In *Wisconsin*, in *Brown v. Cohn* (Wis. 1893), 54 N. W. Rep. 1101, under

a statute providing that a "tax deed shall be executed by the clerk of the county board of supervisors, who shall affix thereto the seal of such board," a device like a seal with the words "County clerk, — County," etc., used by the clerk with the knowledge of the board of supervisors, was held sufficient.

In *Bulger v. Moore*, 67 Wis. 439, where the clerk stated that he had affixed the seal of "the county board of supervisors," when it should have been the "seal of the county," and had signed his name to the deed as "clerk of the board of supervisors," when it should have been signed as "county clerk," the deed was held valid. See also *Dreutzer v. Smith*, 56 Wis. 292.

3. *Woodman v. Clapp*, 21 Wis. 355; *Treat v. Smith*, 68 Me. 394.

In *Leggett v. Rogers*, 9 Barb. (N. Y.) 406, under a statute which required that the deed should be in the name of the people of the state, a deed executed by an officer, which recited the statute and the proceedings generally, and that the land had been sold and the deed given in virtue thereof, was held to be valid. See also *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189. So in *Wilson v. Henry*, 40 Wis. 594, under a statute requiring a county clerk to execute the deed in the name of the state, an acknowledgment of the deed by the clerk, stating that it is the deed of the state, was sufficient. See also *McNamara v. Estes*, 22 Iowa 246.

**Municipal Taxes.**—In *Florida*, under a statute providing that deeds for taxes sold by the state shall be made in the name of the state, a deed of land sold for unpaid city taxes is properly made in the name of the city as grantor. *Florida Sav. Bank v. Brittain*, 20 Fla. 507. See also *Sams v. King*, 18 Fla. 557.

4. *Stevenson v. Weeks*, 22 N. H. 257; *Wilson v. Cochran*, 14 N. H. 397; *Gibson v. Mussey*, 11 Vt. 212.

(2) *Grantee*.—The tax deed should be made to the person entitled to receive it, as the purchaser at the tax sale;<sup>1</sup> or assignee of the certificate of sale, who, when the assignment is authorized, succeeds to all the rights and privileges of the original purchaser.<sup>2</sup>

Several collectors cannot join in one deed for lands sold by them severally. *Humphry v. Boge*, 2 Root (Conn.) 437.

1. See *supra*, this title, *Purchaser's Right Thereof*.

When authority is given to make a deed to the highest bidder, the name of another cannot be legally substituted. *Keene v. Houghton*, 19 Me. 368.

In *Walton v. Hale*, 9 Gratt. (Va.) 194, it was held that a deed executed to persons other than those reported to have been the purchasers, is invalid, and the officer making the deed shows no authority to make it, unless there has been such a long acquiescence and possession as to justify a presumption in its favor.

Where the statute authorizes the making of a deed to the original purchaser or to the assignee by written indorsement, the deed to the administrator of the purchaser at the tax sale, "for the use of the heirs," conveys no title. *Alexander v. Savage*, 90 Ala. 383.

In *Ogden v. Bemis*, 125 Ill. 105, it was held that a tax deed made to Hiram Coombs upon a tax sale to H. Coombs will not be set aside, where the affidavit of the grantee states that he purchased the premises described in the certificate of sale, and requests that a deed be made to him.

**How Designated.**—It is sufficient if the grantee is nominated by his customary name, no matter what may have been his true name. *Garwood v. Hastings*, 38 Cal. 216. A tax deed issued to partners in the firm name has been held sufficient. *Sherry v. Gilmore*, 58 Wis. 324.

**Conveyance to Self.**—In *Barr v. Randall*, 35 Kan. 126, it was held that where the person entitled to the tax deed is the person authorized to make it, and he makes a deed to himself as an individual, which is immediately recorded, it is not absolutely void, and will not even be voidable after the Statute of Limitations relating to tax deeds has run in its favor.

2. In *Dreutzer v. Smith*, 56 Wis. 292, it was held that under a statute which provides that the county clerk or treasurer may assign tax certificates "by writing his name in blank on the back

thereof," the assignment may be made by an officer, by stamping his name and official character. Under such a requirement, the deed cannot be issued to a second assignee, whose assignment is not indorsed on, or attached to, the certificate. *Smith v. Todd*, 55 Wis. 459. Nor can the certificate be assigned by delivery. *Horn v. Garry*, 49 Wis. 464.

In *Territory v. Pereca* (N. Mex. 1892), 30 Pac. Rep. 928, it was held that the mere writing on the back was not a sufficient indorsement, under a statute providing that the certificate "shall be assigned by indorsement."

**Assignment by Quit-claim Deed.**—It was held that a quit-claim deed from the holder of a tax-sale certificate, is not such an assignment of the certificate as will authorize the making of a deed from the county to the grantee in such quit-claim deed. *Clippinger v. Tuller*, 10 Kan. 377; *State v. Winn*, 19 Wis. 323; *Lain v. Shepardson*, 23 Wis. 224.

**Assignee of County or Town.**—A deed made to the assignee of a county, the owner of the certificate, which has no authority to transfer such certificate, is void upon its face. So in *Kansas*, where an assignment for a certificate of sale made in 1862, for taxes of 1861, was not authorized, a deed based thereon was void. *Judd v. Driver*, 1 Kan. 455; *Sapp v. Morrill*, 8 Kan. 677; *Entreken v. Howard*, 16 Kan. 553.

Where authority to make the assignment of the certificate was given to the county clerk only, as was the case under the law of 1864, a valid deed could not be made to the assignee of the certificate assigned by a county treasurer. *Shoat v. Walker*, 6 Kan. 66. Nor could the county commissioners make the transfer. *State v. Haughey*, 5 Kan. 639; *Jordan v. Kyle*, 27 Kan. 190. It seems that the assignment may be made now by the county treasurer. *Board of Regents v. Linscott*, 30 Kan. 240.

In *Wisconsin*, a town cannot lawfully receive or make an assignment of a certificate of sale, and a tax deed issued to the purchaser of a certificate from a town is void as against the original owner. *Irvin v. Smith*, 60 Wis. 175; *Eaton v. Manitowoc County*, 44 Wis. 489; *Jackson v. Jacksonport*, 56 Wis. 310; *Dreutzer v. Smith*, 56 Wis. 292.

The requirement that the fact of assignment should be stated in the deed, is material and cannot be disregarded.<sup>1</sup>

*f. EXECUTION—ACKNOWLEDGMENT.*—In the execution of a tax deed, the statutory requirements as to signing, sealing and witnessing, must be substantially complied with.<sup>2</sup> And unless acknowledged in the manner provided, it will not be considered as executed.<sup>3</sup> Mere formal inaccuracies in the acknowledgment,

1. *North v. Wendell*, 22 Wis. 431; *Krueger v. Knab*, 22 Wis. 429. A memorandum at the bottom of the deed, but not a part thereof, is not sufficient evidence of the assignment. *Florida Sav. Bank v. Brittain*, 20 Fla. 507.

A deed which is in the statutory form stating that "B, assignee of the county of A, had deposited," contains sufficient evidence of the fact of the assignment. *Knox v. Huidekoper*, 21 Wis. 527.

In *Pitkin v. Shacklett*, 106 Mo. 571, a tax deed reciting that the purchaser at the tax sale had assigned "all his right, title, and interest in and to said land," was held to be void under a statute requiring a recital that the indorsement was under the hand of the purchaser written on the back of the certificate of purchase. See also *Pitkin v. Reibel*, 104 Mo. 505.

**Record of Assignment.**—In *Swan v. Whaley*, 75 Iowa 623, it was held that the recording of the assignment of the certificate of sale was not essential to the assignment, but was provided for in order that the treasurer might know who was entitled to the deed.

**Presumption.**—In the absence of evidence that the certificates were not properly assigned, if the deed recites that the grantee is assignee thereof, it must be presumed that the assignment was properly made. *Cousins v. Allen*, 28 Wis. 232.

**Mandamus.**—The county clerk or other person duly authorized may be compelled by *mandamus* to execute a proper deed to the owner of the certificate of sale, to whom a defective deed has been issued. *Clippinger v. Tuller*, 10 Kan. 377; *State v. Winn*, 19 Wis. 323. See also, as to the power to compel the execution of a tax deed by *mandamus*, *supra*, this title, *Purchaser's Right Thereto*.

2. The deed must have the official seal, if required, before it can be admitted in evidence. *Day v. Day*, 59 Miss. 318; *Sutton v. Stone*, 4 Neb. 319; though when the statute does not require it, the seal may be omitted. *Bowers v. Chambers*, 53 Miss. 259.

In *Florida*, a tax deed will not convey the property, unless it is attested by subscribing witnesses, *Paul v. Fries*, 18 Fla. 573; and in *Indiana*, it is not evidence of a legal title in the holder, unless witnessed by the county treasurer. *Gabe v. Root*, 93 Ind. 256; *Bowen v. Striker*, 100 Ind. 45. And see *McCauslin v. McGuire*, 14 Kan. 234.

In *Connecticut*, the deed, to be effectual, must be attested by two witnesses, and no deed not thus attested, will prove a transfer of real estate. *Watson v. Atwood*, 25 Conn. 313.

In the absence of a statutory provision to the contrary, tax deeds must be executed and acknowledged in the same manner as other conveyances of land. *Hogins v. Brashears*, 13 Ark. 242.

**Proof of Execution.**—In *Dillingham v. Brown*, 38 Ala. 311, where there were no attesting witnesses to the deed, evidence of the handwriting of the grantors, and of the official character of the party signing the deed as tax collector at the time of the tax sale and date of his deed, were held sufficient proof of execution.

3. *Stierlin v. Daley*, 37 Mo. 483; *Dalton v. Fenn*, 40 Mo. 109; *Dunlap v. Henry*, 76 Mo. 106; *Williams v. McLanahan*, 67 Mo. 499; *Ryan v. Carr*, 46 Mo. 483; *Douglass v. Bishop*, 45 Kan. 200; *Bowen v. Striker*, 100 Ind. 45; *Keech v. Enriquez*, 28 Fla. 597; *Bird v. McClelland, etc.*, *Brick Mfg. Co.*, 45 Fed. Rep. 458. And see **ACKNOWLEDGMENT**, vol. 1, p. 143; **DEEDS**, vol. 5, p. 443.

The certificate of acknowledgment should be taken by a duly authorized and qualified officer, *Bird v. McClelland, etc.*, *Brick Mfg. Co.*, 45 Fed. Rep. 458; *Douglass v. Bishop*, 45 Kan. 200; and substantially comply with the requisites of the statute. *Schleicher v. Gatlin*, 85 Tex. 270.

It has been held that a treasurer's deed for unseated land sold for taxes, may be acknowledged after the treasurer's term of office has expired. *Heron v. Murphy* (Pa. 1888), 13 Atl. Rep.

however, will be disregarded.<sup>1</sup> In some of the states acknowledgment has been held to be unnecessary.<sup>2</sup>

An improper official designation attached to the signature will not invalidate the deed, where the identity of the officer is not thereby rendered doubtful or uncertain.<sup>3</sup>

**g. DELIVERY AND ACCEPTANCE**—(See also DEEDS, vol. 5, p. 445).—Tax deeds, in so far as delivery and acceptance are concerned, stand upon the same footing as other deeds between individuals; the delivery and acceptance must be mutual and concurrent acts, and the deed takes effect from that time.<sup>4</sup>

958; *Kennedy v. Daily*, 6 Watts (Pa.) 269.

Under the *Massachusetts* statutes, no title can be claimed under a tax deed, unless it has been acknowledged and recorded. *Tilson v. Thompson*, 10 Pick. (Mass.) 359.

In *Waddingham v. Dickson*, 17 Colo. 223, it was held that a statute authorizing a deputy county clerk to take and certify acknowledgments to deeds, does not require the acknowledgment to tax deeds to be taken in the name of the clerk, but permits the deputy to take it in his own name.

**Deed Acknowledged in Sister State.**—A certificate of acknowledgment made by a commissioner of another state need not be under seal, *Irving v. Brownell*, 11 Ill. 402; and no certificate of the official character of such commissioner need be produced. *Thompson v. Schuyler*, 7 Ill. 271.

**Acknowledged Deed as Evidence.**—In *Kansas*, a tax deed duly acknowledged is sufficient without witnesses. *Stebbins v. Guthrie*, 4 Kan. 353; *McCauslin v. McGuire*, 14 Kan. 234.

And in *Pennsylvania*, a sheriff's deed, with a certificate indorsed upon it, under the hand and official seal of the prothonotary, that it was duly acknowledged in open court, and entered of record, is *prima facie* evidence without showing the record. *Foust v. Ross*, 1 W. & S. (Pa.) 501.

**Necessity for Revenue Stamp.**—Where a deed is required to be stamped, it is admissible in evidence, though not stamped at the time the action was commenced, if it has since been stamped in pursuance of the act of Congress, before actually used in evidence. *Knox v. Huidekoper*, 21 Wis. 527.

It has been held that Congress cannot, without the consent of the state, impose a stamp duty upon tax deeds executed under the laws of the state, such deeds being means or instruments devised by

the states for the purpose of collecting their own revenues. *Sayles v. Davis*, 22 Wis. 217; *Delorme v. Ferk*, 24 Wis. 201.

**Presumption of Regularity.**—The acknowledgment will be presumed to have been regular, in the absence of evidence to the contrary. *Douglass v. Bishop*, 45 Kan. 200.

1. A mere mistake in the date of the acknowledgment will not prevent the deed from being recorded. *Yorty v. Paine*, 62 Wis. 154. See also *Chase v. Whiting*, 30 Wis. 544. Nor will a certificate of acknowledgment, if in other respects sufficient, be vitiated for want of a date. *Irving v. Brownell*, 11 Ill. 402; *Thompson v. Schuyler*, 7 Ill. 271.

Where an acknowledgment recited that the deputy county clerk appeared before the proper officer and acknowledged the execution of the deed "as such county clerk," it was held sufficient, the words in quotations being construed to mean "as such deputy county clerk." *Ward v. Walters*, 63 Wis. 39.

In *Hall v. Baker*, 74 Wis. 118, it was held that the record of a tax deed is not defective because the name of the county and not of the state is given as grantor in the index, under a statute requiring a general index to be kept, in which the names of grantors are entered.

2. *Thompson v. Schuyler*, 7 Ill. 271; *Graves v. Bruen*, 6 Ill. 167.

3. *Bulger v. Moore*, 67 Wis. 430; *Knox v. Huidekoper*, 21 Wis. 527.

4. *Hulick v. Scovil*, 9 Ill. 159; *Caruthers v. McLaran*, 56 Miss. 371; *McMichael v. Carlyle*, 53 Wis. 504.

The presumption is that a party will accept a deed because he is to be benefited thereby, but this presumption is never carried to the extent of presuming an acceptance without evidence thereof. *Hulick v. Scovil*, 9 Ill. 159.

**Possession Prima Facie Evidence of Delivery.**—The possession of a deed

*h.* RECORDING—(See also RECORDING ACTS, vol. 20, p. 527).—The recording acts of some states are sufficiently comprehensive to cover tax deeds, while in others there are special statutes which in terms require them to be recorded in the same manner as other conveyances; in such cases the deed, unless recorded, is without effect against the rights of parties having no actual notice thereof.<sup>1</sup> In the absence of such statutes, however, registration has been held unnecessary.<sup>2</sup> As a general rule, tax deeds must

regularly executed is *prima facie* evidence of its delivery and acceptance. *Games v. Stiles*, 14 Pet. (U. S.) 322.

As a general rule, the production of an office copy of a tax deed is *prima facie* proof, not only of the execution, but also of the delivery of the deed; but there may be circumstances attending the record of the deed, which, if shown, will prevent the presumption of delivery from arising therefrom, or diminish its force. *Whitmore v. Learned*, 70 Me. 276.

The acknowledgment of a tax deed need not fix the date of delivery. *Caruthers v. McLaran*, 56 Miss. 371.

1. *Stierlin v. Daley*, 37 Mo. 483; *Dalton v. Fenn*, 40 Mo. 109; *Allen v. Everts*, 3 Vt. 10; *Tilson v. Thompson*, 10 Pick. (Mass.) 359.

That is sufficient registry of a tax deed which would be a sufficient registry of any other deed. *Oconto County v. Jerrard*, 46 Wis. 317.

Where the index to the record of a tax deed described the property as "parts of sections 28 and 29, see record," it was held sufficient to impart constructive notice. *Peirce v. Weare*, 41 Iowa 378.

The corporate seal of the official to a tax deed is sufficiently recorded if indicated upon the record by the word "seal" written within a scroll. *Huey v. Van Wie*, 23 Wis. 613; *Putney v. Cutler*, 54 Wis. 66.

A deed which has been left with the registrar for record, having the date of its reception indorsed on it, but which has neither been spread upon the record nor entered in the general index, is not recorded within the meaning of the *Wisconsin* statute relating to redemption. *International L. Ins. Co. v. Scales*, 27 Wis. 640.

Under the *Florida* statutes, the lien of a judgment against a person who has been in possession of land for two years, is superior to a tax deed for the lands executed before judgment, but not acknowledged and proved for record as

required by law. *Hill v. Gordon*, 45 Fed. Rep. 276.

The special limitation of one year within which to assail the validity of tax titles acquired under the provisions of *Florida* Laws of 1872, ch. 1865, applies only to tax deeds acquired under that act that have been recorded. *Keech v. Enriquez*, 28 Fla. 597.

In *Wisconsin*, the grantee in a tax deed has no such right to the possession of the premises as will enable him to maintain ejectment therefor, until the tax deed is properly recorded. *Hewitt v. Week*, 59 Wis. 444.

Where a tax deed is registered before the expiration of the period of redemption, it is sufficient, and no new registry is required after the expiration of the period of redemption. *Davis v. Hurst* (Tex. 1890), 14 S. W. Rep. 610.

The *Iowa* statute does not make the record of the assignment of a certificate of purchase at a tax sale essential to the sale. It is required for the purpose of affording evidence to the treasurer of the person entitled to the deed, when the right to it accrues, and not for the purpose of giving constructive notice of the rights of the assignee. *Swan v. Whaley*, 75 Iowa 623.

**Notice of Defects.**—A recorded tax deed showing a defect which can be cured by legislation, is notice to a purchaser from the former owner, and he takes title at the risk of the enactment of curative legislation. *In re Com'rs' Report*, etc., 49 N. J. L. 488.

2. *Graves v. Bruen*, 6 Ill. 167; *Rhinehart v. Schuyler*, 7 Ill. 473; *Thompson v. Schuyler*, 7 Ill. 271.

The common-law rule then governs, under which a deed is valid without being recorded. *Burroughs on Taxation* 326.

In *Goodman v. Sanger*, 91 Pa. St. 71, it was held that a tax deed of unseated land, made by a treasurer to the commissioners of a county, is not void as against a subsequent purchaser from the owner of the land, because not recorded in the

be properly executed and acknowledged in order to make the recording of them constructive notice.<sup>1</sup>

i. AS EVIDENCE—(1) *At Common Law*.—The burden is on the party claiming under a tax deed to show that the preliminary steps required by law have been complied with. And at common law, the deed is not even *prima facie* evidence of such facts, but proof of the legality of the sale and regularity of the officer's proceedings must be made *aliunde*;<sup>2</sup> even a recital in the deed of the performance of the acts necessary to validate it not being

office for recording deeds of the county. A complete record of the proceedings may be found in the commissioner's office sufficient to give ample notice to persons interested. And see *Seechrist v. Baskin*, 7 W. & S. (Pa.) 403; 42 Am. Dec. 251.

Under the statutes of *Illinois*, the holder of a tax certificate must take out his deed thereon, and file the same for record within one year after the expiration of the time of redemption, or the certificate or deed, and the sale on which it is based, will be void. But the time he is prevented from taking out his deed by injunction or order of court, or by refusal of the officer to make the same, is to be excluded from the computation of such time. But the courts are not authorized to extend the exceptions to other cases than those named. *Gage v. Reid*, 118 Ill. 35.

1. See *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Stierlin v. Daley*, 37 Mo. 483; *Dunlap v. Henry*, 76 Mo. 106; *Mundee v. Freeman*, 23 Fla. 529. And see *supra*, this title, *Execution—Acknowledgment*.

2. *Collins v. Doe*, 33 Ala. 91; *Johnson v. Phillips*, 89 Ga. 286; *Nancarrow v. Weathersbee*, 6 Martin (La.) 347; *Reeves v. Towles*, 10 La. 276; *Bowen v. Swander*, 121 Ind. 164; *Gavin v. Shuman*, 23 Ind. 32; *Goewey v. Urig*, 18 Ill. 238; *Hinman v. Pope*, 6 Ill. 131; *Skinner v. Fulton*, 39 Ill. 484; *Whipple v. Earich* (Ky. 1892), 19 S. W. Rep. 237; *Pryor v. Hardwick* (Ky. 1893), 22 S. W. Rep. 545; *Jones v. Miracle* (Ky. 1893), 21 S. W. Rep. 241; *Taylor v. Whitting*, 2 B. Mon. (Ky.) 268; *State v. Herron*, 29 La. Ann. 848; *Rapp v. Lowry*, 30 La. Ann. 1272; *Clymer v. Cameron*, 55 Miss. 593; *Ferrill v. Dickerson*, 63 Miss. 210; *Worthing v. Webster*, 45 Me. 270; 71 Am. Dec. 543; *Howe v. Russell*, 36 Me. 115; *French v. Ladd*, 57 Miss. 678; *Rackliff v. Look*, 69 Me. 516; *Westcott v. McDonald*, 22 Me. 402; *Phillips v. Phillips*, 40 Me.

160; *Scott v. Detroit, etc., Soc.*, 1 Dougl. (Mich.) 119; *Farmers', etc., Bank v. Bronson*, 14 Mich. 361; *Latimer v. Lovett*, 2 Dougl. (Mich.) 204; *Moreau v. Detchemendy*, 41 Mo. 431; *Alvord v. Collins*, 20 Pick. (Mass.) 418; *Leggett v. Rogers*, 9 Barb. (N. Y.) 406; *Varick v. Tallman*, 2 Barb. (N. Y.) 113; *Beekman v. Bigham*, 5 N. Y. 366; *Jackson v. Robert*, 11 Wend. (N. Y.) 422; *Jackson v. Esty*, 7 Wend. (N. Y.) 148; *Leggett v. Rogers*, 9 Barb. (N. Y.) 406; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88; 17 Am. Dec. 502; *Brown v. Goodwin*, 75 N. Y. 409; *Hoyt v. Dillon*, 19 Barb. (N. Y.) 644; *Eastern Land, etc., Co. v. State Board of Education*, 101 N. Car. 35; *Fox v. Stafford*, 90 N. Car. 296; *Den v. Gates*, 4 Dev. & B. (N. Car.) 363; *Den v. Stewart*, 3 Dev. & B. (N. Car.) 386; *Harvey v. Mitchell*, 31 N. H. 575; *Hopper v. Malleson*, 16 N. J. Eq. 382; *Holt v. Hemphill*, 3 Ohio 232; *Thompson v. Gotham*, 9 Ohio 170; *Shearer v. Woodburn*, 10 Pa. St. 511; *Emery v. Harrison*, 13 Pa. St. 317; *State v. Thompson*, 18 S. Car. 538; *Bartley v. Harris*, 70 Tex. 181; *Calder v. Ramsey*, 66 Tex. 218; *Reed v. Field*, 15 Vt. 672; *Downer v. Tarbell*, 61 Vt. 530; *Hall v. Collins*, 4 Vt. 316; *May v. Wright*, 17 Vt. 97; *Townsend v. Downer*, 32 Vt. 183; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Christy v. Minor*, 4 Mumf. (Va.) 431; *Gage v. Kaufman*, 133 U. S. 471; *Mayhew v. Davis*, 4 McLean (U. S.) 213; *Moore v. Brown*, 11 How. (U. S.) 414; *Early v. Doe*, 16 How. (U. S.) 610; *Dunn v. Games*, 1 McLean (U. S.) 321; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Bradford v. Hall*, 36 Fed. Rep. 801.

The deed is, at best, evidence of the regularity of the sale only, and is not evidence to prove title, unless accompanied by proof that the proceedings anterior to the sale have been in conformity to the statute. *Scott v. Detroit, etc., Soc.*, 1 Dougl. (Mich.) 119; *Latimer v. Lovett*, 2 Dougl. (Mich.) 204. And see

sufficient to dispense with independent proof.<sup>1</sup> But the tax deed is sometimes held to be *prima facie* evidence of title as against a mere trespasser or intruder.<sup>2</sup> And where the assignment of the tax certificate is permitted, a deed to an assignee thereof in due form, is usually *prima facie* evidence of the regularity and validity of all assignments of the certificate recited therein.<sup>3</sup>

(2) *Under Statutes.*—In many of the states statutes have been

Rapp v. Lowry, 30 La. Ann. 1272; Coxe v. Deringer, 82 Pa. St. 236.

A deed of conveyance from the register of lands, of land sold for taxes, of itself makes no title. Bosworth v. Bryan, 14 Mo. 575.

Where an act making tax deeds *prima facie* evidence of certain things, is repealed, the mere introduction in evidence of a tax deed made under the former statute is not sufficient to establish title, without proof of the preliminary steps. Emeric v. Alvarado, 90 Cal. 444.

In *Florida*, the record of a deed is not proper evidence, if objected to, without proof of an original duly executed, and an original is not *per se* evidence, but its execution must be proved by evidence other than the certificate of proof or acknowledgment for record. Neal v. Spooner, 20 Fla. 38.

1. Dikeman v. Parrish, 6 Pa. St. 210; 47 Am. Dec. 455; Johnston v. Jackson, 70 Pa. St. 164; Rockland, etc., Coal, etc., Co. v. McCalmont, 72 Pa. St. 221; Crum v. Burke, 25 Pa. St. 377; Foust v. Ross, 1 W. & S. (Pa.) 501; Huston v. Foster, 1 Watts (Pa.) 476; Foster v. McDivit, 9 Watts (Pa.) 341; Troutman v. May, 33 Pa. St. 455; Wheeler v. Winn, 53 Pa. St. 122; 91 Am. Dec. 186; Smith v. Bodfish, 27 Me. 289; Dejarrett v. Haynes, 23 Miss. 600; Bellows v. Elliot, 12 Vt. 569; Wells v. Jackson Iron Mfg. Co., 48 N. H. 491; Robinett v. Preston, 4 Gratt. (Va.) 141. And see Hitchcox v. Rawson, 14 Gratt. (Va.) 526; Hoffmann v. Bell, 61 Pa. St. 444; Jackson v. Esty, 7 Wend. (N. Y.) 148; Jackson v. Shepard, 7 Cow. (N. Y.) 88; 17 Am. Dec. 502; Stoudenmire v. Brown, 48 Ala. 699; Davis v. Minge, 56 Ala. 123; Pierce v. Low, 51 Cal. 580; Varick v. Tallman, 2 Barb. (N. Y.) 113; Crooker v. Jewell, 31 Me. 313; Ladd v. Dickey, 84 Me. 190; Worthing v. Webster, 45 Me. 270; 71 Am. Dec. 543; Rackliff v. Look, 69 Me. 516; Mussey v. White, 3 Me. 302; Phillips v. Sherman, 61 Me. 548; Libby v. Mayberry, 80 Me. 137; May v. Wright, 17 Vt. 97;

Polk v. Rose, 25 Md. 153; 89 Am. Dec. 773; Smith v. Corcoran, 7 La. 46; Jesse v. Preston, 5 Gratt. (Va.) 120.

A recital in a deed is only evidence against parties and privies in blood, in estate, and in law. It is not evidence against strangers, nor one claiming under the party executing the reciting deed, by title prior thereto, or adversely to him, but only against those claiming under him by title subsequent. Hill v. Draper, 10 Barb. (N. Y.) 454.

Some of the cases have held, however, that the recitals in a deed regular upon its face will be presumed to be correct, and that the officers have done their duty by complying with all the statutory prerequisites. See Livingston v. Hudson, 85 Ga. 835; Taylor v. Winona, etc., R. Co., 45 Minn. 66; Cousins v. Allen, 28 Wis. 232; Smith v. Todd, 55 Wis. 459; Powell v. Brown, 1 Tyler (Vt.) 285; Parker v. Bixby, 2 Tyler (Vt.) 466. And see Hall v. Collins, 4 Vt. 316.

In Hall v. Collins, 4 Vt. 316, it was held that recitals in a tax collector's deed are not evidence of the acts of other persons, although they may be of the acts of the collector himself.

In Morton v. Waring, 18 B. Mon. (Ky.) 72, it was held that the recitals in a deed made by the register of the land office, that the requisitions of the law authorizing him to sell had been complied with, are evidence of that fact, but not of any other fact.

2. See Troutman v. May, 33 Pa. St. 455; Dikeman v. Parrish, 6 Pa. St. 210; 47 Am. Dec. 455; Foster v. McDivit, 9 Watts (Pa.) 344; Foust v. Ross, 1 W. & S. (Pa.) 501; Johnston v. Jackson, 70 Pa. St. 164; Crum v. Burke, 25 Pa. St. 377; Stille v. Shull, 41 La. Ann. 816; Smith v. Bodfish, 27 Me. 289; Dejarrett v. Haynes, 23 Miss. 600; Thompson v. Burhans, 61 Barb. (N. Y.) 260.

3. Doe v. Bean, 6 Ill. 302; Stephenson v. Thompson, 13 Ill. 186; Gardenhire v. Mitchell, 21 Kan. 83. And see Neenan v. White, 50 Kan. 639.

But the assignment may be shown by

enacted modifying the common-law rule, and making a tax deed *prima facie* evidence, either of the facts recited therein, or of the regularity of all the prior proceedings upon which it is based, and upon its introduction in evidence casting upon the adverse party the burden of showing the non-existence of, or irregularity in, such proceedings; <sup>1</sup> and there is no doubt as to the competency

parol evidence to have been made at a different time from that stated in the deed. *Shelton v. Dunn*, 6 Kan. 128.

In *Pitkin v. Reibel*, 104 Mo. 505, it was held that a tax deed may be sufficient to furnish evidence of an assignment of the certificate so as to enable the grantee to recover for taxes paid, though it is insufficient to carry title.

Under statutes making a tax deed either *prima facie* or conclusive evidence of the regularity of all proceedings up to its execution, if the deed recites that the grantee was the assignee of the tax certificate, it must be assumed that the assignment was properly made, until the contrary is shown. *Cousins v. Allen*, 28 Wis. 232.

1. *Riddle v. Messer*, 84 Ala. 236; *Stoudenmire v. Brown*, 57 Ala. 481; *Lassitter v. Lee*, 68 Ala. 287; *Huntington v. Central Pac. R. Co.*, 2 Sawyer (U. S.) 513; *Tilton v. Oregon Cent., etc., Road Co.*, 3 Sawyer (U. S.) 22; *Williams v. Kirtland*, 13 Wall. (U. S.) 310; *Overman v. Parker*, 1 Hempst. (U. S.) 692; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Webb v. Den*, 17 How. (U. S.) 576; *Thomas v. Lawson*, 21 How. (U. S.) 331; *Lamb v. Gillett*, 6 McLean (U. S.) 365; *Gage v. Kaufman*, 133 U. S. 471; *Scott v. Woodruff*, 49 Ark. 266; *Roberts v. Pillow*, 1 Hempst. (U. S.) 624; *Merrick v. Hutt*, 15 Ark. 331; *Biscoe v. Coulter*, 18 Ark. 423; *Bonnell v. Roane*, 20 Ark. 114; *Hunt v. McFadgen*, 20 Ark. 277; *Twombly v. Kimbrough*, 24 Ark. 459; *Thweatt v. Black*, 30 Ark. 732; *Cairo, etc., R. Co. v. Parks*, 32 Ark. 147; *Norris v. Russell*, 5 Cal. 249; *O'Grady v. Barnhisel*, 23 Cal. 287; *Wetherbee v. Dunn*, 32 Cal. 106; *Rollins v. Wright*, 93 Cal. 395; *Waddingham v. Dickson*, 17 Colo. 223; *Mundee v. Freeman*, 23 Fla. 529; *Paul v. Fries*, 18 Fla. 573; *Messinger v. Germain*, 6 Ill. 631; *Vance v. Schuyler*, 6 Ill. 160; *Rhinehart v. Schuyler*, 7 Ill. 473; *Job v. Tebbitts*, 10 Ill. 376; *Graves v. Bruen*, 11 Ill. 431; *Irving v. Brownell*, 11 Ill. 402; *Illinois Cent. R. Co. v. Phillips*, 55 Ill. 194; *Sullivan v. Oneida*, 61 Ill. 247; *Town-*

*send v. Radcliffe*, 63 Ill. 11; *Roby v. Chicago*, 64 Ill. 447; *Burbank v. People*, 90 Ill. 555; *Taylor v. Wright*, 121 Ill. 455; *Wines v. Woods*, 109 Ind. 291; *Doe v. Himelick*, 4 Blackf. (Ind.) 494; *Hearick v. Dunn*, 4 Ind. 164; *Fitch v. Casey*, 2 Greene (Iowa) 300; *Clark v. Connor*, 28 Iowa 311; *Fuller v. Armstrong*, 53 Iowa 683; *Soukup v. Union Invest Co.*, 84 Iowa 448; *Sprague v. Pitt*, McCahon (Kan.) 212; *Smith v. Hobbs*, 49 Kan. 800; *Bowman v. Cockrell*, 6 Kan. 311; *Hobson v. Dutton*, 9 Kan. 477; *Gardenhire v. Mitchell*, 21 Kan. 87; *Young v. Rheinechex*, 25 Kan. 366; *City R. Co. v. Chesney*, 30 Kan. 199; *Graves v. Hayden*, 2 Litt. (Ky.) 61; *Terry v. Bleight*, 3 T. B. Mon. (Ky.) 271; 16 Am. Dec. 101; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Winter v. Atkinson*, 28 La. Ann. 650; *State v. Herron*, 29 La. Ann. 489; *Fales v. Wadsworth*, 23 Me. 553; *Freeman v. Thayer*, 33 Me. 76; *Orono v. Veazie*, 57 Me. 517; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *Kendall v. Kingston*, 5 Mass. 524; *Holmes v. Hunt*, 122 Mass. 505; 23 Am. Rep. 381; *Beard v. Sharrick*, 67 Mich. 321; *Palmer v. Rich*, 12 Mich. 414; *Wright v. Dunham*, 13 Mich. 414; *Groesbeck v. Seeley*, 13 Mich. 329; *Stockle v. Silsbee*, 41 Mich. 615; *Baker v. Kelly*, 11 Minn. 480; *Broughton v. Sherman*, 21 Minn. 431; *Taylor v. Winona, etc., R. Co.*, 45 Minn. 66; *Minor v. Natchez*, 4 Smed. & M. (Miss.) 602; *Ray v. Murdock*, 36 Miss. 692; *Virden v. Bowers*, 55 Miss. 1; *Morton v. Reeds*, 6 Mo. 74; *State v. Richardson*, 21 Mo. 420; *Woodbridge v. State*, 43 N. J. L. 262; *Doremus v. Cameron*, 49 N. J. Eq. 1; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88; 17 Am. Dec. 502; *Curtiss v. Follett*, 15 Barb. (N. Y.) 337; *Brown v. Allen*, 57 Hun. (N. Y.) 219; *Forbes v. Halsey*, 26 N. Y. 53; *Rathbone v. Hoonery*, 58 N. Y. 463; *Doe v. Lucey*, 1 Murph. (N. Car.) 311; *Carlisle v. Longworth*, 5 Ohio 369; *Jones v. Devore*, 8 Ohio St. 430; *Stanbery v. Sillon*, 13 Ohio St. 571; *Turney v. Yeoman*, 14 Ohio 217; *Woodward v. Sloan*, 27 Ohio St. 592; *Rhodes v. Gunn*, 35 Ohio St. 387; *Der-*



of such legislation.<sup>1</sup> But in some of the states, the statutes

inger v. Coxe (Pa. 1887), 10 Atl. Rep. 412; Lee v. Jeddo Coal Co., 84 Pa. St. 74; State v. Thompson, 18 S. Car. 538; Randolph v. Metcalf, 6 Coldw. (Tenn.) 400; Thompson v. Lawrence, 2 Baxt. (Tenn.) 415; Flanagan v. Grimmet, 10 Gratt. (Va.) 421; Dequasie v. Harris, 16 W. Va. 354; Bemis v. Weege, 67 Wis. 435; Hiles v. Cate, 75 Wis. 91; Stewart v. McSweeney, 14 Wis. 468; Hart v. Smith, 44 Wis. 223; Steadman v. Planters' Bank, 7 Ark. 426. See also Hogins v. Brashears, 13 Ark. 242; Patrick v. Davis, 15 Ark. 363; Thornton v. Smith, 36 Ark. 508; Burgett v. Willford, 56 Ark. 187; McCready v. Sexton, 29 Iowa 656; Genther v. Fuller, 36 Iowa 604; Early v. Whittingham, 43 Iowa 164; Fenton v. Way, 40 Iowa 196; Easton v. Savery, 44 Iowa 655; McCauslin v. McGuire, 14 Kan. 234; Ide v. Finneran, 29 Kan. 569; Hord v. Bodley, 1 J. J. Marsh. (Ky.) 79; Allen v. Robinson, 3 Bibb (Ky.) 326; Ives v. Kimball, 1 Mich. 308; Greve v. Coffin, 14 Minn. 345; 100 Am. Dec. 229; Sheehy v. Hinds, 27 Minn. 259; Striker v. Kelly, 2 Den. (N. Y.) 323; Doughty v. Hope, 3 Den. (N. Y.) 594; Westbrook v. Willey, 47 N. Y. 457; Finlay v. Cook, 54 Barb. (N. Y.) 9; Colman v. Shattuck, 62 N. Y. 348; Marshall v. Benson, 48 Wis. 558; Ward v. Huggins, 7 Wash. 617.

The deed may be made evidence of title in cases in which the land was forfeited to, or purchased by, the state or government, and afterwards deeded to a purchaser, as well as when the sale is made direct to the purchaser by the taxing officer. See Deringer v. Coxe (Pa. 1887), 10 Atl. Rep. 412.

A deed which is not assailable except for fraud or mistake in the assessment or sale, or upon proof that the taxes were paid before sale, is *prima facie* evidence of good title. Hardie v. Chrisman, 60 Miss. 671; Greene v. Williams, 58 Miss. 752.

Under the *Mississippi* constitution, a tax deed is to be regarded with the same favor and indulgence as a title by a sheriff's deed on sale under execution. Virden v. Bowers, 55 Miss. 1.

Levee tax titles in *Mississippi*, whether acquired by purchase at public sale by the tax collector, or from the levee treasurer after the lands are struck off to him, are placed upon the same footing of *prima facie* validity as

ordinary tax titles. Beirne v. Burdett, 52 Miss. 795.

In *Tennessee*, a tax deed reciting all the preliminary requisites to the sale, is *prima facie* evidence of their existence; but if any of such preliminary requisites are omitted, the deed is a nullity. Hightower v. Freedle, 5 Sneed (Tenn.) 312.

The presumption of ownership arising from a recital in a tax deed that the property had been assessed in the name of a specified person as owner, is overcome by an affirmative showing in the record that another person was then the owner. Baer v. Choir, 7 Wash. 631.

In *Shackleford v. Hooper*, 65 Ga. 366, it was held that the recitals in a tax deed are *prima facie* evidence of the acts of the officer making the sale, such as the advertisement, place, manner of sale, etc., but not as to the authority to sell.

Recitals in a collector's deed are not evidence of what has been done by other persons previous to its execution, whether such recitals are evidence of the doings of the collector himself or not. Hall v. Collins, 4 Vt. 316. And see Smith v. Corcoran, 7 La. 46.

In *Maine*, the recitals in a tax deed more than thirty years old, are held to be evidence of the facts recited, only when the grantee takes and holds possession of the premises under the deed. McAllister v. Shaw, 69 Me. 348; Worthington v. Webster, 45 Me. 270; 71 Am. Dec. 543.

1. Delaplaine v. Cook, 7 Wis. 44; Smith v. Cleveland, 17 Wis. 556; Lumsden v. Cross, 10 Wis. 282; Allen v. Armstrong, 16 Iowa 508; Belcher v. Mhoon, 47 Miss. 613; Groesbeck v. Seeley, 13 Mich. 329; Hand v. Ballou, 12 N. Y. 541; Oswego County v. Betts, 53 Hun (N. Y.) 638; White v. Wheeler, 51 Hun (N. Y.) 573; Hickox v. Tallman, 38 Barb. (N. Y.) 608; Den v. Craig, 5 Ired. (N. Car.) 129; McCall v. Lorimer, 4 Watts (Pa.) 351; Abbott v. Lindenbower, 42 Mo. 162; Cook v. Hacklemann, 45 Mo. 317; Nalle v. Fenwick, 4 Rand. (Va.) 591; Pillow v. Roberts, 13 How. (U. S.) 476; Marx v. Hanthorn, 148 U. S. 172.

In *Louisiana*, tax deeds are made *prima facie* evidence of valid title by constitutional enactment. See Coco v. Thienman, 25 La. Ann. 236.

declare that the tax deed shall be conclusive evidence of the regularity of the sale and of certain of the proceedings prior thereto,<sup>1</sup> and in so far as such enactments apply to the manner of making the sale, or to simple irregularities in the exercise of the power to tax, and not to a vital part of the power itself, they are constitutional.<sup>2</sup> But where they attempt to make the deed conclusive

1. *Haaren v. High*, 97 Cal. 445; *Woodbridge v. State*, 43 N. J. L. 262; *Gould v. Thompson*, 45 Iowa 450; *People v. Turner*, 49 Hun (N. Y.) 466; *Beekman v. Bigham*, 5 N. Y. 366.

The Iowa statute making tax deeds conclusive as to the manner of the sale, is applicable in chancery cases as well as in actions at law. *Clark v. Thompson*, 37 Iowa 536.

Under the Tennessee statute, sales made in accordance with the provisions of the act are conclusive, unless the party attacking them can prove payment of the taxes previous to the judgment and order of sale. *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400.

2. *Raley v. Guinn*, 76 Mo. 263; *Oswego County v. Betts*, 53 Hun (N. Y.) 638; *McCready v. Sexton*, 29 Iowa 356; 4 Am. Reg. 214; *Jeffrey v. Brokaw*, 35 Iowa 505; *Robinson v. First Nat. Bank*, 48 Iowa 354; *Rollins v. Wright*, 93 Cal. 395; *Kelly v. Herrell*, 20 Fed. Rep. 364.

The deed may be made conclusive evidence of due notice of the sale, as such notice is not essential to an exercise of the taxing power. *Allen v. Armstrong*, 16 Iowa 508; *Hurley v. Powell*, 31 Iowa 64. But see *contra*, *Marx v. Hanthorn*, 30 Fed. Rep. 579.

In Iowa, a tax deed is conclusive that the treasurer complied with his duty, in endeavoring to collect the tax by distress and sale of personal property, before selling the real estate. *Stewart v. Corbin*, 25 Iowa 144.

A warrant is not an indispensable prerequisite to the validity of a tax sale. A law making the tax deed conclusive evidence that the requirements of the statute in that respect were complied with, therefore, is constitutional. *Parer v. Sexton*, 29 Iowa 421.

A recital in a tax deed as to whom the property was assessed is conclusive. *Brady v. Dowden*, 59 Cal. 51; and tax deeds, showing lands sold in parcels, alleged to have been sold in bulk, are conclusive upon that point. *Rima v. Cowan*, 31 Iowa 125.

The time of a tax sale is not regarded as jurisdictional, and a tax deed is con-

clusive evidence of a compliance with the law in that respect. *Shawler v. Johnson*, 52 Iowa 472; *Phelps v. Meade*, 41 Iowa 470.

In *New Jersey*, where the deed, declaration of sale, or conveyance, is made evidence of title in any action in which the title is directly in issue, the proceedings on which the deed is founded can only be called in question by *certiorari*. *Woodbridge v. Allen*, 43 N. J. L. 262.

Tax deeds may be made conclusive as to matters essential to a valid exercise of the taxing power, if not attacked within a designated period, which must be reasonable. See *Ostrander v. Darling* (N. Y. 1891), 27 N. E. Rep. 353; *Bronson v. St. Croix Lumber Co.*, 44 Minn. 348; *Bull v. Kirk*, 37 S. Car. 395; *Johnston v. Sutton*, 45 Fed. Rep. 296. And see *supra*, this title, *Limitation of Actions*. Or until attacked in a direct proceeding brought for that purpose and set aside. *Doremus v. Cameron*, 49 N. J. Eq. 1.

#### Deed Conclusive as to Manner of Sale.

—While the legislature has no constitutional power to deprive the owner of his land for taxes delinquent thereon, without a sale thereof, and therefore cannot make a tax deed conclusive evidence of the fact of sale, yet it has full authority to prescribe the manner of making the sale, and, consequently, may constitutionally make the tax deed conclusive evidence that the sale was made in the manner thus prescribed. *Rima v. Cowan*, 31 Iowa 125. And see *Martin v. Cole*, 38 Iowa 141; *Smith v. Cleveland*, 17 Wis. 556; *Huey v. Van Wie*, 23 Wis. 613. And in *Bulkley v. Callanan*, 32 Iowa 461, it was held that while a tax deed is not conclusive evidence of the fact of an assessment, levy or sale, it is as to the manner thereof. And see *In re Lake*, 40 La. Ann. 142; *Ware v. Little*, 35 Iowa 234; *Phelps v. Meade*, 41 Iowa 470; *Gould v. Thompson*, 45 Iowa 451; *Clark v. Thompson*, 37 Iowa 536; *Hubbard v. Johnson County*, 23 Iowa 134; *Madson v. Sexton*, 37 Iowa 562; *Bullis v. Marsh*, 56 Iowa 749; *Chandler v. Keiler*, 44 Iowa 371; *Sibley v. Bullis*, 40 Iowa 429;

evidence of matters vitally essential to the valid exercise of the taxing power, they are void.<sup>1</sup>

*Smith v. Easton*, 37 Iowa 384; *Callanan v. Hurley*, 93 U. S. 387; *Jenkins v. McTigue*, 22 Fed. Rep. 148.

A stipulation of the existence of certain facts, under which it is found that the assessment in question was made to a person not the owner of the property, effects a waiver of the conclusive character of the tax deed, and an admission that, if in the judgment of the court, the person to whom the property was assessed was not the true owner, then the assessment was invalid and the tax deed void. *Tracy v. Reed*, 38 Fed. Rep. 69.

1. *Abbott v. Lindenbower*, 42 Mo. 162; *Abbott v. Lindenbower*, 46 Mo. 291; *Bannon v. Burnes*, 39 Fed. Rep. 892; *Marx v. Hanthorn*, 148 U. S. 172; *Davis v. Minge*, 56 Ala. 121; *Stoudenmire v. Brown*, 48 Ala. 699; *Allen v. Armstrong*, 16 Iowa 508; *Martin v. Cole*, 38 Iowa 141; *Gardner v. Early*, 69 Iowa 42; *Magruder v. Esmay*, 35 Ohio St. 221; *Lufkin v. Galveston*, 73 Tex. 340. And see *Baker v. Kelley*, 11 Minn. 480; *Silsbee v. Stottle*, 44 Mich. 561; *Quinlon v. Rogers*, 12 Mich. 168; *Adams v. Beale*, 19 Iowa 61; *Holbrook v. Dickinson*, 46 Ill. 285; *Joslyn v. Rockwell*, 128 N. Y. 334; *Ray v. Murdock*, 36 Miss. 692.

In *McCready v. Sexton*, 29 Iowa 356; 4 Am. Rep. 214, such an act was held unconstitutional in so far as respects the essential prerequisites for the exercise of the taxing power; such as the assessment, levy, sale, and the like. So far as the act makes the deed evidence of the fact of the assessment, it is unconstitutional. *Immegart v. Gorgas*, 41 Iowa 439; *Powers v. Fuller*, 30 Iowa 476; *In re Lake*, 40 La. Ann. 142.

A tax deed may be assailed by proof of failure to comply with whatever may be a constitutional prerequisite to a valid sale for taxes, even though it is provided by statute that the conveyance shall vest a perfect title in the purchaser, which shall not be invalidated or defended against, except by proof of certain specified things. *Greene v. Williams*, 58 Miss. 752. And see *Bell v. Coates*, 54 Miss. 538; *Powers v. Penny*, 59 Miss. 5.

And under the *Mississippi* statute, declaring that no defense against a tax title shall avail, unless it be shown that

the taxes were paid before the sale, any material departure from the law of assessment and sale may be set up. *Griffin v. Ellis*, 63 Miss. 351; *Dingey v. Paxton*, 60 Miss. 1037; *Davis v. Vanarsdale*, 59 Miss. 367; *Stovall v. Connor*, 58 Miss. 138; *Smith v. Nelson*, 57 Miss. 138; *McLeod v. Burkhalter*, 57 Miss. 65; *Hartreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *Vaughan v. Swayzie*, 56 Miss. 705; *Mead v. Day*, 54 Miss. 58; *McGehee v. Martin*, 53 Miss. 519. And see *Griffin v. Dogan*, 48 Miss. 11; *Meeks v. Whatley*, 48 Miss. 337.

Notwithstanding an act making the tax deed conclusive evidence of the regularity of the prior proceedings, it may be shown that no warrant was issued for the collection of the tax, or that there was no sale thereon on that account. *Kelly v. Herrall*, 20 Fed. Rep. 364. And it is always competent to show fraud committed by the officer conducting the sale, or by the purchaser, even under such statutes. *Butler v. Delano*, 42 Iowa 350.

Nor can such provisions preclude the owner from showing payment of the tax before the sale, *Rowland v. Doty*, 1 Harr. (Mich.) 3; *Curry v. Hinman*, 11 Ill. 420; *Jackson v. Morse*, 18 Johns. (N. Y.) 441; 9 Am. Dec. 225; nor from showing that the land has since been redeemed. *Cooper v. Shepardson*, 51 Cal. 298.

A tax deed is not conclusive evidence of the giving of notice when the time for redemption will expire. *Wilson v. Crafts*, 56 Iowa 450; *Reed v. Thompson*, 56 Iowa 455.

In *Strode v. Washer*, 17 Oregon 50, it was held that the exclusion of evidence showing that the assessment was void, in that the property had been assessed with other property not owned by the defendant, and the value of all fixed at a gross sum, was error, even under a statute making a tax deed conclusive evidence of the regularity of the assessment.

In *White v. Flynn*, 23 Ind. 46, the court expressed an opinion that the legislature could not make a tax deed conclusive evidence of the facts therein recited; and in *Gavin v. Shuman*, 23 Ind. 32, it was held that such an act was in derogation of common law and should be strictly construed.

All such statutes are to be strictly construed; <sup>1</sup> thus a provision that the deed shall be sufficient evidence of any fact is held to mean sufficient *prima facie* evidence. <sup>2</sup> And where the deed is made evidence of the regularity of the sale, it applies to the sale alone, and not to the steps preliminary thereto, <sup>3</sup> or to those required to be subsequently taken to complete the inceptive title

One who takes a tax deed under a law making it conclusive evidence of the regularity of the proceedings, cannot avail himself of a remedy provided by a subsequent statute, without subjecting himself to the disadvantages of that statute in making his deed merely *prima facie* evidence, and exposing his title to impeachment by proof of irregularities. *Burrows v. Bashford*, 22 Wis. 100.

1. *Townsend v. Martin*, 55 Ark. 192; *Parr v. Matthews*, 50 Ark. 390; *Stierlin v. Daley*, 37 Mo. 483; *Parker v. Smith*, 4 Blackf. (Ind.) 70; *Gavin v. Shuman*, 23 Ind. 32; *Garrett v. Wiggins*, 2 Ill. 335; *Shoalwater v. Armstrong*, 9 Humph. (Tenn.) 217; *Hannel v. Smith*, 15 Ohio 134; *Dequasie v. Harris*, 16 W. Va. 345; *McCallister v. Cottrille*, 24 W. Va. 173; *Bemis v. Weege*, 67 Wis. 435; *Bucknall v. Story*, 36 Cal. 67.

Though it is provided by statute that a tax deed shall be taken as *prima facie* evidence of title, unless it is made in pursuance of the act, it is without authority and void, and not admissible as evidence of title. *Carlisle v. Longworth*, 5 Ohio 369.

As a general rule, such statutes do not apply to sales for corporation taxes, such taxes being private and not public. *Shoalwater v. Armstrong*, 9 Humph. (Tenn.) 217. And see *Glass v. White*, 5 Sneed (Tenn.) 475; *Bucknall v. Story*, 36 Cal. 67; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Kelly v. Medlin*, 26 Tex. 48; *Ansley v. Wilson*, 50 Ga. 418; *Johnson v. Phillips*, 89 Ga. 286.

To support a deed for taxes under a special law, the preliminary requisites which constitute the authority of the officer to sell the lands, must be shown, even though, under the general law, a tax deed is made *prima facie* evidence of such prerequisites. *Kelly v. Medlin*, 26 Tex. 48.

In *Marsh v. Nelson*, 101 Pa. St. 51, an act providing that the oath of the tax collector shall be deemed conclusive that the taxes are unpaid, and that no personal property can be found on the land out of which said taxes can be

made, was held to be retrospective only, and not to apply to sales of land for unpaid taxes assessed after its passage.

A statute making a deed good and effectual in law and in equity, does not make it even *prima facie* evidence that the requirements of law have been complied with. *Hadley v. Tankersley*, 8 Tex. 12.

A statute declaring that a tax deed shall vest in the purchaser an absolute estate in fee simple, is merely descriptive of the estate acquired by the purchaser, and does not make the deed evidence of the existence of the facts necessary to empower the comptroller to sell the land. *Varick v. Tallman*, 2 Barb. (N. Y.) 113; *aff'd* 5 N. Y. 368; *Jackson v. Morse*, 18 Johns. (N. Y.) 441; 9 Am. Dec. 225; *Tallman v. White*, 2 N. Y. 66; *Steeple v. Downing*, 60 Ind. 478; *Keepfer v. Force*, 86 Ind. 81.

2. *Parker v. Overman*, 18 How. (U. S.) 137; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Thomas v. Lawson*, 21 How. (U. S.) 331; *Martin v. Barbour*, 140 U. S. 634; *Scott v. Mills*, 49 Ark. 256; *Bonnell v. Roane*, 20 Ark. 114; *Merrick v. Hutt*, 15 Ark. 331.

3. *Striker v. Kelly*, 2 Den. (N. Y.) 323; 7 Hill (N. Y.) 9; *Leggett v. Rogers*, 9 Barb. (N. Y.) 406; *Bunner v. Eastman*, 50 Barb. (N. Y.) 639; *Jackson v. Morse*, 18 Johns. (N. Y.) 441; 9 Am. Dec. 225; *Tallman v. White*, 2 N. Y. 66; *Beekman v. Bigham*, 5 N. Y. 366; *Rathbone v. Hooney*, 58 N. Y. 463; *Marsh v. Brooklyn*, 59 N. Y. 280; *Doe v. Leonard*, 5 Ill. 140; *Rowland v. Doty*, 1 Harr. (Mich.) 3; *Scott v. Detroit*, etc., Soc., 1 Dougl. (Mich.) 121; *Latimer v. Lovett*, 2 Dougl. (Mich.) 204; *Ives v. Kimball*, 1 Mich. 308; *Lufkin v. Galveston*, 73 Tex. 340; *Yenda v. Wheeler*, 9 Tex. 408; *Robson v. Osborn*, 13 Tex. 298; *Devine v. McCulloch*, 15 Tex. 490; *Bridge v. Bracken*, 3 Chand. (Wis.) 75. And see *Blair v. Caldwell*, 3 Yeates (Pa.) 284; *Wilson v. Lemon*, 23 Ind. 433; 85 Am. Dec. 471; *Ward v. Montgomery*, 57 Ind. 276; *Keepfer v. Force*, 86 Ind. 81; *Alexander v. Walter*, 8 Gill (Md.) 240; 50 Am.

passed by the sale.<sup>1</sup> And a deed made *prima facie* evidence of title when the land is not redeemed within a prescribed time, is not admissible without proof first made that there has been no redemption within that time.<sup>2</sup> Where the sale is required to be founded on a judgment, a tax deed must be supported by proof of a valid judgment and precept.<sup>3</sup> And when the deed is made

Dec. 688; O'Brien v. Cogswell, 17 Can. Supreme Ct. Rep. 420. But see Rhinehart v. Schuyler, 7 Ill. 473.

In Tallman v. White, 2 N. Y. 66, it is held that the statute declaring a comptroller's deed conclusive evidence of the regularity of the sale, applies only to the proceedings to be had after the power to sell is acquired.

In North Carolina, a party claiming, under a sheriff's deed for land sold for taxes, must show that the taxes are due. Jordan v. Rouse, 1 Jones (N. Car.) 119.

In Parker v. Smith, 4 Blackf. (Ind.) 70, it was held that under the Indiana statute of 1824, a tax deed is *prima facie* evidence of the regularity of the proceedings relative to the purchaser's title, only so far as the acts of the collector are concerned.

In Louisiana, while a tax deed to lands sold as the property of an unknown person, is *prima facie* evidence of a valid sale, yet, in the absence of a recital in the deed, and proof *aliunde* of the appointment of a curator to represent the unknown owner, and of due notice to the curator, the sale is absolutely void. Rapp v. Lowry, 30 La. Ann. 1272.

1. Williams v. Kirtland, 13 Wall. (U. S.) 306; Greve v. Coffin, 14 Minn. 345; 100 Am. Dec. 229; Sheehy v. Hinds, 27 Minn. 259; Sanborn v. Mueller, 38 Minn. 27.

It must be shown that proper notice of the expiration of the time for redemption was given. Reed v. Thompson, 56 Iowa 455; Wilson v. Crafts, 56 Iowa 450.

In Lathrop v. Howley, 50 Iowa 39, it was held that a demand before sale required by statute, is not proved by a recital thereof in the tax deed.

2. Doughty v. Hope, 3 Den. (N. Y.) 594; Beekman v. Bingham, 5 N. Y. 366; Westbrook v. Willey, 47 N. Y. 457; Jackson v. Esty, 7 Wend. (N. Y.) 148; Bunner v. Eastman, 50 Barb. (N. Y.) 639; Miller v. Miller, 96 Cal. 376; Reed v. Lyon, 96 Cal. 501.

It is as necessary to produce the comptroller's certificate to prove a fail-

ure to redeem, as it is to produce the comptroller's deed to prove the sale made by him. Both are necessary links in the chain of the purchaser's title, and both, like other facts, must be proved by the best evidence of which the nature of the case admits. Jackson v. Esty, 7 Wend. (N. Y.) 148.

3. Gage v. Lightburn, 93 Ill. 248; Perry v. Burton, 126 Ill. 599; Dukes v. Rowley, 24 Ill. 210; Bailey v. Doolittle, 24 Ill. 577; Elston v. Kennicott, 46 Ill. 187; Holbrook v. Dickinson, 46 Ill. 285; Eagan v. Connelly, 107 Ill. 458; Little v. Herndon, 10 Wall. (U. S.) 26; Buck v. Delafield, 55 Ill. 31; Wilding v. Horner, 50 Ill. 50; Williams v. Underhill, 58 Ill. 137; Terry v. Bleight, 3 T. B. Mon. (Ky.) 270; 16 Am. Dec. 101; Parker v. Smith, 4 Blackf. (Ind.) 70; Gage v. Caraher, 125 Ill. 447; Hinman v. Pope, 6 Ill. 131; Cottingham v. Springer, 88 Ill. 90; Atkins v. Hinman, 7 Ill. 437; Miller v. Williams, 15 Gratt. (Va.) 213; Bettison v. Budd, 17 Ark. 546; 65 Am. Dec. 442.

The recitals in the deed are not admissible to establish the judgment and precept. People v. Doe, 31 Cal. 220; Bolan v. Bolan, 4 Nev. 150.

Where a tax deed for land is relied on, the judgment and precept under which the sale was made, showing that in fact there was no judgment rendered against the land, are competent to show that no title passed by such deed; but they are not sufficient to show that the deed did not constitute color of title, or want of good faith in obtaining the title. Coleman v. Billings, 89 Ill. 183.

A variance between the judgment recited in the tax deed and the judgment itself, is a good cause for excluding such deed as evidence. Pitkin v. Yaw, 13 Ill. 251.

In Illinois, a regular tax deed founded on a valid precept and judgment, is *prima facie* evidence of every fact necessary to authorize a recovery upon it. Spellman v. Curtenius, 12 Ill. 409. And if not supported by the judgment and precept, the deed is void, and cannot be used as evidence of title. Eagan v. Connelly, 107 Ill. 458; Hinman v. Pope,

evidence of the facts therein recited, it is evidence of those facts only and not of any fact not recited.<sup>1</sup> The recital of steps of which the deed is not made evidence, does not dispense with proof thereof.<sup>2</sup> As a rule, a tax deed made evidence of the facts recited, is admissible only when its recitals show a compliance with the requisites of the statute,<sup>3</sup> and a deed bearing upon its face

6 Ill. 131; *Williams v. Underhill*, 58 Ill. 137; *Gage v. Lighburn*, 93 Ill. 248.

But since the amendment of 1879, making the deed *prima facie* evidence of the regularity of the proceedings, it is unnecessary, in the first instance, for the party claiming title under the tax deed, to produce such precept. It is sufficient if he gives in evidence the tax deed, which may be rebutted by showing there was no valid precept. *Ransom v. Henderson*, 114 Ill. 528.

In *Dukes v. Rowley*, 24 Ill. 221, it was held that under a statute making a tax deed evidence of title, the collector's report and certificate of advertisement, upon which judgment of sale was rendered, must be shown to have been recorded in order to support the deed.

1. And every fact necessary to constitute a valid sale, not recited in the deed, must be otherwise shown. *Bender v. Stewart*, 75 Ind. 88; *Smith v. Kyler*, 74 Ind. 575; *Ward v. Montgomery*, 57 Ind. 276; *Woolen v. Rockafeller*, 81 Ind. 213; *Steeple v. Downing*, 60 Ind. 478; *Keeper v. Force*, 86 Ind. 81; *Langohr v. Smith*, 81 Ind. 495; *Farron v. Clark*, 85 Ind. 449; *Reid v. State*, 74 Ind. 252; *Mason v. Ricker*, 63 Me. 381; *Taylor v. Winona, etc.*, R. Co., 45 Minn. 66; *Woodbridge v. State*, 43 N. J. L. 262; *Gossett v. Kent*, 19 Ark. 602; *Bettison v. Budd*, 17 Ark. 546; 65 Am. Dec. 442; *Jacks v. Chaffin*, 34 Ark. 534; *Donnell v. Roane*, 20 Ark. 114; *Wetherbee v. Dunn*, 32 Cal. 106; *Lawrence v. Zimpleman*, 37 Ark. 643; *Riddle v. Messer*, 84 Ala. 236; *State v. Mantz*, 62 Mo. 258. And see *Farrar v. Eastman*, 5 Me. 345; *Thurston v. Miller*, 10 R. I. 358; *Brown v. Goodwin*, 1 Abb. N. Cas. (N. Y.) 452.

Under a statute requiring the deed to contain a brief statement of the proceedings had for the sale of the lands, which shall be evidence that such sale and other proceedings were regularly made, the deed is evidence of those proceedings only of which that brief statement is required. *Marsh v. Brooklyn*, 59 N. Y. 280.

Though where the deed is made *prima facie* evidence of the regularity

of all the precedent proceedings, it is evidence, though such proceedings are not recited. *Sibley v. Smith*, 2 Mich. 486; *Scarry v. Lewis*, 133 Ind. 96.

In *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94, it was held that if the various acts showing a compliance with the statute, on the part of the revenue officer, are inserted in the deed, such recitals are *prima facie* evidence to support title; but if they are not inserted, they may be proved *aliunde*.

2. *Millikan v. Patterson*, 91 Ind. 517; *Pierce v. Low*, 51 Cal. 580; *State v. Mantz*, 62 Mo. 258; *Taylor v. Winona, etc.*, R. Co., 45 Minn. 66; *Worthing v. Webster*, 45 Me. 270; 71 Am. Dec. 543; *Brown v. Goodwin*, 75 N. Y. 409; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400. And see *supra*, this title, *Form and Contents*.

3. See *Ferris v. Coover*, 10 Cal. 589; *Kelsey v. Abbott*, 13 Cal. 609; *O'Grady v. Barnhisel*, 23 Cal. 287; *Hubbell v. Campbell*, 56 Cal. 527; *Bedgood v. McLain*, 89 Ga. 793; *Reeves v. Towles*, 10 La. 276; *Sheehy v. Hinds*, 27 Minn. 259; *Cogel v. Raph*, 24 Minn. 194; *Sherbourne v. Rippe*, 35 Minn. 540; *Woodward v. Sloan*, 27 Ohio St. 592; *Duff v. Neilson*, 90 Mo. 93; *State v. Mantz*, 62 Mo. 258; *Kelly v. Medlin*, 26 Tex. 48; *Haller v. Blaco*, 10 Neb. 36. But see to the contrary, *Streadman v. Planters' Bank*, 7 Ark. 424; *Gossett v. Kent*, 19 Ark. 602.

Even where it is provided that the certificate of the auditor shall be *prima facie* evidence of the facts contained in it, to make it such it is necessary that it shall contain a detailed statement of the performance of the particular duties enjoined by law upon the auditor. *Morton v. Reeds*, 6 Mo. 64.

The failure to recite a requisite to a valid levy of a tax in a tax deed in which all the proceedings had in such levy, and all other essential proceedings, are set out, is evidence by implication that the requirement omitted was not complied with. *Long v. Burnett*, 13 Iowa 28; 81 Am. Dec. 400; *Rayburn v. Kuhl*, 10 Iowa 92.

the evidence of its invalidity is not admissible in evidence for any purpose.<sup>1</sup>

In order that a tax deed may be admitted in evidence, it must be shown that it was made in pursuance of authority given by law,<sup>2</sup> and was duly executed and acknowledged,<sup>3</sup> and

1. *Ball v. Busch*, 64 Mich. 336; *Hogins v. Brashears*, 13 Ark. 242; *Twombly v. Kimbrough*, 24 Ark. 459; *Merrick v. Hutt*, 15 Ark. 331; *Mundee v. Freeman*, 23 Fla. 529; *Merriam v. Dovey*, 25 Neb. 618; *Allen v. Morse*, 72 Me. 502; *Wiggin v. Temple*, 73 Me. 380; *Orono v. Veazie*, 57 Me. 517; *Farnham v. Jones*, 32 Minn. 7; *Sheehy v. Hinds*, 27 Minn. 259; *Taylor v. Winona, etc.*, R. Co., 45 Minn. 66; *Kilpatrick v. Sisneros*, 23 Tex. 113; *Johnson v. Sutton*, 45 Fed. Rep. 296.

A deed absolutely void is inadmissible in evidence for any purpose. *Wright v. Cradlebaugh*, 3 Nev. 341; *Carlisle v. Longworth*, 5 Ohio 369; *Delaroderie v. Hillen*, 28 La. Ann. 537; *Moore v. Brown*, 11 How. (U. S.) 414.

If a tax deed recites a void assessment, it is void, and it cannot be shown that there was in fact a valid assessment. *Grimm v. O'Connell*, 54 Cal. 522. And where the deed shows on its face a violation of a statute requiring the collector to sell each tract separately, the invalidity cannot be cured by evidence *aliunde* contradicting the recitals. *Pack v. Crawford*, 29 Ark. 489.

An objection to the introduction in evidence, of a state tax deed that assumes facts to be established which constitute matter of defense to the deed, but which might be disputed, is untenable. *Crane v. Reeder*, 25 Mich. 303.

A tax deed, regular but for the objection that the person to whom the land was assessed became the purchaser, ought to be received in evidence; when the opposite party may show that the purchaser occupied such a position as required him to pay the taxes. *Pleasants v. Scott*, 21 Ark. 370; 76 Am. Dec. 403.

A tax deed which is void by reason of fatal defects in the proceedings of the collector, being upon record, has no further operation than to give character to such acts as the grantee, and those claiming under him, may do upon the land. *Wing v. Hall*, 44 Vt. 118.

In *Washburn v. Cutler*, 17 Minn. 361, it was held that a void tax deed is admissible to show claim of title to sustain an adverse possession. See also

*Edgerton v. Bird*, 6 Wis. 527; 70 Am. Dec. 473; *Watkins v. Winnings*, 102 Ind. 330.

A tax deed which has been set aside on account of irregularities, is not evidence, and in such case, in order to uphold the tax for which the sale was made, it must be shown by common-law proof that steps essential to a valid tax have been taken. *O'Neil v. Tyler* (N. Dak. 1892), 53 N. W. Rep. 434.

2. *Jones v. Devore*, 8 Ohio St. 430; *Holt v. Hemphill*, 3 Ohio 233; *Carlisle v. Longworth*, 5 Ohio 369; *Dillingham v. Brown*, 38 Ala. 311; *Burroughs v. Goff*, 61 Mich. 464; *Hobbs v. Shumates*, 11 Gratt. (Va.) 516; *Flanagan v. Grummet*, 10 Gratt. (Va.) 421; *Rochbold v. Barnes*, 3 Rand. (Va.) 473; *Shearer v. Corbin*, 1 McCrary (U. S.) 307; *Madland v. Benland*, 24 Minn. 372; *Spurlock v. Dougherty*, 81 Mo. 171; *Bemis v. Weege*, 67 Wis. 435.

Where a statute declares the effect of a tax deed, when executed and acknowledged in pursuance of a designated authority, it does not make the deed presumptive evidence of such authority. *Bemis v. Weege*, 67 Wis. 435.

In *California*, a sheriff acting as tax collector, has no authority to appoint an under tax collector; and a deed executed by a sheriff as tax collector, by his under sheriff, is inadmissible in evidence, and conveys no title to the grantee. *Lathrop v. Brittain*, 30 Cal. 680.

In *New Hampshire*, an office copy of a deed, when admissible as part of a chain of title, is *prima facie* evidence of the authority of the person who certifies the acknowledgment. *Harvey v. Mitchell*, 31 N. H. 575.

**Rejection of Part.**—The fact that a portion of the recitals in a deed are not authenticated, may be sufficient reason for the rejection of such portion as evidence, but cannot constitute a ground for rejecting another and entirely distinct and separate portion, which is properly authenticated. *Gilman v. Riopelle*, 18 Mich. 145.

3. *Dalton v. Fenn*, 40 Mo. 109; *Sterlin v. Daley*, 37 Mo. 483; *Mundee v. Freeman*, 23 Fla. 529; *Gabe v. Root*,

it is subject to be rebutted by evidence of any material defect in the proceedings antecedent to its execution and delivery.<sup>1</sup>

j. AS COLOR OF TITLE—(See also ADVERSE POSSESSION, vol. I, p. 225; TITLE (REAL PROPERTY), vol. 26).—There is no doubt that a tax deed, fair on its face, and purporting to convey title to the lands sold, will constitute color of title, under which adverse possession for the period prescribed in the Statute of Limitations will operate as a bar, notwithstanding it may be insufficient to pass an absolute title, by reason of defects and irregularities in the tax proceedings prior to its execution.<sup>2</sup> But the question upon which there is much conflict of authority is, will a tax deed, void on its face, constitute such color of title? In some jurisdictions it will,<sup>3</sup> for example, in *Nebraska*, *Iowa*, *Alabama*, *Wis-*

93 Ind. 256; *Day v. Day*, 59 Miss. 318; *Sprague v. Pitt*, McCahon (Kan.) 212; *Sheehy v. Hinds*, 27 Minn. 259; *Dunn v. Snell*, 74 Me. 22; *Sutton v. Stone*, 4 Neb. 319; *Richardson v. Dorr*, 5 Vt. 9; *Putney v. Cutler*, 54 Wis. 66.

It would be error to admit a tax deed not properly acknowledged, or without proof of the signature of the officer making the sale, even as color of title. *Winstanley v. Meacham*, 58 Ill. 97.

In *California*, a tax deed properly acknowledged is admissible in evidence without further proof. Courts will take judicial notice of the fact as to who holds the office of tax collector, and of the genuineness of the signature of the officer. *Wetherbee v. Dunn*, 32 Cal. 106.

1. *Roberts v. Chan Tin Pen*, 23 Cal. 259; *Daly v. Ah Goon*, 64 Cal. 512; *Hall v. Theiden*, 61 Cal. 524; *Abbott v. Doling*, 49 Mo. 302; *Large v. Fisher*, 49 Mo. 307; *Johnson v. Elwood*, 53 N. Y. 431; *Hickman v. Kemper*, 35 Ark. 505; *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400; *Laraby v. Reid*, 3 Greene (Iowa) 419; *Hickman v. Dawson*, 33 La. Ann. 438; *West v. Duncan*, 42 Fed. Rep. 430; *Jarvis v. Silliman*, 21 Wis. 599.

The recitals in a tax deed, of the date of the collector's receipt of the tax books, may be contradicted by his receipt to the clerk, showing a different date. *Hickman v. Kempner*, 35 Ark. 505.

Where a deed may properly be recorded in two places or offices, and is so recorded, and the original is lost, one record or a copy of it may be introduced in evidence to impeach the other, and from the whole, the jury may find what the original deed was. *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491.

In *Missouri*, though a tax deed shows

by its recitals that the law has been complied with, it may be contradicted as to material matters by evidence, wherever the questions arise, whether in a collateral proceeding or otherwise. *Abbott v. Doling*, 49 Mo. 302.

2. *Whitney v. Stevens*, 77 Ill. 585; *Russell v. Mandell*, 73 Ill. 136; *Coleman v. Billings*, 89 Ill. 190; *Rawson v. Fox*, 65 Ill. 200; *McCagg v. Heacock*, 42 Ill. 157; *Stubblefield v. Borders*, 92 Ill. 280; *Woodward v. Blanchard*, 16 Ill. 424; *Dawley v. Van Court*, 21 Ill. 460; *Halloway v. Clark*, 27 Ill. 483; *Morrison v. Norman*, 47 Ill. 477; *Winstanley v. Meacham*, 58 Ill. 97; *Dickenson v. Breeden*, 30 Ill. 279; *Hassett v. Ridgely*, 49 Ill. 202; *Brooks v. Bruyn*, 35 Ill. 392; *Irving v. Brownell*, 11 Ill. 402; *Watts v. Parker*, 27 Ill. 224; *McClellan v. Kellogg*, 17 Ill. 498; *Wright v. Matison*, 18 How. (U. S.) 50; *Dresback v. McArthur*, 7 Ohio 146; *Flannagan v. Grimmet*, 10 Gratt. (Va.) 421; *Waldron v. Tuttle*, 4 N. H. 371; *Hearick v. Dunn*, 4 Ind. 164; *Hall v. Law*, 102 U. S. 461; *Carter v. Woolfork*, 71 Md. 283; *Baker v. Swan*, 32 Md. 358; *Finlay v. Cook*, 54 Barb. (N. Y.) 9; *Charles v. Saffold*, 13 Tex. 94; *Ricker v. Butler*, 45 Minn. 545; *Harrison v. Spencer*, 90 Mich. 586.

3. Deed Void on Its Face Is Color of Title—*Nebraska*.—*Deputron v. Young*, 134 U. S. 241; *Gatling v. Lane*, 17 Neb. 80. But such a deed is not admissible to show color of title, under the special limitation of the revenue act of this state. *Sutton v. Stone*, 4 Neb. 319.

*Iowa*.—*Colvin v. McCune*, 39 Iowa 502; *Douglass v. Tullock*, 34 Iowa 262; *Chicago, etc., R. Co. v. Allfree*, 64 Iowa 500; *Childs v. Shower*, 18 Iowa 266.

*Alabama*.—*Pugh v. Youngblood*, 69 Ala. 296; *Stovall v. Fowler*, 72 Ala.



*consin, Oregon, Arkansas and Texas*; in others it will not, as in *Illinois*, the *District of Columbia*, and *Kansas*.<sup>1</sup>

Good faith on the part of the person claiming title by adverse possession under color of title, is required.<sup>2</sup> Color of title is a question of law; but the good faith of the party claiming under it is a question of fact, to be found and settled like other facts.<sup>3</sup> In the absence of evidence to the contrary, good faith will be presumed.<sup>4</sup>

A tax certificate is not sufficient to constitute color of title. An instrument, to be effectual as color, must purport on its face to convey title—such certificate in the ordinary form does not purport to pass any title; at most, it is only evidence that the holder, or his assignor, purchased the land therein described, at the tax sale, and that if not redeemed according to law, the holder will be entitled to a deed.<sup>5</sup> Nor does a mere sale of the lands for non-payment of taxes give the purchaser color of title.<sup>6</sup>

But a quit-claim deed from the grantee in the tax deed, will constitute color of title.<sup>7</sup> The tax deed, it has been held in one

77; *Dillingham v. Brown*, 38 Ala. 311; *Hughes v. Anderson*, 79 Ala. 209; *Hooper v. Clayton*, 81 Ala. 391.

*Wisconsin*.—*Lefingwell v. Warren*, 2 Black (U. S.) 599; *McMillan v. Wehle*, 55 Wis. 685; *Edgerton v. Bird*, 6 Wis. 527; 70 Am. Dec. 473; *Sprecher v. Wakeley*, 11 Wis. 432; *Hill v. Kricke*, 11 Wis. 443; *Knox v. Cleveland*, 13 Wis. 245; *Lindsay v. Fay*, 25 Wis. 460.

*Oregon*.—*Smith v. Shattuck*, 12 Oregon 362.

*Arkansas*.—*Pillow v. Roberts*, 13 How. (U. S.) 472; *Elliott v. Pearce*, 20 Ark. 508; *Cofer v. Brooks*, 20 Ark. 546; *Pleasants v. Scott*, 21 Ark. 371; 76 Am. Dec. 403.

*Texas*.—*Wofford v. McKinna*, 23 Tex. 36; 76 Am. Dec. 53. But such a deed does not constitute color of title so as to support the plea of three years' limitation under section 15, or five years' limitation under section 16, of the statute of this state. *Kilpatrick v. Sisneros*, 23 Tex. 113; *Smith v. Power*, 23 Tex. 29; *Wofford v. McKinna*, 23 Tex. 36; 76 Am. Dec. 53.

1. **Deed Void on its Face, Not Color of Title**.—*Illinois*.—*Moore v. Brown*, 11 How. (U. S.) 414; *Arrowsmith v. Burlingim*, 4 McLean (U. S.) 489; *Irving v. Brownell*, 11 Ill. 402. See also the *Illinois* cases cited in note just preceding.

*District of Columbia*.—*Keefe v. Bramhall*, 3 Mackey (D. C.) 551.

*Kansas*.—*Taylor v. Miles*, 5 Kan. 498;

7 Am. Rep. 558; *Shoat v. Walker*, 6 Kan. 65; *Carithers v. Weaver*, 7 Kan. 110; *Sapp v. Morrill*, 8 Kan. 677.

2. *Bowman v. Wittig*, 39 Ill. 416; *Dalton v. Lucas*, 63 Ill. 337.

3. *Woodward v. Blanchard*, 16 Ill. 424; *Wright v. Mattison*, 18 How. (U. S.) 50.

4. *Brooks v. Bruyn*, 35 Ill. 392; *Coleman v. Billings*, 89 Ill. 183.

And it is held that the deed itself purports good faith, unless the facts and circumstances attending its execution show that the party accepting it had no faith or confidence in it. *Dickinson v. Breeden*, 30 Ill. 279; *McConnel v. Street*, 17 Ill. 254; *Morrison v. Kelly*, 22 Ill. 626; 74 Am. Dec. 169.

5. **Tax Certificate Does Not Constitute Color of Title**.—*McKeighan v. Hopkins*, 14 Neb. 361; *Bride v. Watt*, 23 Ill. 507; *Dunlop v. Daugherty*, 20 Ill. 404; *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; *O'Mulcahy v. Florer*, 27 Minn. 449. See also TAXATION—*Tax Sales*.

6. **Mere Sale Not Color of Title**.—*Annan v. Baker*, 49 N. H. 161.

7. **Quit-Claim Deed From Tax Purchaser Is Color of Title**.—*Minot v. Brooks*, 16 N. H. 374; *Cowly v. Monson*, 10 Biss. (U. S.) 182.

In *Wheeler v. Merriman*, 30 Minn. 372, it was held that a quit-claim deed purporting to remise, release, and convey all the grantor's interest in and to the land, and containing the following, "intending hereby to convey only my title to said land, acquired by the pur-

case, is available as color of title only from its date, and not from the date of the sale.<sup>1</sup>

k. BY WHAT LAW GOVERNED.—Tax deeds are governed by the laws in force at the time of sale.<sup>2</sup>

**IV. WHO MAY ACQUIRE—1. Persons Bound for Taxes.**—One whose duty it is to pay the taxes may not, by neglecting to pay them, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title, either by purchasing at the sale himself, or by suffering a third person to buy, and then purchasing from him. A purchase under such circumstances operates as a payment of the taxes, leaving the title in precisely the situation in which it would have stood had the payment been before, instead of after, the sale. The obligation to pay the taxes may be owing either to the public or to the owner. These principles are applicable to the following cases: The real owner;<sup>3</sup> one in possession

chase of the same for taxes for the year 1864, and previous years"—constitutes "color of title in fee," and the recital in the deed that the title conveyed is only a tax title, is not of itself sufficient to charge the grantee with actual notice of the infirmities in such title, although of record.

**1. When Color of Title Commences.**—*DeGraw v. Taylor*, 37 Mo. 311.

**2. State v. Mantz**, 62 Mo. 258; *McCann v. Merriam*, 11 Neb. 241; *Smith v. Cleveland*, 17 Wis. 556; *Nelson v. Roundtree*, 23 Wis. 369; *Woodman v. Clapp*, 21 Wis. 355.

**3. Owner.**—*McAlpine v. Zitzer*, 119 Ill. 273; *Griffin v. Turner*, 75 Iowa 250; *Pleasants v. Scott*, 21 Ark. 370; 76 Am. Dec. 403; *Swift v. Agnes*, 33 Wis. 228; *Montgomery v. Whitfield*, 41 La. Ann. 649; *Thorington v. Montgomery*, 88 Ala. 548. *Contra*, *Branham v. Bezanson*, 33 Minn. 49. And where the owner of a distinct parcel of land neglects to pay the taxes thereon, and the same is sold jointly with the land of others, and he purchases the whole, the sale is void and passes no title; the purchaser being in default in not paying his taxes. *Cooley v. Waterman*, 16 Mich. 366; *Lewis v. Ward*, 99 Ill. 525; *State v. Williston*, 20 Wis. 228. But see *Towle v. Shelly*, 19 Neb. 636.

Where land subject to the lien of certain taxes is leased and subsequently purchased by the owner at a tax sale, the lease is still good; the taxes being extinguished as by a payment. *Smith v. Phelps*, 63 Mo. 585.

But it seems that the fact that lands were assessed to, and sold in the name of, a particular person, does not pre-

clude his acquiring title thereto, if he was under no legal obligation to pay the taxes, and they were not assessed to him with his consent. *Pleasants v. Scott*, 21 Ark. 370; 76 Am. Dec. 403.

And where the owner holds by a title acquired after the levy of the tax, and has not assumed its payment, or in anywise become liable to see it paid, he is not disqualified from acquiring the tax title. *Oswald v. Wolf*, 129 Ill. 200.

Where one, at the time the taxes accrue, holds the legal title to the land, but this is subsequently set aside because of fraud on the part of his grantor, he may afterwards purchase the tax title and set it up against the legal title. *Seymour v. Harrison* (Iowa, 1892), 52 N. W. Rep. 114. See also *Atkinson v. Dixon*, 89 Mo. 464.

**Purchase by Grantor with General Warranty.**—In *Frank v. Caruthers*, 108 Mo. 569, a person conveyed to his children, with general warranty, lands on which he had allowed taxes to become delinquent, and subsequently they were sold for such taxes and conveyed to him by the purchaser at the sale; it was held that he acquired no title thereby.

**Claimant Under Prior Void Tax Title.**—One who is not in possession of the property, and whose only claim thereto is based upon a void tax deed, may acquire a valid title by purchasing at a subsequent sale. *Mallory v. French*, 44 Iowa 133; *Neal v. Frazier*, 63 Iowa 451; *Eaton v. North*, 29 Wis. 75; *Coxe v. Gibson*, 27 Pa. St. 160; *Staley v. Leomans*, 53 Ark. 428.

**When Title Is in Controversy.**—It has been held that where there is a *bona*

under claim of ownership at the time of assessment; <sup>1</sup> a purchaser in possession under an executory contract, and agreeing to pay taxes; <sup>2</sup> one receiving the rents and profits, and ought to keep

*fide* controversy as to a title, and one of the claimants is in possession, he is under no duty to the other to pay the taxes, and may strengthen his claim by procuring a tax title. *Jeffery v. Hursh*, 45 Mich. 59. *Compare* *Butterfield v. Walsh*, 36 Iowa 534.

**1. One in Possession Under Claim of Title.**—*McMinn v. Whelan*, 27 Cal. 300; *Coppinger v. Rice*, 33 Cal. 408; *Bernal v. Lynch*, 36 Cal. 135; *Barrett v. Amerein*, 36 Cal. 322; *Garwood v. Hastings*, 38 Cal. 216; *Christy v. Fisher*, 58 Cal. 256; *Kelsey v. Abbott*, 13 Cal. 609; *Reily v. Lancaster*, 39 Cal. 354; *Stears v. Hallenbeck*, 38 Iowa 550; *Anson v. Anson*, 20 Iowa 55; 89 Am. Dec. 514; *Thomas v. Stickle*, 32 Iowa 71; *Jones v. Davis*, 24 Wis. 229; *Bassett v. Welch*, 22 Wis. 175; *Fallass v. Pierce*, 30 Wis. 443; *Whitney v. Gunderson*, 31 Wis. 359; *Smith v. Lewis*, 20 Wis. 350; *Lybrand v. Haney*, 31 Wis. 230; *Stubblefield v. Borders*, 92 Ill. 279; *Choteau v. Jones*, 11 Ill. 301; 1 Am. Rep. 460; *Dubois v. Campau*, 24 Mich. 360; *Rule v. Broach*, 58 Miss. 552; *Pool v. Ellis*, 64 Miss. 555; *Douglas v. Dangerfield*, 14 Ohio 522; *Wambole v. Foot*, 2 Dakota 1; *Rodman v. Sanders*, 44 Ark. 504; *Miller v. Ziegler*, 31 Kan. 417; *Jacks v. Dyer*, 31 Ark. 333; *Gwynn v. McCauley*, 32 Ark. 97.

But it is held that one in possession by virtue of a purchase at a tax sale, is not precluded from becoming a purchaser at a subsequent sale, made before his title has become absolute by the expiration of the time of redemption. *Tweed v. Metcalf*, 4 Mich. 579.

In *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524, it was held that one in possession of land, claiming it as his own, cannot acquire title by purchasing at a sale for taxes which were a lien upon the land at the time of his taking possession.

But in *Blackwood v. Van Vleit*, 30 Mich. 118, this case is criticised; the court, by Cooley, J., saying that they have examined into the cases relied upon in *Lacey v. Davis*, "and find that in all of them, the party who was held precluded from acquiring a title at a tax sale, was either in possession of the land when the tax was assessed, and, upon that ground, chargeable with its payment, *Douglas v. Dangerfield*, 14 Ohio 522;

*Ballance v. Forsyth*, 13 How. (U. S.) 18; *Voris v. Thomas*, 12 Ill. 442; *Glancy v. Elliott*, 14 Ill. 456; or by contract or otherwise it had become his duty to other parties concerned to make payment. *Chambers v. Wilson*, 2 Watts (Pa.) 495. These cases fall short of supporting the court in the position taken."

**Mere Possession Without Claim of Title.**—Mere possession by one who does not claim title to the lands, and who is in no wise bound for the taxes, does not constitute a bar to his acquiring a valid tax title. *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Bowman v. Cockrill*, 6 Kan. 311; *Blakeley v. Bes-tor*, 13 Ill. 709; *Seaver v. Cobb*, 98 Ill. 200; *Stubblefield v. Borders*, 92 Ill. 279; *Sands v. Davis*, 40 Mich. 14; *Curtis v. Smith*, 42 Iowa 665; *Weichselbaum v. Curlett*, 20 Kan. 709; 27 Am. Rep. 204; *Buckley v. Taggart*, 62 Ind. 236.

In *Link v. Doerfer*, 42 Wis. 391; 24 Am. Rep. 417, it was held that the taking of a tax deed by a party who occupied the land at the time of the levy of the tax, is presumptively inconsistent with any prior claim of title, and in the absence of evidence that his previous entry or occupation was under claim of title, he must be assumed to have been a mere intruder, and as such, capable of acquiring a tax title.

**2. Purchaser in Possession Under Executory Contract, and Agreeing to Pay Taxes.**—*Oliver v. Crosswell*, 42 Ill. 41; *Baily v. Doolittle*, 24 Ill. 577; *Quinn v. Quinn*, 27 Wis. 168; *Haskell v. Putnam*, 42 Me. 224; *Stinson v. Richardson*, 48 Iowa 541. See also *Jones v. Wells*, 31 Mich. 170.

And one who enters into an arrangement with another who is in possession by virtue of such a contract, cannot acquire a valid title to the premises as against such owner by virtue of a sale for taxes, which, under the contract, it was the duty of his assignor to pay, but would hold any title thus acquired in trust for the owner. *Bertram v. Cook*, 32 Mich. 518.

There are cases holding that a vendee, under an executory contract, in possession and enjoying the rents and profits, is also incapacitated, although the title bond does not in terms indicate who is to keep down the taxes during the interval before the contract

down the taxes; <sup>1</sup> tenant in common, or his grantee; <sup>2</sup> tenant for

becomes executed. *Miller v. Corey*, 15 Iowa 166; *Hunt v. Rowland*, 22 Iowa 54; *Fitzgerald v. Spain*, 30 Ark. 95; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *Johnston v. Smith*, 70 Ala. 108. See also *Seaver v. Cobb*, 98 Ill. 200; *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113.

1. **One Receiving Rents and Profits.**—*Hunt v. Gaines*, 33 Ark. 267; *Duffitt v. Tuhan*, 28 Kan. 292; *Sanders v. Ellis*, 42 Ark. 215.

2. **Tenants in Common.**—*Emeric v. Alvarado*, 90 Cal. 444; *Holterhoff v. Mead*, 36 Minn. 42; *Dubois v. Campau*, 24 Mich. 360; *Richards v. Richards*, 75 Mich. 408; *Butler v. Porter*, 13 Mich. 292; *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446; *Clark v. Brown*, 70 Iowa 139; *Smith v. Smith*, 68 Iowa 608; *Sheean v. Shaw*, 47 Iowa 411; *Conn v. Conn*, 58 Iowa 747; *Shell v. Walker*, 54 Iowa 386; *Fallon v. Chidester*, 46 Iowa 588; *Weare v. Van Meter*, 42 Iowa 128; 20 Am. Rep. 616; *Pratt v. St. Clair*, 6 Ohio 93; *Clark v. Lindsey*, 47 Ohio St. 437; *Bracken v. Cooper*, 80 Ill. 221; *Chickering v. Faile*, 38 Ill. 342; *Bender v. Stewart*, 75 Ind. 88; *Burgett v. Taliaferro*, 118 Ill. 503; *Brown v. Hogle*, 30 Ill. 119; *McChesney v. White*, 140 Ill. 330; *Delashmutter v. Parrent*, 39 Kan. 548; *Phipps v. Phipps*, 39 Kan. 495; *Muthersbaugh v. Burke*, 33 Kan. 260; *Cocks v. Simmons*, 55 Ark. 104; *Johns v. Johns*, 93 Ala. 239; *Donnor v. Quartermas*, 90 Ala. 164; *Willard v. Strong*, 14 Vt. 532; 39 Am. Dec. 240; *Downer v. Smith*, 38 Vt. 464; *Williams v. Gray*, 3 Me. 207; 14 Am. Dec. 234; *Harrison v. Harrison*, 56 Miss. 174; *Fox v. Coon*, 64 Miss. 465; *Wise v. Hyatt*, 68 Miss. 714; *Allen v. Poole*, 54 Miss. 323; *Barker v. Jones*, 62 N. H. 497; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Maul v. Rider*, 51 Pa. St. 377; *Davis v. King*, 87 Pa. St. 261. The foregoing cases hold that the most that can be acquired by such a purchase, is a right to compel contribution from the co-tenants, for the taxes paid in their behalf, and to have the amount treated as a lien upon the property to secure such contribution.

Nor is a tax deed acquired by a tenant in common, sufficient in equity to divest the interest of a co-tenant, notwithstanding the holder of the deed may have acquired the tax certificate before

he became a tenant in common. *Flinn v. McKinley*, 44 Iowa 68; *Tice v. Derby*, 59 Iowa 312.

**As Against Strangers.**—But the title acquired will be good as against strangers; the tenant stands in no fiduciary relation towards them; and if the co-tenants do not complain, they may not. *Burgett v. Williford*, 56 Ark. 187.

**Effect of Adverse Possession.**—But it has been held that adverse possession under a tax title by a tenant in common for twenty years, will give him as complete title as though there had been no joint tenancy. *English v. Powell*, 119 Ind. 93.

In *Wright v. Sperry*, 21 Wis. 331, it was held that where the mortgage of land, and the foreclosure of judgment and sale, purport to be of the entire premises, but the purchaser requires in fact only an undivided part, thereby becoming tenant in common with the mortgagor, he may take title to the residue by purchasing an outstanding tax deed to the whole; his claim of title to the whole under the foreclosure sale, being adverse to that of the mortgagor. But compare *Davis v. Chapman*, 24 Fed. Rep. 674, holding that where a tenant in common with his own funds buys the interest of his co-tenant at a tax sale, but the sale is irregular, vesting in him only a lien upon the property, which, by lapse of time, may ripen into a perfect title, but before that event he receives rents sufficient for his reimbursement, he must so apply them, and not permit the statute to run.

**Grantee of Tenant in Common.**—A grantee of a tenant in common, is under the same duties and obligations to the latter's co-tenants as his grantor, and like him, cannot divest their interest by acquiring a tax deed to the common property. *Austin v. Barrett*, 44 Iowa 488. But this rule does not apply where the grantor acquired the tax title first, and subsequently purchased a co-tenant's interest in the land, as the owner of a tax title has a right to supplement it by such a purchase, and to rely upon it. *Jonas v. Flanniken*, 69 Miss. 577.

**Husband of Tenant in Common.**—The rule of the tax precludes also the husband of a tenant in common from acquiring a valid tax title as against her co-tenants. *Burns v. Byrne*, 45 Iowa 285; *Chace v. Durfee*, 16 R. I. 248;

life;<sup>1</sup> tenant in possession under an agreement to pay taxes;<sup>2</sup>

*Busch v. Huston*, 75 Ill. 343. But compare *Broquet v. Warner*, 43 Kan. 48, where it is held that a tax title purchased by the husband of a co-heiress to the lands of the heirs, where the husband and wife were not in possession of the land, is not void as between the holder and the mortgagee under a mortgage from the father of the heirs.

**Trustee of Tenant in Common.**—A trustee of a tenant in common can neither severally, nor jointly with another, acquire a tax title adverse to the co-tenants of his *cestui que trust*. And being himself disqualified, the title of the party taking jointly with him, must fall also. *Sorenson v. Davis*, 83 Iowa 405.

**Partition Before Assessment.**—If partition is had, and the land is held in severalty, before the taxes for which the land is sold, were assessed, there will be nothing to prevent anyone of the former co-tenants from buying the land of the other exclusively for his own use. *Maul v. Rider*, 51 Pa. St. 377.

**After Co-tenant's Interest Has Ceased.**—And a tenant in common of land which has been sold for taxes, may, after his interest has been conveyed and he has ceased to be connected with the title as tenant in common, buy the tax title and set it up as against his former co-tenants. *Jonas v. Flanniken*, 69 Miss. 577.

**Tenant in Common Acquiring Title from Purchaser at the Sale After Expiration of Time of Redemption.**—The foregoing principles have been modified in several jurisdictions where it is held that, after a sale to a stranger and the time for redemption has passed, one of the tenants in common may purchase the land from the stranger, who has received his deed, and such purchase will not enure to the benefit of his co-tenants. *Kirkpatrick v. Mathiot*, 4 W. & S. (Pa.) 251; *Reinboth v. Zerbe Run Imp. Co.*, 29 Pa. St. 139. Nor will the fact of indebtedness by the purchaser of the tax-sale title to his former co-tenant, to an amount equal to one-half of the purchase-money, alter the case. *Lewis v. Robinson*, 10 Watts (Pa.) 355.

To the same effect are *Alexander v. Sully*, 50 Iowa 192; *Keele v. Cunningham*, 2 Heisk. (Tenn.) 288; *Coleman v. Coleman*, 3 Dana (Ky.) 398. See also *Frentz v. Klotsch*, 28 Wis. 312. But the contrary is held in *Battin v. Woods*, 27

W. Va. 58, and *Dubois v. Campau*, 24 Mich. 360. In the latter case, it is said that such a purchase by the co-tenant only corrects the wrong he had before committed, and operates as a payment of the tax, and he may not set up such tax title against his co-tenants.

**1. Tenant for Life.**—As it is the duty of a tenant for life to pay the taxes assessed during his tenancy, he is not allowed to purchase and hold adversely to the remainderman or reversioner. *Varney v. Stevens*, 22 Me. 331; *Dunn v. Snell*, 74 Me. 22; *Patrick v. Sherwood*, 4 Blatchf. (U. S.) 112; *Olleman v. Kelgore*, 52 Iowa 38; *Phelan v. Boylan*, 25 Wis. 679; *Foley v. Kirk*, 33 N. J. Eq. 170; *Burhaus v. Van Zandt*, 7 N. Y. 524; *Stewart v. Matheny*, 66 Miss. 21. And he will not be entitled to the benefit of ch. 23, § 4, *Mississippi Laws*, 1888, providing, with reference to certain tax titles sold and conveyed by public authorities, that occupation of such lands for twelve months shall constitute a bar to any action to recover the same. *Jones v. Merrill*, 69 Miss. 747.

But in *Illinois*, it is held that where the tenant for life procures the issuance of a tax deed to himself, and then conveys the land by warranty deed, the possession taken thereunder is adverse to that of the remainderman, as the warranty deed is color of title in fee. *Lewis v. Pleasants* (Ill. 1892), 30 N. E. Rep. 323.

**2. Tenant in Possession Under Agreement to Pay Taxes.**—*Busch v. Huston*, 75 Ill. 343; *Blake v. Howe*, 1 Aik. (Vt.) 306; 15 Am. Dec. 681; *Shepardson v. Elmore*, 19 Wis. 424; *Williamson v. Russell*, 18 W. Va. 612; *Haskell v. Putnam*, 42 Me. 244; *Donner v. Quartermas*, 90 Ala. 170; *Connecticut Mut. L. Ins. Co. v. Boulte*, 45 Mich. 113; *Carithers v. Weaver*, 7 Kan. 110.

A purchase by the tenant under such circumstances, would be considered as held in trust for the landlord if living, and if dead, then for his heirs. *Burgett v. Taliaferro*, 118 Ill. 503.

**Where There Is no Covenant to Pay Taxes.**—The cases are not agreed as to the right of the tenant to acquire a valid tax title as against his landlord, when there is no agreement to pay taxes. In favor of his right are: *Ferguson v. Etter*, 21 Ark. 160; *Bettison v. Budd*, 17 Ark. 545; *Weichselbaum v. Curlett*, 20 Kan. 709; 27 Am. Rep. 204. Against it are:

a licensee; <sup>1</sup> a mortgagee; <sup>2</sup> a mortgagor in possession and parties claiming under him. <sup>3</sup>

*Bailey v. Campbell*, 82 Ala. 342; *Jackson v. King*, 82 Ala. 432; *Gaskins v. Blake*, 27 Miss. 675; *Petty v. Mays*, 19 Fla. 652; *Williamson v. Russell*, 18 W. Va. 612. Especially if the taxes were upon improvements added by the tenant. *Williams v. Towl*, 65 Mich. 204. See also *Thode v. Spoffard* 65 Iowa 294.

1. **Licensee.**—*Keokuk, etc., R. Co. v. Lindley*, 48 Iowa 11; *Saunders v. Farmer*, 62 N. H. 572.

2. **Mortgagee.**—A mortgagee, either in or out of possession, may not acquire, as against the mortgagor or the other mortgagees, a tax title to the mortgage premises. *Hall v. Westcott*, 15 R. I. 373; *Maxfield v. Willey*, 46 Mich. 252; *Taylor v. Snyder*, Walk. Ch. (Mich.) 490; *Moore v. Titman*, 44 Ill. 367; *Chickering v. Failes*, 26 Ill. 507; *McLaughlin v. Green*, 48 Miss. 175; *Fisk v. Brunette*, 30 Wis. 102; *Burchard v. Roberts*, 70 Wis. 111; *Ward v. Matthews*, 80 Cal. 343; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 525.

Some cases make the circumstance of possession by the mortgagee all important. Thus, it is held that a mortgagee out of possession may acquire a tax title, *Spratt v. Price*, 18 Fla. 289; *Summers v. Kanawha County*, 26 W. Va. 159; *Waterson v. Devoe*, 18 Kan. 223; *Williams v. Townsend*, 31 N. Y. 415; and there is a dictum in *Sturdevant v. Mather*, 20 Wis. 576, to the same effect. While a mortgagee in possession may not acquire such a title. *Schenck v. Kelley*, 88 Ind. 444; *Brown v. Simons*, 44 N. H. 475; *Shoemaker v. Bank*, 15 Phila. (Pa.) 297.

Under the *Minnesota Gen. Sts.*, ch. 11, § 87, a mortgagee may acquire title as against the mortgagor, when he is neither legally nor equitably bound to protect the property against the taxes for which the sale is made. *Reimer v. Newel*, 47 Minn. 237.

In *Martin v. Swofford*, 59 Miss. 328, it is said that whatever may be the rule as to the foregoing question, it is certain that the mortgagee may not buy for the common good, and then use the title acquired for the purpose of defeating the rights of the mortgagor.

The fact that an agent purchases at a tax sale, land upon which he holds in his own right a mortgage, will not render invalid the title acquired by his principal. *Jury v. Day*, 54 Iowa 573.

**Purchase by Junior Mortgagee.**—A junior mortgagee may not, by purchase at a tax sale, acquire title which will defeat the lien of a senior incumbrancer. *Garrettson v. Scofield*, 44 Iowa 35; *Frank v. Arnold*, 73 Iowa 370; *Wadsworth v. First Nat. Bank*, 73 Iowa 425; *Goodrich v. Kimberly*, 48 Conn. 395; *Woodbury v. Swan*, 59 N. H. 22; *Smith v. Lewis*, 20 Wis. 350. Compare *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113.

**Rights of Purchaser Under Senior Mortgage.**—A purchaser in foreclosure under a senior mortgage by proceedings to which a junior mortgagee was not a party, cannot, by buying the land at a tax sale, acquire any right which will preclude such junior mortgagee from redeeming the premises by a tender of the proper amount. *Anson v. Anson*, 20 Iowa 55; 89 Am. Dec. 514.

**Acquisition of Title by Lien Holder.**—In *Fair v. Brown*, 40 Iowa 209, it was held that a lien holder cannot acquire title at a tax sale which will defeat the lien of another incumbrancer.

In *Wilson v. Jamison*, 36 Minn. 59, the question was presented, whether a judgment creditor of a mortgagor, having by his judgment a lien upon the property junior to the mortgage, could, by purchasing at a tax sale, acquire as against the mortgagee a title by vesting the lien of the mortgage. The court was equally divided upon the question, so that the decision of the lower court, that there was no disability, was affirmed.

The holder of a judgment lien may acquire title as against the owner to the property by purchasing at the sale. *Morrison v. Bank of Commerce*, 81 Ind. 335.

3. **Mortgagor in Possession, and Parties Claiming under Him.**—A mortgagor in possession, or parties claiming under him, cannot defeat the lien of the mortgagee by acquiring a tax title to the land. *Allison v. Armstrong*, 28 Minn. 276; 41 Am. Rep. 281; *Kezer v. Clifford*, 59 N. H. 208; *Woodbury v. Swan*, 59 N. H. 22; *Phinney v. Day*, 76 Me. 83; *Gardiner v. Gerrish*, 23 Me. 46; *Fuller v. Hodgdon*, 25 Me. 243; *Dayton v. Rice*, 47 Iowa 429; *Fair v. Brown*, 40 Iowa 209; *Porter v. Lafferty*, 33 Iowa 254; *Stears v. Hollenbeck*, 38 Iowa 550; *Connecticut Mut. L. Ins. Co. v. Bulte*,

**2. Agent, Attorney, Guardian, Husband, and Wife.**—An agent having the control and management of the property, is disqualified from purchasing the same on his own account, without a previous explicit renunciation of his agency.<sup>1</sup> And the rule is not changed by the fact that the principal fails to furnish him funds to pay the taxes.<sup>2</sup> Nor can an agent engaged by the owner to bid off the property, acquire title thereto by taking the deed in his own name.<sup>3</sup> And so, the purchase by an attorney of land, in regard

45 Mich. 113; *Maxfield v. Willey*, 46 Mich. 252; *Pells v. Barbour*, 58 Mich. 49; *Ralston v. Hughes*, 13 Ill. 469; *Frye v. Illinois Bank*, 11 Ill. 367; *Cooper v. Jackson*, 99 Ind. 566; *Travelers, Ins. Co. v. Patten*, 98 Ind. 209; *Beltram v. Villere* (La. 1888), 4 So. Rep. 506; *Austin v. Citizens' Bank*, 30 La. Ann. 691; *Newton v. Marshall*, 62 Wis. 8; *Avery v. Judd*, 21 Wis. 262; *Fallass v. Pierce*, 30 Wis. 443; *Leppo v. Gilbert*, 26 Kan. 138. And this rule applies to the owner of a small undivided interest in an equity of redemption. *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513.

The purchaser of lands at an administrator's sale, subject to the mortgage, stands in the position of the mortgagor, and cannot acquire a tax title so as to cut off the mortgage. *Edgerton v. Schneider*, 26 Wis. 385.

A vendee, in possession, under an equitable title, occupies the position of a mortgagor as to the unpaid purchase-money, and he may not acquire a tax title to the premises to the prejudice of his vendor. *Cowdry v. Cuthbert*, 71 Iowa 733.

Where the mortgagor, by fraud and collusion with a third party, allows the land to be sold for taxes, and procures such party to purchase the same to defeat the mortgage, the tax title will be treated as though the mortgagor were the purchaser. *McAlpine v. Zitzer*, 119 Ill. 273.

A tax deed taken by the wife of the mortgagor at his request and held for his benefit, is invalid as against the mortgagee. *Drew v. Morrill*, 62 N. H. 565. But in *Mississippi*, it is held that the wife of the grantor in a trust deed to the land embraced therein, may defend successfully against an action of ejectment by the secured creditor who purchases at the trustee's sale. *Carter v. Bustamente*, 59 Miss. 559.

A debtor whose property has been seized, sold, and purchased by his mortgage creditor, may not subsequently acquire the tax title thereto as against

such creditor, in virtue of a sale for taxes assessed in his name, and which accrued on the property during his ownership. *Magner v. Hibernia Ins. Co.*, 30 La. Ann. 1357.

**1. Agents.**—*Bartholemew v. Leech*, 7 Watts (Pa.) 472; *Murdoch v. Milner*, 84 Mo. 96; *Barton v. Moss*, 32 Ill. 50; *Gonzalia v. Bortelsman*, 143 Ill. 634; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 467; *Morris v. Joseph*, 1 W. Va. 256; 91 Am. Dec. 386; *Franks v. Morris*, 9 W. Va. 664; *Woodman v. Davis*, 32 Kan. 344; *Coxe v. Wolcott*, 27 Pa. St. 154; *McMahon v. McGraw*, 26 Wis. 614; *Baker v. Whiting*, 3 Sumn. (U. S.) 475.

In *Fox v. Zimmerman*, 77 Wis. 414, it was held that if an agent employed to collect rents and pay taxes on land, having rents in his hands sufficient to pay the taxes, permits the land to be sold therefor, and purchases the same, it is equivalent to a redemption, and he thereby acquires no title as against his principal; and the result is the same if the agent buys as agent for his wife and in her name, for in such case she is chargeable with notice of the fraud.

Where the court charged that the evidence was too slight to constitute an agency, this was, on appeal, held to be error—that it was a question for the jury. *Lamb v. Irwin*, 69 Pa. St. 436. See *Lamb v. Davis*, 74 Iowa 719, for a case where the circumstances were held not to constitute the party purchasing an agent.

But the purchase is voidable only at the option of the principal, who must refund what has been paid, if he avoids the purchase. *Ellsworth v. Cordrey*, 63 Iowa 675.

Nor can an agent having charge of the lands, by a purchase of the certificate from the county, make himself the owner of the lands as against his principal. *Fisher v. Krutz*, 9 Kan. 501. See also *Huzzard v. Trego*, 35 Pa. St. 9; *Shay v. McNamara*, 54 Cal. 169.

**2. Bowman v. Officer**, 53 Iowa 640; *McMahon v. McGraw*, 26 Wis. 614.

**3. Matthews v. Light**, 32 Me. 305;

to which he has been retained, is inconsistent with his relation to his client, and void, although there may have been no bad faith on his part.<sup>1</sup> But the mere fact that the purchaser had been, during the life of the owner, his attorney in some suits, does not cast upon him the duty of paying the taxes, or affect his right to purchase.<sup>2</sup>

A tax deed, made upon the sale of a minor's lands, to his guardian, conveys no title adverse to the ward, whether the deed be made to the guardian or to his assignee of the certificate of sale.<sup>3</sup>

It has been held that a husband may not acquire title, as against his wife, to her separate estate, by purchasing at a tax sale.<sup>4</sup>

**3. Tax Officers.**—The officer conducting the sale may not, either personally or by an agent, purchase the property; <sup>5</sup> nor may he

*Curtis v. Borland*, 35 W. Va. 124. See also *Linsley v. Sinclair*, 24 Mich. 380.

**1. Attorneys.**—*Wright v. Walker*, 30 Ark. 44. But where the client refused for more than four years to pay his attorney fees, and reimburse him his expenses incurred in a suit to foreclose a mortgage, and the land mortgaged was subsequently bought by the attorney at a tax sale, the client being informed of the sale, and failing to pay the amount so advanced, it was held the client could not, seven years thereafter, maintain an action to set aside the tax deed. *Eckrote v. Myers*, 41 Iowa 324.

**2. Pack v. Crawford, 29 Ark. 489.**

**3. Guardian.**—*Dohms v. Mann*, 76 Iowa 723.

**4. Husband and Wife.**—*Laton v. Balcom*, 64 N. H. 92. And in this case it was also said that the wife is under a similar disqualification as to the husband's property.

In *Willard v. Ames*, 130 Ind. 351, the court, by Miller, J., said: "It seems to be settled law that a husband whose duty it is to look after the business interests of his wife and family, as well as to support them, will not be permitted to acquire title to the property of his wife by purchasing at a tax sale. But we know of no law to prevent a wife from purchasing at a public tax sale, the lands of her husband, or of others of which he is in possession, provided the purchase is made on her own account and with her own money."

But in *Swift v. Agnes*, 33 Wis. 229, the court, while refraining from determining whether a wife, especially one who has no separate estate, can take a

tax deed of her husband's land and hold such land adversely to the husband, said: "If she may lawfully do so, some singular complications growing out of such transactions may hereafter arise."

In *Burns v. Byrne*, 45 Iowa 285, the court said: "It would be a startling doctrine that a husband may possess and enjoy the profits of his wife's real estate, neglect to pay the taxes, purchase the property at the same sale for the delinquency, and acquire a valid title. Such a refusal or neglect to pay taxes would be a fraud upon his wife and would vitiate the title acquired."

**5. Officer as Purchaser.**—*Clute v. Barron*, 2 Mich. 192; *McLeod v. Burkhalter*, 57 Miss. 65; *Sponable v. Woodhouse*, 48 Kan. 173; *Haxton v. Harris*, 19 Kan. 511; *Chandler v. Moulton*, 33 Vt. 245.

In *Spicer v. Rowland*, 39 Kan. 740, it was held that a sale directly to the officer himself, or to a firm of which he is a member, is absolutely void, and may be called in question by a purchaser at a subsequent sale, or other interested party.

In *Iowa*, under the statute, the sale is held to be voidable only, and the title based on such a sale, when held by a subsequent purchaser for value without notice, may not be defeated, save upon proper proceedings instituted therefor. *Ellis v. Peck*, 45 Iowa 112. And the right to have the sale set aside may become barred by the Statute of Limitations. *Lawrence v. Hornick*, 81 Iowa 193.

In *Yancey v. Hopkins*, 1 Munf. (Va.) 419, the sheriff who made the



act in the matter as the agent of a third party.<sup>1</sup> This rule, however, is held not to preclude a clerk of the officer, who has no independent authority or control over the sale, from purchasing.<sup>2</sup>

sale, became the purchaser, and his title was held valid. But here there was a general custom, recognized in a public statute, and proved in the case itself, for sheriffs and their deputies to purchase lands at tax sales.

In *Pennsylvania*, a county commissioner may not purchase for himself lands sold at a treasurer's sale at a price less than the amount of taxes, costs, etc., but he may purchase at a price exceeding that amount. *Cuttle v. Brockway*, 24 Pa. St. 145.

In *California*, if a court commissioner, whose duty it is, in cases of default in tax suits, to draft a decree enforcing the lien, by negligence inserts in the decree a clause that the summons had been served, when such was not the fact, and subsequently buys the property at the sale, equity will not permit him to profit by his wrongful act, and will set aside his deed. *Martin v. Parsons*, 50 Cal. 498.

**Deputy as Purchaser.**—Under *Iowa* Code, § 885, the deputy of the county treasurer is prohibited from acquiring an interest in lands sold at a tax sale. And where he enters upon the books a sale as made to a party who is not present, and who subsequently assigns the certificate to him, the sale is invalid. *Ellis v. Peck*, 45 Iowa 112.

In *Kirk v. St. Thomas' Church*, 70 Iowa 287, the deputy county treasurer had funds of his minor child which he desired to invest in the purchase of property at a tax sale. He procured A, to bid in the property for that purpose. The certificate was made out to A, but never delivered to him. The deputy paid the bid to the treasurer and took the certificate and procured an assignment thereof by A to his son—A having no consultation at any time with the minor and receiving nothing for his services. The sale was held to be invalid.

In *Galbraith v. Drought*, 24 Kan. 591, it was held that where an auctioneer is employed by the sheriff to cry the property, and, although the sheriff be present, exercises full discretion in regard to the sale, he becomes *pro hac vice*, the deputy of the sheriff; and where, at such a sale, property be struck off by the auctioneer to himself, the sale is void under *Kansas* Code Civ. Pro., § 462; and this, although such purchase

was made as an accommodation to the former owners, and with the understanding that they might have the property upon repayment of the amount of the bid.

Under the *Virginia* Act of 1813, where the deputy was the purchaser, the title was adjudged void in the hands of a *bona fide* purchaser claiming under the deputy. *Taylor v. Stringer*, 1 Gratt. (Va.) 158.

But in *Arkansas*, it is held that a deputy who has no control of the collection of taxes, may purchase at the sale as any other person. *Hare v. Carnall*, 39 Ark. 196.

And in *Mississippi*, the fact that the deputy sheriff becomes a purchaser at a sale made by his principal, does not render the sale *ipso facto* void, when it is not shown that the deputy had any part in making the sale, and there is no suggestion of any unfair practice or bad faith on his part in reference thereto. *O'Reilly v. Holt*, 4 Woods (U. S.) 645.

**1. Officer Purchasing as Agent.**—*Everett v. Beebe*, 37 Iowa 452; *Corbin v. Beebe*, 36 Iowa 336; *Payson v. Hall*, 30 Me. 319. In this latter case it was said: "A collector of taxes cannot, consistently with a faithful and legal discharge of his official duties, become the agent of a purchaser whose interest it is to acquire the whole estate, or as much of it as possible, by payment of the taxes and costs, and whose agent, to be faithful, must have the same interest, while a faithful discharge of official duty would require him to sell as little as possible of the estate to obtain such payment. His official duties and those of his private agency would come into direct conflict. The performance of one duty is inconsistent with the faithful performance of the other."

**2.** *Fox v. Cash*, 11 Pa. St. 207; *Lorain v. Smith*, 37 Iowa 67; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235; 90 Am. Dec. 575.

In *O'Reilly v. Holt*, 4 Woods (U. S.) 645, it was held that the fact that the purchaser was clerk of the court, in whose office the deed must be filed on the day of sale, did not render the sale absolutely void.

And in *Kentucky*, it is held that if the deputy register of the land office becomes the purchaser, it is incumbent

**4. State, County, and Municipality.**—It is generally provided by statute that if the lands cannot be sold for want of bidders, or if the highest bid is insufficient to pay the taxes and costs, it shall be bid in for the state, county, or municipality, as the case may be.<sup>1</sup>

upon him to show that his purchase was fair in every particular, and founded upon a full and adequate consideration. *Morton v. Waring*, 18 B. Mon. (Ky.) 72.

In *Arkansas*, the county clerk being required by law to advertise the land for sale, to attend and make a record of the sale, and to issue certificates of purchase and redemption, and a deed to the purchaser if not redeemed, is himself forbidden from becoming a purchaser. *Cole v. Moore*, 34 Ark. 582.

**1. State, County, or City as Purchaser.**—In *Nebraska*, county commissioners may purchase at all tax sales, public or private, for the use and benefit of the county, lands which are offered and remain unsold for want of bidders. *State v. Cain*, 18 Neb. 635; *Otoe County v. Mathews*, 18 Neb. 466; *Otoe County v. Brown*, 16 Neb. 394; *Shelley v. Towle*, 16 Neb. 194. And it is unnecessary for the county to pay to the treasurer the amount of the delinquent taxes; the taxes being due the county in its own or a representative capacity—that is, as trustee of the various corporations, such as the towns, villages, and school districts within the county. *Lancaster County v. Trimble*, 34 Neb. 752.

Under the *Kansas* statute, a county may not enter into competition with individuals as a voluntary bidder; it can only become the involuntary purchaser of the lands when they cannot be otherwise sold for the amount due. And a deed reciting a sale to the county as a competitive bidder is void upon its face. *Babbitt v. Johnson*, 15 Kan. 252; *Maggill v. Martin*, 14 Kan. 67; *Guittard Tp. v. Marshall County*, 4 Kan. 332; *Norton v. Friend*, 13 Kan. 532; *Larkin v. Wilson*, 28 Kan. 513; *Mack v. Price*, 35 Kan. 134. But it seems that the party entitled may, if the sale was in fact valid, and that fact is apparent from the record of the sale and the certificate, compel by *mandamus* the issue of a valid deed. *Bryson v. Spaulding*, 20 Kan. 427.

By section 83 of the charter of the city of Elizabeth, if the lands are not bid for, they shall be struck off to the city for a term of fifty years; this term is not enlarged by section 22 of the *New Jersey* Act of 1873, p. 778; that

applies to purchasers other than the municipality. And a sale to the state for a term of nine hundred years, is unauthorized. *Morgan v. Elizabeth*, 44 N. J. L. 571; *Schatt v. Grosch*, 31 N. J. Eq. 199; *Ludington v. Elizabeth*, 34 N. J. Eq. 357. See also *In re* Report of Com'rs, etc., 49 N. J. L. 488.

And under the *Wisconsin* Laws of 1859, ch. 22, § 9, a county is only authorized to purchase after the lands have been twice offered at public sale and remain unsold. And it is not then authorized to purchase the same jointly with an individual. And a deed, from which it appears that the land was sold to the county and another, is void upon its face. *Sprague v. Coenen*, 30 Wis. 209.

In *North Carolina*, under the Act of 1798, if no one bids off a smaller quantity than the whole for the sum due, such bid shall be considered as a bid by the governor for the use of the state. But the state's title is not complete until all the requisites pointed out by the act are complied with, such as execution of deed, registration of same, etc. *Doe v. Bryan*, 2 Hawks (N. Car.) 17.

And where the land was stricken off to the governor for the use of the state, and the officer, instead of executing his deed at the county court succeeding the sale, as the act requires, did it at a subsequent term, the deed was held to be inoperative. *Den v. Rose*, 4 Dev. (N. Car.) 549.

Under the act, the officer has no authority to use the name of the governor as a bidder for the state, except at a sale made prior to the period at which he settled, or ought to have settled, for the public revenue. *Den v. Wilbourn*, 5 Ired. (N. Car.) 344; *Den v. Rose*, 4 Dev. (N. Car.) 554.

In *Pennsylvania*, a treasurer's sale of unseated lands to the commissioners, for the county, for more than the taxes and costs, takes away the title of the owner—the county might refuse to ratify the purchase and charge the commissioners individually with the taxes and costs; but it is a matter entirely between the county and her commissioners. The former owner of the land has nothing to do with it. *Russel v. Reed*, 27 Pa. St. 166.

The commissioners selling lands for taxes, under the act of Congress of Feb. 6th, 1863, are bound to bid them off for the *United States*, if no one will bid more than two-thirds of their assessed value, unless the owner shall request that they be struck off to some other person at a less price; and the commissioners are without discretion in the matter. *Turner v. Smith*, 18 Gratt. (Va.) 830.

In *Alabama*, where lands are sold, whether under the revenue law of 1868, or that of 1874, or that contained in the Code of 1876, §§ 450-460, and the state purchases at the sale, the sum bid must include the county tax, with interest thereon and the penalties incurred, but the state is not liable to the county for this part of the amount bid. *State v. Brewer*, 64 Ala. 287.

In *Tennessee*, this matter of priority is regulated by statute, state, city, and county taxes being liens on the lands from the time they become due and payable, and the proceeds of sale are distributed in accordance with the priority of such liens. *Nashville v. Lee*, 12 Lea (Tenn.) 452.

In *Pennsylvania*, where the county commissioners, in pursuance of Act of March 13th, 1815, § 5, Pamph. Laws 177, bid in lands sold at a treasurer's sale, and subsequently, said lands being unredeemed, the commissioners sell the same in pursuance of the Act of March 29th, 1824, Pamph. Laws 167, the county must, where the proceeds of sale are sufficient, pay to the township, in which such lands are situate, the road tax due thereon at the time of the treasurer's sale, and which has since accrued. *Rush Tp. v. Schuylkill County*, 100 Pa. St. 356.

**Forfeiture to State for Want of Bidders.**—In some of the states, the statutes provide that if the lands cannot be sold for want of bidders, they shall be declared forfeited to the state. In such cases there can be no forfeiture, unless the lands are exposed for sale according to law, and there is a failure to sell for want of bidders. *Biggins v. People*, 106 Ill. 270; *Scott v. People*, 2 Ill. App. 642; *State v. Thompson*, 18 S. Car. 538; *Owens v. Owens*, 25 S. Car. 155; *Magruder v. Esmay*, 35 Ohio St. 221. See also *Gilfillan v. Chatterton*, 38 Minn. 335; *Mulvey v. Tozer*, 40 Minn. 384; *Woodward v. Sloan*, 27 Ohio St. 592. See TAXATION—*Forfeiture for Non-compliance with Tax Laws*.

**Evidence of Failure to Sell.**—In *Ohio*,

the books of the county auditor are held to be admissible in evidence to prove that the land was offered for sale and not sold for want of bidders, although in the entries of said books there may be some irregularities. *Thevenin v. Slocum*, 16 Ohio 519.

**State Purchase—Louisiana.**—There is no law in *Louisiana* preventing the state from purchasing at tax sales. The object of article 210 of the constitution of that state was to prevent the state from acquiring property for taxes by forfeiture, and not to prohibit the state from purchasing. *Martinez v. State Tax Collectors*, 42 La. Ann. 677; *Breaux v. Negrotto*, 43 La. Ann. 426.

**Whether Deed is Necessary to Convey Title.**—In *Arkansas*, at a sale under the "Overdue Tax Act," of March, 1881, where lands are struck off to the state for lack of bidders, no deed is necessary to convey title. *Neal v. Andrews*, 53 Ark. 445; *Doyle v. Martin*, 55 Ark. 37.

But in *Mississippi*, merely striking the land off to the state will not vest title. The list certified by the collector to be correct, provided by Code of 1871, § 1698, as an economical substitute for the numerous deeds formerly required, is essential. *Mayson v. Banks*, 59 Miss. 447; *Ferrill v. Dickerson*, 63 Miss. 210.

Where, by a statute in *Wisconsin*, it was provided that, "whenever any lot or tract of land shall be, or shall have been, for five consecutive years sold for taxes and bid in for the county, and remain unredeemed, the title thereof shall absolutely vest in the county where such lot or tract of land is situate," it was held that the original owner was divested of his title, and the title was vested in the county without any deed, and by the mere operation of the act, and that such a method of transfer to the county is constitutional. *Baldwin v. Ely*, 66 Wis. 171; *Lombard v. White*, 76 Wis. 445.

In *Colorado*, a deed is authorized to be executed to the county, and the form prescribed for cash purchasers should be substantially pursued as far as applicable to the county as a bidder, and varied only so far as may be necessary to show the truth of the transaction; as, for instance, it must show that it was struck off to the county for lack of bidders, etc. *Dyke v. Whyte*, 17 Colo. 296.

In *Kansas*, no deed can be issued to the county; the land being held by it for the purpose of being assigned to the

But a city or other municipal corporation, in the absence of an enabling statute, has no authority to purchase; the general power to buy and hold real estate, will not authorize it.<sup>1</sup>

**V. NATURE OF TITLE ACQUIRED—1. Before Execution and Delivery of Deed**—(See also TAXATION—*Tax Sales*, vol. 25).—Until the expiration of the time for redemption, and the execution and delivery of the deed, the title to the lands sold remains with the tax debtor; the purchaser acquiring simply a statutory lien for the amount of his bid, interest, costs, and penalties.<sup>2</sup> He does not acquire the right of possession,<sup>3</sup> and, consequently, is not entitled to the rents and profits.<sup>4</sup> And his certificate of sale will

first party willing to take it. *State v. Magill*, 4 Kan. 415; *Guittard Tp. v. Marshall County*, 4 Kan. 389.

1. *Logansport v. Humphrey*, 84 Ind. 467.

Under the *Iowa* Code of 1851, the counties of the state were not authorized to purchase. *Bruck v. Broesigks*, 18 Iowa 393. See also *Miller v. Gregg*, 26 Iowa 75.

The city of Milwaukee was not authorized in 1852 to purchase, and a sale to it was void. *Knox v. Peterson*, 21 Wis. 247.

Section 159 of the *Illinois* Act for the incorporation of cities and villages, confers no power to become purchasers, on cities and villages organized under special charters. *Champaign v. Harmon*, 98 Ill. 491.

The city of Jefferson has power under her charter, *Missouri* Acts 1872, p. 390, § 1, to buy at execution sales for taxes due the city. *Jefferson v. Curry*, 71 Mo. 85.

The *Illinois* Act of 1879, authorizing suit to be brought for delinquent taxes in the name of the people, or in the name of the proper county, is broad enough to authorize the county to purchase under the judgment. *Douthett v. Kettle*, 104 Ill. 357. Compare with the foregoing *Keller v. Wilson*, 90 Ky. 350; *Parish v. Eager*, 15 Wis. 590.

2. *Stephens v. Holmes*, 26 Ark. 48; *Spratt v. Price*, 18 Fla. 290; *Douglass v. Dickson*, 31 Kan. 310; *People v. Hammond*, 1 Dougl. (Mich.) 276; *Brackett v. Gilmore*, 15 Minn. 245; *Tripp v. Ide*, 3 R. I. 51; *Donohoe v. Veal*, 19 Mo. 331; *Shalemiller v. McCarty*, 55 Pa. St. 186; *Lightner v. Mooney*, 10 Watts (Pa.) 407.

In *Watkins v. Eaton*, 30 Me. 535; 50 Am. Dec. 637, it is said that the purchaser's title is in principle a mortgage, although it does not exist in a form to

be included by the statutory provisions respecting such instruments.

Under the *Iowa* Code of 1851, § 503, the legal title passes to the purchaser, but it is only to support the statutory lien. *Dennison v. Keokuk*, 45 Iowa 270; *Tredway v. McDonald*, 51 Iowa 663; *Byington v. Buckwalter*, 7 Iowa 512; 74 Am. Dec. 279.

3. *Cooley on Taxation* 368, § 9; *Hibbard v. Brown*, 51 Ala. 469; *People v. Hammond*, 1 Dougl. (Mich.) 276; *Shalemiller v. McCarty*, 55 Pa. St. 186; *Wing v. Hall*, 47 Vt. 182; *Crosthwait v. Byington*, 11 Iowa 532; *Tredway v. McDonald*, 51 Iowa 663; *Dennison v. Keokuk*, 45 Iowa 270; *Lacy v. Johnson*, 58 Wis. 414.

In *Minnesota*, if the holder of the certificate enters and makes improvements before the expiration of the time for redemption, he does not hold under color of title, and, consequently, will not be allowed therefor. *McLellan v. Omodt*, 37 Minn. 157.

Under the *Missouri* Rev. Act of 1857, the purchaser is entitled to possession for a limited time, and after the expiration of the time for redemption, may procure a deed, but he cannot defend his possession simply upon his certificate, against a party showing a legal title. *Dalton v. Fenn*, 40 Mo. 109.

4. *Mayo v. Woods*, 31 Cal. 269; *People v. Hammond*, 1 Dougl. (Mich.) 276; *Woodland Oil Co. v. Lawrence*, 1 Pennyp. (Pa.) 480. And under 1 *Indiana* R. S., 1876, p. 120, the holder of the certificate is entitled to the possession, and the rents and profits. *Ethel v. Batchelder*, 90 Ind. 520.

But the certificate does not confer this right unless the sale was regular and valid. When one takes possession under an invalid certificate, he is accountable for the rents and profits, and after receiving more than enough

not protect him in the commission of waste.<sup>1</sup> But he has been permitted to maintain an action to enjoin the removal of buildings, and the commission of other such acts calculated to depreciate the value of the property.<sup>2</sup>

**2. After Execution and Delivery of Deed.**—The local statutes determine what estate is acquired by virtue of the tax deed, after the expiration of the period of redemption. In general, the grantee is vested with an estate in fee simple, all prior interests, liens and incumbrances being extinguished, the theory being that the land itself is taxed and sold, and not the owner's title.<sup>3</sup> But in some of the states only such title and estate pass as were had

to repay the amount of his bid, interest, and costs, will not be considered as holding a certificate which, constituting in the beginning a mere lien, can grow by lapse of time, under a statute of limitations, into a title at law, or into a defense against such a title. *Davis v. Chapman*, 24 Fed. Rep. 674; *Barton v. McWhinney*, 85 Ind. 481.

1. *Douglas v. Dickson*, 31 Kan. 310, *criticising* *Stebbins v. Guthrie*, 4 Kan. 353; *Dalton v. Fenn*, 40 Mo. 109; *Woodland Oil Co. v. Shoup*, 107 Pa. St. 293; *Shalemiller v. McCarty*, 55 Pa. St. 186, holding that the owner of unseated lands may recover of the purchaser at a tax sale thereof, for timber, cut and removed therefrom before redemption of the premises. But *compare* *Wright v. Wing*, 18 Wis. 45.

2. *Phillips v. Meyers*, 55 Iowa 265. The *Pennsylvania* Act of June 13th, 1883 (T. L. 89), gives the purchaser of unseated lands the writ of estrepement against the owner or other person acting under him, to stay waste prior to redemption. *Woodland Oil Co. v. Shoup*, 107 Pa. St. 293.

3. *Robbins v. Barron*, 32 Mich. 36; *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Peckham v. Millikan*, 99 Ind. 352; *Parker v. Baxter*, 2 Gray (Mass.) 185; *Billings v. Stark*, 15 Fla. 297; *Doe v. Deavors*, 8 Ga. 479; *Maumus v. Beynet*, 31 La. Ann. 462; *Marion v. New Orleans*, 30 La. Ann. 293; *In re Douglas*, 41 La. Ann. 765; *Dunlap v. Gallatin County*, 15 Ill. 7; *Langley v. Chapin*, 134 Mass. 82; *Fager v. Campbell*, 5 Watts (Pa.) 287; *Parker's Appeal*, 8 W. & S. (Pa.) 449; *Kelso v. Kelly*, 14 Pa. St. 204; *Board of Regents v. Linscott*, 30 Kan. 240; *McFadden v. Goff*, 32 Kan. 418; *Becker v. Howard*, 66 N. Y. 5; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Thorington v. Montgomery*, 88 Ala. 548; *Jones v. Devore*,

8 Ohio St. 430; *Smith v. Lewis*, 20 Wis. 350; *Sayles v. Davis*, 22 Wis. 225; *Jarvis v. Peck*, 19 Wis. 74; *Butler v. Baily*, 2 Bay (S. Car.) 244; *Gitchell v. Kreidler*, 84 Mo. 472; *Allen v. McCabe*, 93 Mo. 138; *Myers v. Bassitt*, 84 Mo. 479; *Williams v. Hudson*, 93 Mo. 524; *Vincent v. Eaves*, 1 Metc. (Ky.) 247; *Verdery v. Dotterer*, 69 Ga. 194; *Greene v. Williams*, 58 Miss. 752; *Eastman v. Thayer*, 60 N. H. 408; *Smith v. Messer*, 17 N. H. 420; *People v. Hammond*, 1 Dougl. (Mich.) 276; *Sinclair v. Learned*, 51 Mich. 344; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166; *Bigler v. Karns*, 4 W. & S. (Pa.) 137; *Newby v. Brownlee*, 23 Fed. Rep. 322; *Pike v. Wassell*, 94 U. S. 714; *Brown v. Austin*, 41 Vt. 262; *Gwynne v. Neiswanger*, 18 Ohio 408; *Wines v. Woods*, 109 Ind. 291; *Scott v. Mills*, 49 Ark. 226; *Biscoe v. Coulter*, 18 Ark. 423; *Steeple v. Downing*, 60 Ind. 478; *Keepfer v. Force*, 86 Ind. 81; *Sharpleigh v. Surdam*, 1 Flip. (U. S.) 472; *Abbott v. Lindenbower*, 42 Mo. 162; *Tallman v. White*, 2 N. Y. 66; *Jackson v. Morse*, 18 Johns. (N. Y.) 441; 9 Am. Dec. 225; *Atkins v. Hinman*, 7 Ill. 437; *Clark v. Stirckland*, 2 Curt. (U. S.) 439; *M'Coy v. Michew*, 7 W. & S. (Pa.) 386; *Doe v. Hearick*, 14 Ind. 242.

**Title Acquired from the State.**—In *Alabama*, where the state is the purchaser, but acquires no title by reason of irregularities in the sale, a certificate purporting to transfer "all the right and title of the state secured by said purchase," confers no title. *Fleming v. McGee*, 81 Ala. 409. See also *Boykin v. Smith*, 65 Ala. 294.

In *Mississippi*, a plaintiff seeking to recover lands upon a tax title derived from the state, must, in order to make out his title, besides producing his deed from the state, show by the list of lands sold to the state, or by a deed from the

by the delinquent at the commencement of the year for which the assessment was made.<sup>1</sup> And when the statute deals with particular interests in the land, rather than the land itself, and assesses such interests separately, only the interest assessed and sold will pass, and previous liens will, as a rule, be left intact.<sup>2</sup>

When the right of redemption exists after the execution of the deed, as in some states in case of infants, married women, etc., the estate of the grantee is conditional, liable to be defeated by a redemption in conformity with law.<sup>3</sup>

Where different tax deeds are executed to different persons for the taxes of different years, the deed last executed for the taxes of the latest year, is paramount to any previously executed.<sup>4</sup> It seems that the tax deed, when given, will not relate back to the time of sale.<sup>5</sup>

tax officer, according to the statute applicable to sales for taxes, how the state acquired her title. Failing to do this, his deed from the state may be excluded from the evidence upon the motion of the defendant. *Vaughn v. Swayzie*, 56 Miss. 704; *Clymer v. Cameron*, 55 Miss. 593; *Weathersby v. Thoma*, 57 Miss. 286; *French v. Ladd*, 57 Miss. 678; *Ferrill v. Dickerson*, 63 Miss. 210.

1. *Dyer v. Branch Bank*, 14 Ala. 622; *Summers v. Kanawha County*, 26 W. Va. 159; *McDonnald v. Hannah*, 51 Fed. Rep. 73; *Ex p. Macay*, 84 N. Car. 63 (here under the statute such title passes as was had at time of sale); *Gates v. Lawson*, 32 Gratt. (Va.) 12; *Hopper v. Malleson*, 16 N. J. Eq. 382; *Morrow v. Dows*, 28 N. J. Eq. 459 (holding that the estate acquired by a mortgagee prior to the assessment is not affected); *Nashville v. Cowan*, 10 Lea (Tenn.) 215; *Wheeler v. Yenda*, 11 Tex. 562; *Hulick v. Scovil*, 9 Ill. 159; *Dunn v. Winston*, 31 Miss. 135.

Where the owner of land has previously given a deed of trust to secure the payment of money thereon, the purchaser at the tax sale acquires only the equity of redemption existing in the grantor; and the land is first liable for the trust lien. *Smith v. Lewis*, 2 W. Va. 39.

**Lands Mortgaged to School Fund—Iowa.**—Under section 811 of the *Iowa* Revision, where lands are mortgaged to the school fund, the interest of the person who holds the title is alone sold for taxes, and the interest of the state is not affected, the purchaser acquiring only the right to redeem from the mortgage. This provision applied to all sales made after it took effect, whether the taxes became delinquent before or

after that event. *State v. Shaw*, 28 Iowa 67; *Jasper County v. Rogers*, 17 Iowa 254; *Helphrey v. Ross*, 19 Iowa 40; *Crum v. Cotting*, 22 Iowa 423.

2. *Cooley on Taxation*, p. 446; *Irwin v. Bank of U. S.*, 1 Pa. St. 349; *Pittsburgh's Appeal*, 40 Pa. St. 455; *Alleghany City's Appeal*, 41 Pa. St. 60; *Cadmus v. Jackson*, 52 Pa. St. 295.

3. *Wright v. Wing*, 18 Wis. 45; *Douglas v. Dickson*, 31 Kan. 310. See *TAXATION*, subd., *Redemption*.

4. *Board of Regents v. Linscott*, 30 Kan. 240; *Case v. Frazier*, 30 Kan. 343; *McFadden v. Goff*, 32 Kan. 418; *Campbell v. Stagg*, 37 Kan. 419; *Belz v. Bird*, 31 Kan. 141; *Harris v. Curran*, 32 Kan. 580; *Johns v. Griffin*, 76 Iowa 419; *Bowman v. Thompson*, 36 Iowa 505; *Chandler v. Dunn*, 50 Cal. 15; *John v. Rush*, 14 Pa. St. 339; *Townsend v. Prowattain*, 81\* Pa. St. 139; *Montgomery v. Meredith*, 17 Pa. St. 42; *McCoy v. Michew*, 7 W. & S. (Pa.) 386; *Knox v. Lidgen*, 23 Wis. 292; *Wadleigh v. Marathon County Bank*, 58 Wis. 546. But where several deeds for the same property are made to the same grantee, and the eldest deed is good to vest title in him, the subsequent deeds are merely evidence of the payment of taxes. *Paul v. Fries*, 18 Fla. 573.

5. *Donohoe v. Veal*, 19 Mo. 331; *Woodland Oil Co. v. Shoup*, 107 Pa. St. 293. See also *Paul v. Fries*, 18 Fla. 573; *Eaton v. Lyman*, 28 Wis. 324; *Pitkin v. Yaw*, 13 Ill. 251. Compare *Ferguson v. Miles*, 8 Ill. 358.

In *Connecticut Mut. L. Ins. Co. v. Butte*, 45 Mich. 113, it is said that the title will relate back to the sale for all purposes of substantial justice, but not otherwise; and that it may not be used to divest rights acquired since the pe-

**VI. RIGHTS OF PURCHASERS OF DEFECTIVE TITLES—1. At Common Law.**—At common law, the doctrine of *caveat emptor* applies in its fullest extent to tax sales. If the tax title proves to be worthless, the purchaser is without remedy, either against the tax officer, the owner, the state, or the municipality. His payment is regarded as a voluntary one, and he assumes all risks; for, as in judicial sales, there is in tax sales, no warranty.<sup>1</sup>

**2. Under Statutes—*a*. RETURN OF PURCHASE-MONEY.**—In most of the states statutes have been enacted, affording purchasers relief when their titles prove worthless. Usually they are authorized to recover of the owner the amount of the purchase-money, and all subsequent taxes, together with a specified rate of interest on the same; the whole being made a lien upon the land.<sup>2</sup> If,

riod to which it would relate. See also *Hemmingway v. Drew*, 47 Mich. 554. And in *Hess v. Griggs*, 43 Mich. 400, it was held that the deed cannot, by relation, make parties trespassers by reason of acts done upon the land before it was given.

1. *Barber v. Evans*, 27 Minn. 92; *Burdick v. Bingham*, 38 Minn. 182; *Packard v. New Limerick*, 34 Me. 266; *Lynde v. Melrose*, 10 Allen (Mass.) 49; *St. Louis, etc., R. Co. v. Alexander*, 41 Ark. 190; *Harper v. Rowe*, 53 Cal. 233; *Loomis v. Los Angeles*, 59 Cal. 456; *Worley v. Cicero*, 110 Ind. 208; *Logansport v. Humphrey*, 84 Ind. 467; *State v. Casteel*, 110 Ind. 174; *Churchman v. Indianapolis*, 110 Ind. 259; *Indianapolis v. Langdale*, 29 Ind. 486; *McWhinney v. Indianapolis*, 98 Ind. 182; *Coe v. Farwell*, 24 Kan. 566; *Lyon County v. Goddard*, 22 Kan. 389; *McCormick v. Edwards*, 69 Tex. 106; *Ross v. Mabry*, 1 Lea (Tenn.) 226; *Larimer County v. National State Bank*, 11 Colo. 564; *Treat v. Orono*, 26 Me. 217; *Emerson v. Washington County*, 9 Me. 88; *Harth v. Gibbes*, 3 Rich. (S. Car.) 316; *Hamilton v. Valiant*, 30 Md. 139; *Rice v. Auditor Gen'l*, 30 Mich. 12; *Simpson v. Edmiston*, 23 W. Va. 675; *Jenks v. Wright*, 61 Pa. St. 410; *Bredin v. Road Com'rs*, 87 Pa. St. 441; *Coffin v. Brooklyn*, 116 N. Y. 159. *Compare Norton v. Rock County*, 13 Wis. 611; *Whiton v. Rock County*, 16 Wis. 44.

In *Phillips v. Hudson*, 31 N. J. L. 143, where the ordinance under which the lands were sold was void and the title failed, the purchaser was nevertheless allowed to recover the purchase-money from the town in an action of *assumpsit*, *Beaseley, C. J.*, dissenting. But in *Tooker v. Roe*, 44 N. J. L. 591,

the court, by Scudder, J., says in reference to this case: "In my opinion, the authority of this case is shaken by the dissenting opinion, and by the subsequent case of *Hampton v. Nicholson*, 23 N. J. Eq. 423, in which the chancellor says, 'Purchasers frequently accept deeds by which no title is conveyed, under a misapprehension of the law. When there is no mistake or misrepresentations as to the facts and no fraud and no warranty of title, they have no redress at law or in equity.'" See also *State v. Picataway Tp.*, 43 N. J. L. 353.

By the terms of the *Pennsylvania Act of April 21st*, 1856, the rule *caveat emptor* does not apply to purchasers at treasurer's sales, where the lands sold are not in the county, or when they are sold upon a double assessment. *Bredin v. Road Com'rs*, 87 Pa. St. 441.

2. *Springer v. Bartle*, 46 Iowa 688; *Everett v. Beebe*, 37 Iowa 452; *Besore v. Dosh*, 43 Iowa 211; *Sexton v. Henderson*, 45 Iowa 160; *Claussen v. Rayburn*, 14 Iowa 136; *Light v. West*, 42 Iowa 138; *Guise v. Early*, 72 Iowa 283; *Orr v. Travacier*, 21 Iowa 68; *Buckley v. Early*, 72 Iowa 289; *Bradley v. Cole*, 67 Iowa 650; *Thompson v. Savage*, 47 Iowa 522; *Buck v. Holt*, 74 Iowa 294; *Hunter v. Early*, 75 Iowa 769; *Goodnow v. Wells*, 67 Iowa 654; *Goodnow v. Litchfield*, 67 Iowa 691; *Goodnow v. Burrows*, 74 Iowa 758; *Hoffman v. Groll*, 35 Kan. 652; *Jackson v. Challis*, 41 Kan. 247; *Stetson v. Freeman*, 36 Kan. 608; *Fairbanks v. Williams*, 24 Kan. 16; *Smith v. Smith*, 15 Kan. 292; *Shaw v. Kirkwood*, 24 Kan. 476; *Corbin v. Young*, 24 Kan. 198; *Auld v. McAllaster*, 43 Kan. 163; *Geer v. Thrasher*, 37 Kan. 657; *Arm v. Hopkin*, 25 Kan. 707; *White v. Shell*, 84 Mo. 569; *Wisconsin Cent. R. Co. v. Com-*

stock, 71 Wis. 88; *Hosbrook v. Schooley*, 74 Ind. 51; *Duke v. Brown*, 65 Ind. 25; *Harlan v. Jones*, 104 Ind. 167; *Locke v. Catlett*, 96 Ind. 291; *Crecelius v. Mann*, 84 Ind. 147; *Sloan v. Sewell*, 81 Ind. 180; *Ludlow v. Ludlow*, 109 Ind. 199; *Culbertson v. Munson*, 104 Ind. 451; *Parker v. Goddard*, 81 Ind. 294; *Scott v. Millikan*, 104 Ind. 75; *McKeen v. Haskell*, 108 Ind. 97; *Peterson v. Kittredge*, 65 Miss. 33; *Cogburn v. Hunt*, 56 Miss. 718, *distinguishing* *Yandell v. Pugh*, 53 Miss. 303; *Dillon v. Merriam*, 22 Neb. 151; *Pettit v. Black*, 8 Neb. 52; *Wilhelm v. Russell*, 8 Neb. 120; *Lynam v. Anderson*, 9 Neb. 368; *Miller v. Hurford*, 11 Neb. 377; *Reed v. Merriam*, 15 Neb. 323; *Merriam v. Hemple*, 17 Neb. 345; *Wise v. Newatney*, 26 Neb. 88; *Wright v. Graham*, 42 Ark. 140; *Coats v. Hill*, 41 Ark. 149; *Hare v. Carnall*, 39 Ark. 196; *Merriam v. Rauhen*, 23 Neb. 217; *Gage v. Depuy*, 134 Ill. 132; *Gage v. Waterman*, 121 Ill. 115; *Smith v. Prall*, 133 Ill. 308; *Smith v. Gage*, 11 Biss. (U. S.) 217; *Nester v. Busch*, 64 Mich. 657.

In *Indiana*, the purchaser will have the benefit of the state's lien in all cases, except (1) where the land is not subject to taxation; (2) where the taxes have been paid before sale; and (3) where the description is so imperfect as to fail to identify the land intended to be sold. *Morrison v. Jacoby*, 114 Ind. 84.

But one who claims the lien must show that the lands were sold for taxes and were purchased by him at such sale; mere voluntary payment will not entitle him to the lien. *Sohn v. Wood*, 75 Ind. 17.

In *Millikan v. Ham*, 104 Ind. 498, it is held that a purchaser at a sale for delinquent state and county taxes, who afterwards pays the city tax on such property, may have the same allowed and decree a lien thereon, as part of the original claim for the purchase price.

The fact that the owner of the land sold is a railroad corporation, does not deprive the purchaser, on failure of his title, of his right to personal judgment for the taxes, penalty, interest and costs, against the railroad company as such defaulting owner. *St. Louis, etc., R. Co. v. Alexander*, 49 Ark. 190.

A valid tax title outstanding in a third party for subsequent taxes, is a good defense to the right of recovery, under the *Michigan* Laws of 1865, p. 575, giving to the holder of a tax deed, which is proved to be invalid, a lien upon the land and a judgment against

the owner for the amount of the purchase-money and taxes paid by him with interest. This statute is applicable only to those cases where it will affect no one but the person owning the land when the taxes were assessed, and those claiming through him. *Robbins v. Barron*, 32 Mich. 36. See also *La Rue v. King*, 74 Iowa 288; *Hunt v. Curry*, 37 Ark. 100.

Under *Illinois* Sess. Laws 1885, p. 235, providing "that any judgment or decree of court setting aside any tax deed procured under this act, shall provide that the claimant shall pay to the party holding such tax deed all taxes and legal costs, together with all penalties, as provided by law, as it shall appear the holder of such deed or his assigns shall have properly paid, or be entitled to in procuring such deed," a decree setting aside the deed on the ground of irregularity in the sale, upon payment of the amount of the purchase-money and all subsequent taxes, with interest thereon, is proper without requiring payment of the amount that would have been required to redeem the property with interest thereon. *Gage v. Pirtle*, 124 Ill. 502.

But in *Missouri*, the owner must pay, in addition to the purchase-money, the amount which would have been necessary to effect redemption, and this latter item must be included in the judgment giving a lien on the land. *Allen v. Buckley*, 94 Mo. 158.

In *Johnson v. Stewart*, 29 Ohio St. 498, the purchaser was allowed to recover from the owner the amount of taxes paid, with interest, but without penalty.

A purchaser at a sale for the non-payment of assessments, under the *Two-Mile Improvement Law of Ohio*, after the same has proved invalid, may recover from the owner the amount of taxes, interests, and penalties due at the time of sale, interests subsequently accruing, and all legal taxes by him afterwards paid under authority of section 32 of the act relating to county auditors (S. & C. 104), and section 106 of the Tax Law of 1859 (S. & C. 1473). *Chapman v. Solars*, 38 Ohio St. 378.

In *Mississippi*, where lands held by the state for taxes legally due thereon, are purchased from the auditor of public accounts within the period allowed the original owner for redemption, and the owner applied in due time to the auditor to redeem, the purchaser's right to reimbursement must be limited to the amount which the owner would



however, the tax is illegal, creating no obligation on the part of the owner to pay it, the purchaser does not acquire a lien.<sup>1</sup> It is also provided in many states, that when the title fails by reason of the fact that the lands were not subject to taxation, or that the taxes had been paid before sale, the state, county or municipality, as the case may be, shall refund to the purchaser the amount of the purchase-money with interest.<sup>2</sup> And a statute giving the

have been required to pay in redeeming the land, with interest thereon at six per cent. *McLaran v. Moore*, 60 Miss. 376.

In *Arkansas*, it is held that where a tax sale is adjudged invalid "for irregularity in the same," it will not be presumed, on appeal from a judgment in favor of the purchaser against the owner of the land sold for penalty, costs, etc., that the irregularity was at such a time, or of such a character, as to invalidate the penalty and costs. *St. Louis, etc., R. Co. v. Alexander*, 49 Ark. 190.

The fact that some of the taxes were paid by strangers, does not affect the right of the holder of the tax title to recover them, when they were paid in his behalf. *Guisse v. Early*, 72 Iowa 283.

In *West Virginia*, there is no statute transferring the lien of the state for the subsequent taxes paid to the holder of an invalid title, and he is not entitled to reimbursement for same from the former owner. *Simpson v. Edmiston*, 23 W. Va. 675.

1. *Mayer v. Peebles*, 58 Miss. 628; *Wilmerton v. Phillips*, 103 Ill. 78.

In *Minnesota*, the purchaser has no lien for his purchase-money when the sale is invalid by reason of an illegal assessment or levy. *Barber v. Evans*, 27 Minn. 92. But in *Mississippi*, on the failure of the title of lands sold to the state for taxes in 1875, and bought from the state by an individual in 1885, the latter has a lien for the amount of the purchase-money, taxes, with interest and damages, if there was an effort by the proper officers to subject the land to sale for taxes due and unpaid; and no valid levy, assessment, or sale is necessary to support such lien. And the repeal of section 1718, by the act of 1877, operates only on sales thereafter to be made, and does not affect liens existing and vested before such repeal. *Capital State Bank v. Lewis*, 64 Miss. 727.

And under section 536 of the *Mississippi* Code of 1880, giving the purchaser a lien "if the taxes for which such land was sold were due, although said sale

was illegal on some other ground," he may not be denied the benefit of the provision because the sale was based upon an invalid assessment, on the theory that taxes could not "be due" on such assessment. *Kaiser v. Harris*, 63 Miss. 590.

Under art. 6, § 64, of the *Kansas* City charter, providing that the purchaser may recover when his tax deed is executed "substantially as provided for in the preceding section," one claiming under a deed which fails to recite that the sale was "publicly" held, is not entitled. *Bingham v. Delaugherty* (Mo. 1890), 13 S. W. Rep. 208.

In *Iowa*, where the sale and deed transfer no interest because of an insufficient description of the premises in the proceedings, the purchaser may not recover for subsequently paid taxes. *Roberts v. Deeds*, 57 Iowa 320; *Hintrager v. Nightingale*, 36 Fed. Rep. 847; *Barke v. Early*, 72 Iowa 237.

2. In *Michigan*, this right of the purchaser arises only where either, first, the land was not subject to taxation at all; or second, the taxes had been actually paid in due time; or third, a certificate had been given in due time by the proper officer, that no taxes were charged on the land; and does not cover a case where the land was subject to taxation, and taxes have been actually assessed, even though illegally, and no attempt has been made to ascertain and pay them. *People v. Auditor Gen'l*, 30 Mich. 12.

Under the *Nebraska* statute, providing that "when by mistake or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of the act, etc., the county is to hold the purchaser harmless by refunding him the amount of principal, interest, and cost," the county is liable where the lands sold were not taxable, and upon which no tax was due. *Roberts v. Adams County*, 18 Neb. 471; *Roberts v. Adams County*, 20 Neb. 409; *Fuller v. Colfax County*, 33 Neb. 716; *Wilson v. Butler County*, 26 Neb. 716.

Under section 71 of the former revenue law of *Nebraska* (Gen. St. 924), it was only when, by such "mistakes or wrongful acts" as were not of record, and were not participated in by the purchaser, land was sold contrary to the provisions of the act, that the county was to save the purchaser harmless. *Merriam v. Otoe County*, 15 Neb. 408.

See *Tyler v. Cass County*, 1 N. Dak. 369, for a case where the sale was not by "wrongful act or mistake" of the officer within the meaning of a similar statute, and denying a recovery to the purchaser.

Where the county, from year to year after the sale, causes the land to be assessed and taxes levied thereon, the tax purchaser may pay the taxes to protect his supposed lien, and upon failure of his interest or title, may recover the amounts so paid, with interest, from the county. *Wilson v. Butler County*, 26 Neb. 676.

The claims against the county should be presented to the county board for audit and allowance, and if rejected, an appeal may be had to the district court. *Fuller v. Colfax County*, 33 Neb. 716; *Richardson County v. Hull*, 24 Neb. 536; *Richardson County v. Hull*, 28 Neb. 810.

Under *Wisconsin* Laws 1859, ch. 22, § 27, the claimant for repayment of money from the county is required to present the tax certificates and deeds, to be delivered and canceled on payment to him of the money; but he is not required, prior to such payment, either to cancel them himself, or to leave them with the board or other county officers to be canceled. *Warner v. Outagamie County*, 19 Wis. 611.

As to what constitutes a disallowance by the county board before an appeal is authorized to the circuit court, under 1 Taylor Stats. (Wis.) 302, see *Warner v. Outagamie County*, 19 Wis. 611.

Under the *New York* Laws 1855, ch. 427, §§ 83, 85, authorizing the comptroller to cancel tax sales which are invalid or ineffectual to pass title, and refund the money out of the state treasury to the purchaser, his power is not restricted to cases where the invalidity of the sale appears upon the face of the proceedings, but extends to cases where it does not so appear, and must be established by extrinsic evidence. And he may be compelled by *mandamus* to hear and determine an application by the purchaser to cancel the sale and refund the purchase-money, where the

latter alleges that the tax was invalid, and presents proof in support of his allegation. *People v. Chapin*, 105 N. Y. 309.

In *Indiana*, it is only where the sale is void and conveys nothing that the purchaser may recover, and not where the sale is effectual to convey a lien. *State v. Casteel*, 110 Ind. 174; *Ball v. Barnes*, 123 Ind. 394.

But where the description of the premises in the tax deed is too uncertain and indefinite to render the sale effectual to convey title, but is sufficiently definite and certain to carry a lien, and an action is instituted by the owner of the land against the city treasurer and the purchaser, and defended by the city, wherein it is decreed that the purchaser acquired no lien, and the certificate is canceled and the plaintiff's title quieted, the city is concluded by the judgment, and the purchaser is entitled to reimbursement, under *Indiana* R. S. 1881, § 6487. *Millikan v. Lafayette*, 118 Ind. 323.

In *Iowa*, it is held that the city does not take the place of the delinquent taxpayer by an invalid sale, and is not liable to the purchaser, in refunding his money, for interest at the rate charged delinquents in the case of redemption; but it is liable at the rate of six per cent. from the date of payment by the purchaser. *Corbin v. Davenport*, 9 Iowa 239.

In *Minnesota*, the right is not dependent upon the judgment stating the reason for which the sale was declared void. It is sufficient that the sale has been declared void "by judgment of court." *German Am. Bank v. White*, 38 Minn. 471; *Easton v. Hayes*, 38 Minn. 463.

The procedure under *Minnesota* Gen. Sts. 1878, ch. 11, § 148, added by Laws 1881, ch. 10, is not judicial in its nature, and the duties thereby imposed may be performed by other than judicial officers. *State v. Dressell*, 38 Minn. 90.

Under the *Colorado* Gen. Sts. 1883, section 2824, providing that when land has been sold for taxes, "on which no tax was due at the time," the county shall refund to the purchaser the amount paid, etc., does not authorize an action by the purchaser to recover back the amount of personal-property tax admitted to be due and included in the purchase price. *Larimer County v. National State Bank*, 11 Colo. 564.

Under the *Colorado* Gen. Laws 1877,

right may be made retroactive, and apply to titles founded upon sales made before its passage;<sup>1</sup> but one assuming to take away, obstruct, or incumber the right, is void in so far as it purports to apply to sales already made.<sup>2</sup>

The right extends as well to a purchaser of lands forfeited to the state for non-payment of taxes, as to a purchaser at a tax sale.<sup>3</sup>

Under these statutes, if the original purchaser has assigned his interest, his assignee is the one entitled to restitution.<sup>4</sup>

requiring the county to reimburse the purchaser who, in consequence of the mistake of the assessor or other official, does not obtain a good title, and in turn making such official responsible to the county, the county is liable to one who purchased at a sale taking place after the act took effect, although the mistake of the assessor rendering the title invalid was made prior to that time, giving the county no recourse against him. *Hurd v. Hamill*, 10 Colo. 174.

Under the *Massachusetts* Statutes of 1862, ch. 183, § 6, a mortgagee, whether in possession before foreclosure, or out of possession, who buys the land at the tax sale, is entitled to be reimbursed the purchase-money in case the sale is invalid. But a mortgagee who has, after the assessment of the tax, become the absolute owner, by buying at a sale under a power in the mortgagee, and who buys the land at the tax sale, is not so entitled. *Home Sav. Bank v. Boston*, 131 Mass. 277.

In *Kansas*, it is held that the mere fact that a railroad company is the purchaser, does not prove that such purchase is *ultra vires*, and the tax-sale certificate in its hands null and void, so as to release the county from the obligation to refund, in case the sale proves to be invalid. *School Dist. No. 15 v. Allen County*, 22 Kan. 568.

In *Wisconsin*, it is held that a special contract by the county supervisors, at the time of the sale, with the purchaser or his assigns, to refund on demand the money paid at the sale with interest, if, through the failure of the officers to comply with the law in the tax proceedings, the certificate should be void, or an agreement to secure to such purchaser or his assigns a perfect title in fee simple to the lands, would be in excess of the authority conferred by law on that body, and of no effect. *Hyde v. Kenosha County*, 43 Wis. 129.

The remedy of the purchaser being purely statutory, unless he can bring his complaint within some provision of

the statute, it will be bad. *Hilgenberg v. Marion County*, 107 Ind. 494.

1. *Flinn v. Parsons*, 60 Ind. 573; *State v. Cronkhite*, 28 Minn. 197; *Schoonover v. Galarnaut*, 45 Minn. 174. But the statute will be given a prospective effect only, in the absence of a clear legislative intent that it shall be retrospective. *Shaw v. Morley*, 89 Mich. 313.

2. *Fleming v. Roverud*, 30 Minn. 273; *State v. Foley*, 30 Minn. 350; *Morgan v. Miami County*, 27 Kan. 79; *St. Louis, etc., R. Co. v. Alexander*, 49 Ark. 190. In *Corbin v. Washington County*, 3 Fed. Rep. 356, the law, at the time the sale was made, provided for the return of the purchaser's money, in the event that the sale should not be consummated by reason of irregularities therein. A subsequent statute providing that the purchaser should not be entitled to a return in any case, unless the board of supervisors should see proper to so order, was adjudged void in so far as it purported to apply to sales already made. But it was further held that a subsequent statute providing that the money should not be refunded, unless the party claiming under the tax deed should deliver a quit-claim deed, executed to such persons as the commissioners might direct, was a proper exercise of the power of the legislature to modify without impairing the remedy, and therefore valid.

3. *Fleming v. Roverud*, 30 Minn. 273; *Wilkinson County v. Fitts*, 63 Miss. 600.

4. *People v. Chapin*, 109 N. Y. 177; *Norton v. Rock County*, 13 Wis. 611; *Easton v. Hayes*, 35 Minn. 418; *Pitkin v. Reibel*, 104 Mo. 506.

In *Mississippi*, the right of the purchaser passes to the holder under him, and it makes no difference whether the latter acquires by a conveyance from the purchaser, or by conveyance from the sheriff under judgment and execution against him. *McGehee v. Fitts*, 65 Miss. 357.

In *Morris v. Sioux County*, 42 Iowa 416, the sale was void, but meanwhile

The right to reimbursement—whether by a recovery from the selling power,<sup>1</sup> or by foreclosure of the lien given upon the land<sup>2</sup>—is limited in time, by varying statutes. The period does not commence to run against the right to foreclose the lien until the title acquired by the tax deed fails; that is, until it is adjudged bad by a court of competent jurisdiction.<sup>3</sup>

the owner voluntarily redeemed his land. It was held that he could not be regarded as the assignee of the purchaser and entitled to the right given the latter to recover from the county.

1. *Baker v. Columbia County*, 39 Wis. 444, *overruling* a remark in *State v. Sheboygan County*, 29 Wis. 79; *Tarbox v. Adams County*, 34 Wis. 558; *Eaton v. Manitowoc County*, 40 Wis. 663; *Reid v. Albany County*, 128 N. Y. 364; *Rork v. Douglas County*, 46 Kan. 175.

In *Fuller v. Colfax County*, 33 Neb. 716, it was held that where the purchaser has neither demanded a deed within five years from the date of sale, nor instituted proceedings to foreclose the tax certificate within the period of limitation for such action, he is not entitled to reimbursement from the county by reason of the invalidity of the sale.

In *Hutchinson v. Sheboygan County*, 26 Wis. 402, it was held that the Statute of Limitations does not begin to run on the claim, until the grantee has clear and positive information or knowledge of the existence of proof that the sale was invalid; and a statement by one who was not the owner of, nor interested in, the land, that the tax was paid, was not sufficient to put the statute in motion. *Paine, J.*, dissenting.

2. *Sexton v. Peck*, 48 Iowa 250; *Barke v. Early*, 72 Iowa 273; *Hooper v. Sac County Bank*, 72 Iowa 280; *Mitchell v. Lines*, 36 Kan. 378; *Montgomery v. Aydelotte*, 95 Ind. 144; *Scott v. Millikan*, 104 Ind. 75; *Capron v. Adams County*, 43 Wis. 613.

3. *McClure v. Warner*, 16 Neb. 447; *Bryant v. Estabrook*, 16 Neb. 217; *Otoe County v. Brown*, 16 Neb. 394; *Merriam v. Otoe County*, 15 Neb. 408; *Schoenheit v. Nelson*, 16 Neb. 235; *Pett v. O'Brien*, 5 Neb. 360; *St. Louis, etc., R. Co. v. Alexander*, 49 Ark. 190.

In *Nebraska*, an action to foreclose may be brought on the tax certificate, where the petition alleges that a deed, if issued, would be invalid; and in such case the cause of action would accrue at the expiration of the period of redemption, and suit may be brought at

any time within five years thereafter. *Parker v. Matheson*, 21 Neb. 546; *Helprey v. Redick*, 21 Neb. 80; *Shepherd v. Burr*, 27 Neb. 432; *DeGette v. Sheldon*, 27 Neb. 829. But in *Indiana*, the right does not exist until the purchaser obtains the deed. *Sharpe v. Dillman*, 77 Ind. 280; *Montgomery v. Aydelotte*, 95 Ind. 144; *Reed v. Earhart*, 88 Ind. 159.

It is unnecessary for the holder of the tax deed to bring ejectment and fail therein, before instituting an action to foreclose his lien; he may allege in his petition the invalidity of his deed, and state facts showing his right to foreclose. *McClure v. Warner*, 16 Neb. 447; *Shelley v. Towle*, 16 Neb. 194; *Miller v. Hurford*, 13 Neb. 20.

In *Douglass v. Boyle*, 42 Kan. 392, where the tax deed was recorded in 1863, but the holder did not take possession of the land described therein until 1873, he was adjudged not entitled to a lien for the amount of taxes recited in said deed, with interest, as the deed and all rights thereunder were barred by the Statute of Limitations.

In *Harber v. Sexton*, 66 Iowa 211, where the tax deed was invalid by reason of the fact that the taxes had been paid prior to the sale, but the owner allowed the tax purchaser, in good faith, to pay the taxes on the land for more than twenty years, and then called him into a court of equity, where his invalid title was set aside; it was held that the purchaser was entitled to recover for all the subsequently paid taxes, with six per cent. interest on each payment from the date thereof, and to have the judgment declared a lien on the land, and that to such a case the Statute of Limitations had no application, since the right to reimbursement was a mere equity incidental to the relief asked by, and granted to, the plaintiff. *Distinquishing Thode v. Spofford*, 65 Iowa 294.

When the right to enforce a lien for the purchase-money, has been lost by lapse of time, a subsequent payment of taxes will be deemed voluntary, furnishing no cause of action, and ineffectual

b. COMPENSATION FOR IMPROVEMENTS.—Under statutes in many of the states, known as the “occupying claimants,” “betterment,” or “improvement” acts, the purchaser may, on failure of his title, recover from the owner for permanent and beneficial improvements, made in good faith, and in the belief that his title was good.<sup>1</sup> But in order to have the benefit of the occupying claimants’ act, the claimant, at the time the improvements are made, must have the full and actual possession; he may not enter upon the land in possession of another, and

to restore the original right. *Brown v. Fodder*, 81 Ind. 491.

1. *Coney v. Owen*, 6 Watts (Pa.) 435; *Miller v. Keene*, 5 Watts (Pa.) 348; *Gilmore v. Thompson*, 3 Watts (Pa.) 106; *Cranmer v. Hall*, 4 W. & S. (Pa.) 36; *McKee v. Lumberton*, 2 W. & S. (Pa.) 107; *Lynch v. Brudie*, 63 Pa. St. 206; *Steele v. Spruance*, 22 Pa. St. 256; *Creigh v. Wilson*, 1 S. & R. (Pa.) 38; *Hockenbury v. Snyder*, 2 W. & S. (Pa.) 240; *Haney v. Cole*, 28 Ark. 299; *Boatmen's Sav. Bank v. Grewe*, 101 Mo. 625; *Burke v. Circuit Judge*, 42 Mich. 513; *Jewell v. Truhn*, 38 Minn. 433; *Neiswanger v. Gwynne*, 13 Ohio 75; *Payne v. Anderson*, 35 La. Ann. 977; *Gernon v. Handlin*, 19 La. Ann. 25; *Towle v. Holt*, 14 Neb. 221; *Page v. Davis*, 26 Neb. 670; *Board of Regents v. Linscott*, 30 Kan. 240; *Cain v. Hunt*, 41 Ind. 466; *Huebschmann v. McHenry*, 29 Wis. 655.

*Michigan* Compiled Laws, §§ 6252–3, do not apply, where the entry or holding was not under a tax title alone. *Sands v. Davis*, 40 Mich. 14; *King v. Harrington*, 18 Mich. 212.

The *Minnesota* Act of March 10th, 1873, was not intended to apply to cases of improvements made before its passage. *Wilson v. School Dist.*, 22 Minn. 488.

Under the *Ohio* statute, the occupant in possession under claim of title, is allowed as well for improvements made before his tax title accrued, as for those made afterwards. *Davis v. Powell*, 13 Ohio 308; *Shaler v. Magin*, 2 Ohio 236. But the contrary is held in *Wheeler v. Merriman*, 30 Minn. 372, and *Jacks v. Dyer*, 31 Ark. 335.

In *Wisconsin*, the tax-title claimant cannot recover for any improvements made prior to November 1st, 1878, unless the tax upon which his deed was based is lawfully assessed upon the land. *Oberich v. Gilman*, 31 Wis. 495. But under *Wisconsin* Rev. Stat., § 3096, he may recover for improvements made

since that date, notwithstanding the invalidity of the assessment. *Zwietusch v. Watkins*, 61 Wis. 615.

In *Louisiana*, where the sale is void because of an irregular assessment, but is made by competent authority, and no nullity is patent on the face of the tax deed, the purchaser cannot be regarded a purchaser in bad faith, but is entitled to reimbursement for useful improvements. *Hickman v. Dawson*, 35 La. Ann. 1086; *Miller v. Montagne*, 32 La. Ann. 1293; *Guidry v. Broussard*, 32 La. Ann. 924; *Stafford v. Twitchell*, 33 La. Ann. 520; *Hopkins v. Daunoy*, 33 La. Ann. 1423; *Eldredge v. Tibbitts*, 5 La. Ann. 380; *Wederstrandt v. Freyhan*, 34 La. Ann. 705.

Under the *Kansas* statute, one holding under a void certificate of sale, *Stebbins v. Guthrie*, 4 Kan. 353, or under a tax deed void on its face, *Smith v. Smith*, 15 Kan. 290; *Wilder v. Cockshutt*, 25 Kan. 504; *Larkin v. Wilson*, 28 Kan. 516; *Millbank v. Ostertag*, 24 Kan. 471, is entitled to compensation for improvements.

But in other jurisdictions it is held that if the deed shows upon its face that it is void, it cannot be the foundation for a claim for the value of improvements. *House v. Stone*, 64 Tex. 677; *Hatchett v. Conner*, 30 Tex. 104; *Hershey v. Thompson*, 50 Ark. 485. But one claiming under an invalid tax title not void on its face, is entitled to adduce evidence as to his improvements under his suggestion of good faith, and to have that issue determined. *House v. Stone*, 64 Tex. 677, *approving* *French v. Grenet*, 57 Tex. 273, and *Wofford v. McKinna*, 23 Tex. 36; 76 Am. Dec. 53, and *questioning* *Robson v. Osborn*, 13 Tex. 298.

In *Liggett v. Long*, 19 Pa. St. 499, it was held that where the officer omits to place his signature to the deed at the proper place for it, near the impression of a seal, but attaches it to the receipt for taxes and costs and bond for the

make improvements, and receive compensation therefor.<sup>1</sup> His possession, however, need not be personal; the occupancy of the tenant is the occupancy of the landlord within this rule.<sup>2</sup> The occupant is not entitled to the actual costs of the improvements, but only to the amount which they have enhanced the value of the property.<sup>3</sup> A grantee is an "assignee," within the meaning of these statutes passing the rights of the purchaser to his "assignee."<sup>4</sup>

**VII. ACTIONS CONCERNING TAX TITLES—1. By Tax-title Claimant**  
—*a.* TO OBTAIN POSSESSION.—If the original owner, or one claiming under him, is in possession of the premises, the proper and usual remedy for the tax-title claimant, in order to obtain possession, is an action at law in the nature of ejectment.<sup>5</sup> It is not competent for the legislature to provide for putting the purchaser in possession forcibly and without a judicial ascertainment of the facts, although the tax deed be made *prima facie* evidence

surplus purchase-money, and acknowledges the deed in open court, which acknowledgment is duly certified on the deed and entered on the records of the court, the omission of the signature is not such a defect as will deprive the purchaser of reimbursement for improvements made on the faith of such title.

In *Hilgenberg v. Rhodes*, 111 Ind. 167, it was held that the purchaser was not entitled to compensation for improvements made by him after service of summons in a suit instituted by one asserting a paramount right to the property. But see *Zweitusch v. Watkins*, 61 Wis. 615.

1. *Coonradt v. Myers*, 31 Kan. 30; *Smith v. Smith*, 15 Kan. 290; *Waterson v. Devoe*, 18 Kan. 231; *Millbank v. Ostertag*, 24 Kan. 471; *Neil v. Case*, 25 Kan. 510; 37 Am. Rep. 259; *Larkin v. Wilson*, 28 Kan. 516.

2. *Parsons v. Moses*, 16 Iowa 440.

3. *Childs v. Shower*, 18 Iowa 261.

In *Minnesota*, the occupant is not entitled to interest upon the value of the improvements. *Madland v. Benland*, 24 Minn. 372.

4. *Childs v. Shower*, 18 Iowa 261.

5. See *Crane v. Randolph*, 30 Ark. 579; *Whitney v. Stevens*, 77 Ill. 585; *Michigan Cent., etc., R. Co. v. McNaughton*, 45 Mich. 87; *Callanan v. Lewis*, 79 Iowa 452; *French v. Ladd*, 57 Miss. 678.

**Collateral Attack.**—In *Arkansas*, in ejectment by a purchaser at a tax sale made in pursuance of a judgment of the circuit court having jurisdiction under the overdue tax law of that state, it is

no defense that the taxes had been paid prior to the sale. The judgment and sale thereunder may not be collaterally attacked. *McCarter v. Neil*, 50 Ark. 188. See also *Wallace v. Brown*, 22 Ark. 118; 76 Am. Dec. 421.

**Recording Tax Deeds.**—In *Wisconsin*, it is held that until the tax deed is properly recorded, the grantee has not such a right to the possession of the land as will enable him to maintain ejectment therefor. *Hewitt v. Week*, 59 Wis. 444. See also *Hewitt v. Butterfield*, 52 Wis. 384.

**When Bonds Are in Custody of Court.**—In *Young v. Vanhooser*, 6 Lea (Tenn.) 136, it was held that the remedy of a purchaser at a tax sale of lands in the custody of the court of chancery at the time, is by petition *pro interesse suo* in the suit in which the receivership exists, setting out his title, and asking for possession on the title, or for leave to assert the title in a suit for that purpose; and an original bill against all parties to the chancery suit, without leave, is not maintainable.

**Defect in Title.**—In *Iowa*, although there are defects in the title of the patent holder, he is nevertheless entitled to possession as against one claiming under a void tax deed, when his possession is based on claim and color of title. *Keokuk, etc., R. Co. v. Lindley*, 48 Iowa 11.

In *Pennsylvania*, where, in an action of ejectment by one claiming under a treasurer's tax deed, there is a question as to the validity of the deed, because of a doubt in regard to the identity of the land described in the writ and the deed,

of title in him.<sup>1</sup> Summary proceedings may be authorized, but, at the same time, they must be of a judicial nature.<sup>2</sup>

It should be observed, however, that the law does not require the purchaser to institute judicial proceedings and be put in possession by the officers of the law, when he may enter peaceably, and without resistance or difficulty.<sup>3</sup>

6. TO QUIET AND CONFIRM TITLE.—In some of the states statutes have been passed authorizing the tax-title claimant to bring a bill in chancery to quiet and confirm his title.<sup>4</sup> In some

or because it is uncertain whether the land was really assessed as unseated, or whether it was in fact unseated, such questions are properly for the jury and not for the court. And this is true, although the defendant is an intruder, not having even color of title. *Miller v. McCullough*, 104 Pa. St. 624.

Under the *Michigan Comp. Laws*, § 1141, providing that the holder of a tax title shall not be entitled to possession as against the holder of a subsequent tax deed, until he shall have paid or tendered to the latter the amount of the taxes for which the subsequent deed was given, it was held that the subsequent title, which will thus preclude possession, is not necessarily a legal tax title, although the tax on which it was based must have been one that was not merely arbitrary, but had some warrant in law. *Sinclair v. Learned*, 51 Mich. 336. See also *Beard v. Sharrick*, 67 Mich. 321.

1. *Calhoun v. Fletcher*, 63 Ala. 574. See also *Ex p. Webb*, 58 Ala. 109; *Webb v. Carlisle*, 65 Ala. 313.

2. In *Louisiana*, it is held that in the absence of a statute expressly authorizing it, the tax-title claimant may not proceed to evict the former owner, by rule to show cause. In that state the proceeding must be by petition and citation. *Fischel v. Mercier*, 32 La. Ann. 704; *Mayenno v. Millandon*, 32 La. Ann. 1123; *State v. Judge*, 27 La. Ann. 704; *Schoombs v. Krieger*, 33 La. Ann. 420.

Under section 4, *Ohio Act March 2d, 1846*, the tax-title claimant may recover possession by action of forcible detainer. *Hannel v. Smith*, 15 Ohio 134. But prior to that act, he could not. *Kelley v. Hunter*, 12 Ohio 216.

*Mississippi Code 1880*, section 538, providing for an action of unlawful detainer for the recovery of possession by the purchaser, and making a judgment in his favor therein, after one year, a bar to any action to controvert his title,

is applicable alike to all sales of lands for taxes, and precludes all controversy, whatever may be the ground for assailing the title. *McLemore v. Scales*, 68 Miss. 47.

In summary proceedings under the charter of the city of Brooklyn, *New York Laws 1854*, ch. 384, as amended by *New York Laws of 1862*, ch. 63, and *New York Laws, 1873*, ch. 863, to recover the possession of land by the grantee in the tax deed, it is necessary to prove by competent common-law evidence, the service of the notice of sale required by said chapter (tit. 5, § 27), to be served before the owner can be divested of his title. The affidavit of such service required to be filed by the charter (tit. 5, § 28), is not competent evidence.

In *People v. Andrews*, 52 N. Y. 445, it is held that in order to confer jurisdiction in the proceedings for the recovery of possession under the laws mentioned above, an affidavit merely stating that the party in possession refused to deliver the same upon demand, is not sufficient.

3. *Martin v. Langenstein*, 43 La. Ann. 789.

4. Under *Mississippi Code*, section 587, providing that a party claiming under a tax title may apply to the chancery court to have his title quieted and confirmed, "and if it shall appear that complainant is entitled to a decree, it shall be rendered confirming the tax title against all persons claiming to hold the same by title existing at the time of sale," it was held that where plaintiff fails to show title in himself, it cannot avail him that his adversary's claim is imperfect. *Peterson v. Kittridge*, 65 Miss. 33.

This provision applies to every variety and species of such titles. *Chrisman v. Currie*, 60 Miss. 858; *Beirne v. Burdette*, 52 Miss. 795. See *Belchor v. Mhoon*, 47 Miss. 613; *Metcalf v. Perry*, 66 Miss. 68, holding that the provision

jurisdictions, actual possession by the tax-title claimant is essential; in others it is not.<sup>1</sup>

The purchaser of an undivided interest may have his title thereto quieted and confirmed against persons denying his right and title to any and all parts and interests in the premises; it not being necessary for him to turn out his co-owners in so doing.<sup>2</sup>

In a suit by the tax-title claimant for possession, or to quiet title, it is competent for the defendant to show any irregularities in the tax proceedings that would vitiate the title; as, for instance,

applies to tax titles at sales for taxes due the levee board.

**Who May Controvert the Confirmation.**—Under *Mississippi* Act 1860, for the confirmation of tax titles, a mortgagee out of possession, the holder of a mechanic's lien, or the purchaser at a bankrupt sale, has, in any event, such an "interest or claim," whether valid or not, as entitles him to controvert the confirmation of the tax title. *Meeks v. Whatley*, 48 Miss. 337.

On a petition filed for confirmation under the 149th chapter of the Revised Code of *Arkansas*, a party will not be permitted to defend, who claims by answer to do so merely as "tenant in possession," and a demurrer to such answer is good; the presumption of law being, in such case, that the person answering holds under the purchaser and is his tenant or a mere tort-feasor; unless the possession of such respondent is adverse to the tax-title claimant, he has no right to oppose confirmation. *Black v. Percifield*, 1 Ark. 472.

1. In *Kansas*, the plaintiff must allege and prove an actual possession by himself or tenant. *Douglass v. Nuzum*, 16 Kan. 515; *Eaton v. Giles*, 5 Kan. 24; *Sale v. Bugher*, 24 Kan. 434; *Pierce v. Thompson*, 26 Kan. 714; *Brenner v. Bigelow*, 8 Kan. 496; *Giles v. Ortman*, 11 Kan. 65.

In *Wisconsin*, the decisions have been somewhat vacillating. At first it was held that the plaintiff, in order to bring an action to quiet title under § 29, ch. 141, Rev. Sts., of that state, must have actual and visible possession of the premises; *Grimmer v. Sumner*, 21 Wis. 179; but this decision was overruled in *Taylor v. Rountree*, 28 Wis. 391, where the court sustained an action under the statute, although the plaintiff was not in actual possession, but only had the constructive possession which the law attaches to the legal title. In a subsequent case, this decision was overruled, and *Grimmer v.*

*Sumner*, 21 Wis. 179 affirmed, *Wals v. Grosvenor*, 31 Wis. 681.

The *Michigan* Law 1865, p. 576, provides that "any person claiming title to land through the auditor general's deed executed upon the sale thereof for non-payment of taxes, may file a bill in chancery to quiet his title thereto without taking possession thereof," etc. In a proceeding in chancery to quiet title by one claiming through such a deed against one holding the lands under an adverse claimant, it was held: first, that the act does not authorize such a proceeding against a defendant in possession, its purpose being to extend the remedy by bill in equity to cases where the land was vacant, and where under the then existing law the complainant could not bring his bill without first taking possession; second, that under art. 6, § 27 of the state constitution, it was not competent for the legislature to authorize such a proceeding without providing a mode by which the defendant could have the benefit of a jury trial, if he so elected, where the right existed when the constitution was formed. *Tabor v. Cook*, 15 Mich. 323.

In *Arkansas*, possession by the purchaser is unnecessary. *Bonnell v. Roane*, 20 Ark. 114; *Worthen v. Ratcliffe*, 42 Ark. 330; *Black v. Percifield*, 1 Ark. 472; *Evans v. Percifull*, 5 Ark. 424; *Moses v. Hawkins*, 22 Ark. 550; *Scott v. Watkins*, 22 Ark. 556.

In *Indiana*, the purchaser must have received his deed before he is in a position to have his title quieted. *Sharpe v. Dillman*, 77 Ind. 280.

A pleading by one holding only a certificate of sale, which proceeds on the theory that he is entitled to the remedy, is bad, as he is entitled to nothing more than to be protected in the lien transferred to him by the state at the time of purchase. *McDonald v. Geisendorff*, 128 Ind. 153.

2. *Hintrager v. Nightingale*, 36 Fed. Rep. 847.



that the sale was made on a day unauthorized by law;<sup>1</sup> that the delinquent list and notice of time and place of sale were not published as required;<sup>2</sup> that the assessment roll was not filed, or was not received and approved by the appointed officers at the time required.<sup>3</sup>

The defendant cannot, in such a proceeding, litigate the validity of any claim the federal government may have to cancel a patent to the land granted by it for fraud practised in its procurement, with the view of showing that the land was not liable to taxation when sold for taxes.<sup>4</sup>

In some of the states there are statutes requiring the former owners to deposit in court the amount for which the land was sold, and all subsequently paid taxes, with interest, as a condition precedent to the right to defend an action by the tax-title claimant to bar their rights and interests.<sup>5</sup>

When the statute authorizes the holder of the tax title to exhibit a bill for its confirmation "when the period of redemption has expired," the general period applicable to the whole community is intended, not the exceptional and special period allowed to parties under disability; accordingly, a bill brought against minors interested in the land after the expiration of the former, but before the expiration of the latter, is not premature. But the

1. *Plympton v. Sapp*, 55 Iowa 195.

2. *Tully v. Bauer*, 52 Cal. 487.

3. *Osborn v. Hide*, 68 Miss. 45.

4. *Chrisman v. Currie*, 60 Miss. 858.

In *Missouri*, it is held that the fact that the sheriff sold two lots together, cannot be set up as a defense. *Brown v. Walker*, 11 Mo. App. 226. See also *Wellshear v. Kelley*, 69 Mo. 343.

5. *Powell v. St. Croix County*, 46 Wis. 211; *Wakely v. Mohr*, 15 Wis. 609; *Jarvis v. McBride*, 18 Wis. 315; *Orono v. Veazie*, 57 Me. 517.

In *Wisconsin*, it is held that such a provision can be upheld only by construing it to apply to defenses based upon mere irregularities in the tax proceedings, and not to those which go to the groundwork of the tax itself. *Philleo v. Hiles*, 42 Wis. 527; *Tierney v. Union Lumber Co.*, 47 Wis. 248; *Smith v. Smith*, 19 Wis. 615; 88 Am. Dec. 707.

Thus, such an action may be defended without a deposit, upon the ground that the assessor did not value defendant's property, nor any considerable portion of the lands in his town, from actual view, and did not inform himself in any manner of the actual or relative value of the lands, but valued them arbitrarily, and did not sign or certify the tax roll, nor make and annex thereto the required affidavit. *Philleo v. Hiles*, 42 Wis. 527.

The defendant may also, without a deposit, set up any facts which show that the plaintiff was incapable, as against him or his grantor, of taking title by tax deed, or by deed for the taxes of the particular years relied upon. *Wilson v. Jarvis*, 19 Wis. 597. See also *Wakeley v. Nicholas*, 16 Wis. 588; *Tondro v. Cushman*, 5 Wis. 279. But where the answer does not state any facts impeaching the equity or justice of the tax, but alleges only technical defenses and irregularities in the proceedings, the defendant must make the required deposit before he may interpose such defenses. *Wakeley v. Nicholas*, 16 Wis. 588; *Knight v. Barnes*, 25 Wis. 352.

And in order to sustain a judgment for the defendant, there must be proof and a finding of the fact that the required deposit was made. It is not sufficient that the answer alleges a deposit. *Smith v. Smith*, 19 Wis. 615; 88 Am. Dec. 707.

If the action by the tax-title claimant is commenced while a prior action in the same court by the former owner, to quiet his title against him, is pending, the plaintiff in the prior action should set up the pendency thereof, together with any other defense he may have, in such subsequent action, and ask for a stay therein until his action is determined. *Wilson v. Jarvis*, 19 Wis. 597.

proceeding to confirm leaves the right of redemption after the removal of the disability of infancy, unaffected.<sup>1</sup>

**2. By the Owner**—*a.* TO SET ASIDE SALE AND DEED.—As a general rule, if there has been fraud, or any illegality or irregularity materially affecting the tax proceedings, the owner may institute an action to set aside the sale and conveyance based thereon.<sup>2</sup>

See also *Prentiss v. Danaher*, 20 Wis. 311; *Danaher v. Prentiss*, 22 Wis. 311; *Graham v. Chappell*, 24 Wis. 38.

1. *Metcalfe v. Perry*, 66 Miss. 68.

2. In *Gray v. Coan*, 23 Iowa 345, it was held that a petition in equity to set aside a tax deed, alleging that the complainant was the owner of certain land at the time of the sale of the same for taxes, and still continues to be; that he had redeemed from the sale and paid all the taxes due, and that notwithstanding these facts the defendant had in some way obtained a tax deed to the land, states a good cause of action.

In *Yancey v. Hopkins*, 1 Munf. (Va.) 419, it was held that if land be listed to a wrong person, sold as the property of such person, and conveyed by deed to the purchaser, the proper resort of the owner for relief is to a court of equity, by which the deed may be canceled and a release or reconveyance of the land decreed.

Evidence of a fraudulent combination between purchasers at the sale, to prevent competition in the bidding, is admissible in the first instance, in an action to set aside a deed based on such sale, although it is not shown that the defendant, who was a purchaser, was a party to such combination. *Kerwer v. Allen*, 31 Iowa 578. As to fraudulent combinations at the sale, see *TAXATION*, subd., *Tax Sales*.

In *Simpson v. Edmiston*, 23 W. Va. 675, it is held that where the deed is assailed and claimed to be invalid, by a plaintiff, and such deed is exhibited with, and made part of his bill, and it appears upon its face to be invalid, the court will not decline to declare it void, and set it aside merely because the plaintiff's bill did not specify the particular grounds on which the court deems it void.

In *Kentucky*, a suit to set aside the sale, on the ground of fraud, may be maintained by the owner, though not in possession of the land, as it is not a suit to quiet title. *Herr v. Martin*, 90 Ky. 377.

In *Perkins v. Nugent*, 45 Mich. 156, a proceeding against the validity of a tax deed, on the ground that for a portion of the time covered by it, a part of the lands in the same township had not been assessed, was not sustained; it not appearing that such lands were worth anything during that period, and it being shown, on the other hand, that certain classes of real estate were then exempt.

**Collateral Attack.**—In *Louisiana*, tax titles which are not mere simulations, may not be attacked collaterally. They are presumed to be valid until annulled in and by a revocatory action. *Jurey v. Allison*, 30 La. Ann. 1234; *Lannes v. Workingmen's Bank*, 29 La. Ann. 112; *Gerac v. Guilbeau*, 36 La. Ann. 843. But this rule does not apply to a petitory action in which the defendant alleges the tax sale as his title. In such case, the plaintiff may show the illegality of the title opposed to him, though it be a tax sale *prima facie* valid. *Hickman v. Dawson*, 33 La. Ann. 438.

**United States Direct Tax Act—Power of Treasury Department.**—The officers of the *United States* treasury department could not set aside a sale, nor vacate a title acquired at a sale, for direct taxes, and the assent of the purchaser to the setting aside of the sale, after he had conveyed lands to a third person, cannot affect the rights of the latter, unless he assented also. *Billings v. Stark*, 15 Fla. 297.

**Parties Defendant.**—A sheriff having sold land for taxes, and subsequently taken an assignment of one-half of the same from the purchaser, is properly made a party to a bill filed by the former owner of the land to set aside the tax sale. *Twombly v. Kimbrough*, 24 Ark. 459.

Under Rev. Sts. *Texas*, art. 1202, providing that in every suit against the estate of decedent, involving title to real estate, the executor or administrator, if any, and the heirs, shall be made parties defendant, the heirs are not nec-

But where the owner has allowed judgment for taxes to go by default, he may not subsequently, in a suit to set aside the sale, be heard to allege that a part of the taxes for which the judgment was rendered was illegal.<sup>1</sup>

The right to have the tax title set aside is not confined to the former owner, but may be exercised by a mortgagee or other creditor, and perhaps by anyone who can show such an interest in the estate as would have entitled him to redeem.<sup>2</sup>

b. TO REMOVE CLOUD FROM TITLE.—A court of equity, by virtue of its general powers, will entertain a bill by the true owner, in possession, to remove a cloud upon his title, occasioned by a

essary parties to an action to cancel a tax deed by the executor and sole devisee, in which defendant files a bill in reconvention in the nature of a cross-action of trespass to try title. *Lufkin v. Galveston*, 73 Tex. 340.

An action to annul the title derived to the state through tax proceedings, cannot be maintained against the auditor general, unless the state consents to the suit and designates that official to represent it as party defendant thereto. *Burrill v. Auditor Gen'l*, 46 Mich. 256.

Where, by tax proceedings absolutely void, lands have been adjudicated to the state, and subsequently the state transfers the same by adjudication to third parties, under *Louisiana* Act 107, of 1880, the owner in reclaiming his property, is not bound to make the state a party, and is not without remedy because the state is exempt from suit. *Denègre v. Gèrac*, 35 La. Ann. 952.

1. *Chicago Theological Sem. v. Gage*, 11 Biss. (U. S.) 289.

2. *Miller v. Cook*, 135 Ill. 190; *Burton v. Perry*, 146 Ill. 127.

In *Connolly v. Connolly*, 63 Iowa 202, a tax deed was set aside at the instance of a mortgagee, on the ground that it was procured by a conspiracy for the purpose of divesting the lien of his mortgage.

In *Ohio*, a judgment creditor having a lien upon the land when sold for taxes, may not file a bill in equity to avoid the sale as invalid, without first refunding the amount of the tax, penalty, and interest, or offering to do so. *Gillett v. Webster*, 15 Ohio 623.

In *Iowa*, by statute no person is permitted to question the title acquired by a treasurer's deed, without first showing that he, or the party under whom he claims title, had title to the property at the time of sale, or that the title was obtained from the *United States* or

from the State of *Iowa* after the sale. See *Varnum v. Shuler*, 69 Iowa 92; *Foster v. Ellsworth*, 71 Iowa 262. This statute was designed only to prevent the interference of strangers. One who claims under a tax deed, though his claim may not be good as against a prior owner, may question the validity of a subsequent tax title. *Adams v. Burdick*, 68 Iowa 666.

Where a county claimed to have title at the time of sale by patent from the *United States* to the state, and from the state to it, it was held that the patent from the state to the county was *prima facie* evidence of its title, and sufficient for the purpose of enabling it to question the tax title, and that evidence of the patent from the *United States* to the state was unnecessary. *Callanan v. Wayne County*, 73 Iowa 709.

And in *Hintrager v. Kiene*, 62 Iowa 605, it was held that, where the party questioning the tax title is allowed to testify that he was the owner of the property at the time of sale, and is not required to produce the record, evidence of his title, there is a sufficient basis for the introduction of other evidence as-sailing the tax title.

*Michigan* Comp. Laws, § 1130, debarring any person from questioning a tax title unless he shows that at the time of sale, or subsequently, he, or the person through whom he claims, holds a title acquired from the *United States*, or from the State of *Michigan*, is held not to apply to one who shows a title *prima facie* sufficient under common-law rules. And a *prima facie* case is established by producing such evidence as raises a presumption of title in the claimant, as all titles in the State of *Michigan* are supposed either to have been granted or else to have been originally recognized and confirmed by the *United States* or by the state. *Gamble v. Horr*, 40 Mich. 561.

tax deed, which may be vexatiously or wrongfully used to invalidate or throw suspicion upon it.<sup>1</sup>

The general rule is that, if the complainant's title is legal in its nature, he must be in possession of the premises before he can successfully invoke the aid of equity, in the absence of a statute to the contrary; since, if he is out of possession, he may, by bringing ejectment, test the validity of the instrument constituting the alleged cloud. Where, however, his title is an equitable one, possession is not essential; and the same is true in some jurisdictions where the lands in question are wild and unoccupied.<sup>2</sup>

1. *Gage v. Rohrbach*, 56 Ill. 262; *Rowland v. Doty*, Harr. Ch. (Mich.) 3; *Davis v. Boston*, 129 Mass. 377; *Holt v. Weld*, 140 Mass. 578; *Forster v. Forster*, 129 Mass. 566; *Kimball v. Ballard*, 19 Wis. 601; 88 Am. Dec. 705.

In *Lyon v. Alley*, 130 U. S. 177, the court, by Lamar, J., said: "It is well settled by the decisions of this court and the state courts, that after land has been sold and a conveyance of some sort made to the purchaser, courts of equity have inherent jurisdiction to give relief to the owner against vexatious litigation and threatened injury to the market value of the land, by removing the cloud which such illegal sale, and the illegal claim arising from it, may cast upon the title."

Under the general equity powers conferred upon the superior court by the *Massachusetts* statutes of 1883, ch. 223, that tribunal has jurisdiction of a bill in equity to remove a cloud upon title resulting from an invalid tax sale. And the discretionary power given by Pub. Sts., ch. 176, §§ 1, 2, of that state, by which, in a proper case, a party may be ordered to bring an action at common law to try his title, does not limit its general authority. *Smith v. Smith*, 150 Mass. 73; *Clouston v. Shearer*, 99 Mass. 209.

A court of equity has jurisdiction where the owner of land is in possession, and the holder of a tax title holds it as a cloud over the title, refusing to prosecute it. *Sharpleigh v. Surdam*, 1 Flip. (U. S.) 472.

In *Massachusetts*, a sale of land by the collector, more than two years after the warrant for the collection of the tax was committed to his predecessor, is void, although within two years after the warrant was committed to the collector who made the sale, if the land was alienated by the owner after the assessment of the tax, and before the sale; and the grantee in possession may

bring a bill in equity against the purchaser to remove the cloud from his title, if the purchaser has recorded his tax deed, and refuses to release to the purchaser, and claims to be the owner of the land. *Russell v. Deshon*, 124 Mass. 342.

In *Wisconsin*, a tax certificate is such a claim to land as affects its value, and throws such a cloud on the title as to bring it within the purview of the statute and the equity powers of the court. *Dean v. Madison*, 9 Wis. 402; *Maxon v. Ayers*, 28 Wis. 612; *Hamilton v. Fond du Lac*, 25 Wis. 490.

In *Chaffee v. Detroit*, 53 Mich. 373, it is held that a void conveyance of property, to satisfy a special sewer assessment, casts a cloud on the title, which the owner and occupant of the premises cannot force the municipality to prosecute at law, and he may maintain a bill in equity to clear his title from such cloud.

In *Arkansas*, in a proceeding to dispel cloud from title, the affidavit required by the statute to be filed before action for the recovery of land, or the possession thereof, is not necessary. *Chaplin v. Holmes*, 25 Ark. 415.

2. *Sloan v. Sloan*, 25 Fla. 53; *Weaver v. Arnold*, 15 R. I. 53; *Blackwood v. VanVleet*, 11 Mich. 252; *Blanchard v. Tyler*, 12 Mich. 339; 88 Am. Dec. 57; *Hall v. Kellogg*, 16 Mich. 135; *Busbee v. Lewis*, 85 N. Car. 332; *Clark v. Covenant Mut. L. Ins. Co.*, 52 Mo. 272; *Shell v. Martin*, 19 Ark. 139, which holds to the contrary, was disapproved by Mr. Justice Fairchild in *Apperson v. Ford*, 23 Ark. 746, and has been discredited by the later decisions in that state. *Branch v. Mitchell*, 24 Ark. 421; *Byers v. Danley*, 27 Ark. 77; *Miller v. Neiman*, 27 Ark. 233; *Chaplin v. Holmes*, 27 Ark. 414; *Sale v. McLean*, 29 Ark. 612; *Crane v. Randolph*, 30 Ark. 579; *Lawrence v. Zimbleman*, 37 Ark. 643.

Possession by a duly authorized agent, having full and complete charge of the premises, will sustain the equitable jurisdiction in favor of the owners of the legal title who are non-residents.<sup>1</sup> If the complainant is in the actual possession, that fact should be alleged in the bill.<sup>2</sup>

But although actual possession is averred, if the fact is not established, but on the other hand the defendant is shown to be in possession, and nothing appears to prevent proceedings at law, the bill cannot be maintained.<sup>3</sup>

And an averment in the bill that the defendant has entered upon the premises and kept the complainant out by personal force and violence, has the effect of negating a fact that is necessary to the theory of the bill.<sup>4</sup>

The complainant must establish a reasonably clear title; he must proceed upon the strength of his own title, and not upon the weakness of his adversary's.<sup>5</sup>

But it would seem that actual possession established by the complainant, is proof sufficient of title to authorize the relief sought, in the absence of proof of title in someone else.<sup>6</sup>

While, as a general rule, in an action to remove a cloud upon the title, the facts which show the apparent validity of the instrument which is said to constitute the cloud, and, also, the facts showing its invalidity, are required to be stated in the complaint, yet when the instrument, which constitutes the cloud, is a tax deed, which under the statutes is declared to be *prima facie* evidence of title, the name of the instrument is sufficient for the purpose of showing an apparent title.<sup>7</sup>

It is not every tax deed that will constitute a cloud upon the title, so as to justify the interposition of equity. The rule for

**Wild and Unoccupied Lands.**—Mathews v. Marks, 44 Ark. 436; Gould v. Sternburg, 105 Ill. 488; Gage v. Rohrbach, 56 Ill. 262; Hardin v. Jones, 86 Ill. 313; Whitney v. Stevens, 97 Ill. 482.

Under the *Mississippi* Code of 1871, § 975, a bill in equity may be maintained by the true owner against a party in possession to cancel, as clouds upon the title, a void tax deed, and a title bond from one who never had title. But the jurisdiction is exhausted when the clouds are removed, and the court may not put the complainant in possession. Wofford v. Bailey, 57 Miss. 239.

In *Wisconsin*, the holder of the legal title, though not in possession, may, independently of § 29, ch. 141, Rev. Sts. of that state, maintain a suit in equity, in the nature of a bill *quia timet*, to remove the cloud upon his title, when the invalidity of the hostile claim cannot be established by any record,

but must be proven by extrinsic evidence. And in such a suit, the court may decree the reformation, surrender, or cancellation of the instrument constituting the cloud, or the reformation or cancellation of records, and the execution of deeds or releases. Pier v. Fond du Lac, 38 Wis. 476, *overruling* Gunderson v. Cook, 33 Wis. 551, as to the necessity of actual possession in order to maintain the bill *quia timet* independently of the statute, and *criticizing* Shaffer v. Whelpley, 37 Wis. 334.

1. Sloan v. Sloan, 25 Fla. 53.

2. Gage v. Schmidt, 104 Ill. 106.

3. Barron v. Robbins, 22 Mich. 35.

4. Kilgannon v. Jenkinson, 51 Mich. 240.

5. Lawrence v. Zimpleman, 37 Ark. 644.

6. Gage v. Schmidt, 104 Ill. 106.

7. Hibernia Sav., etc., Soc. v. Ordway, 38 Cal. 679. See also Castro v. Barry, 79 Cal. 445.

determining the question may be stated thus: When the deed is void upon its face, or the tax proceedings do not show a compliance with the statutory requirements, so that an inspection of the record and a comparison of it with the law will afford a decisive test of its illegality, it does not constitute a cloud, and in such cases, equity will not interpose.<sup>1</sup> When, however, the illegality or defect does not appear upon the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in the purchaser, and the evidence to rebut this case may possibly be lost, or be unavailable from death of witnesses, or other causes, or when the deed would, by statute, be presumptive evidence of a good title in the holder, so that he might rely upon it until the illegalities were established, equity will exercise jurisdiction and afford relief on the ground that a cloud exists or is imminent.<sup>2</sup>

1. Cooley on Taxation (2d ed.), p. 780; 2 Story's Eq. Jur. (12th ed.), § 700; *Eastman v. Thayer*, 60 N. H. 408; *Lawrence v. Zimpleman*, 37 Ark. 643; *Chaplin v. Holmes*, 27 Ark. 414; *Detroit v. Martin*, 34 Mich. 170; *Curtis v. East Saginaw*, 35 Mich. 508; *Wills v. Austin*, 53 Cal. 152; *Overing v. Foote*, 43 N. Y. 290; *Fonda v. Sage*, 48 N. Y. 173, *aff'd* 46 Barb. (N. Y.) 109; *Maniturn v. Smith*, 2 Sawy. (U. S.) 142; *Sloan v. Sloan*, 25 Fla. 53. Thus, where it appears on the face of the deed that several tracts of land were sold together for the taxes due on the whole, *Crane v. Randolph*, 30 Ark. 579; or the description of the land embraced in the deed is too vague and uncertain, *Busbee v. Macy*, 85 N. Car. 329, the deed is void, and casts no cloud upon the owner's title.

In *Wisconsin*, a tax deed upon a prior sale, though made and recorded after one upon a later sale, does not cast any cloud upon the title of the holder of the latter. *Truesdell v. Rhodes*, 26 Wis. 215.

2. *Marquette, etc., R. Co. v. Marquette*, 35 Mich. 504.

Under *Oregon Comp. Laws* 1874, p. 767, a tax deed is *prima facie* evidence of title, and of the regularity of the prior proceedings, which evidence can be overthrown only by the proof of certain facts *dehors* the deed. Therefore, the deed constitutes a cloud upon the title of the property. *Tilton v. Oregon Cent., etc., Road Co.*, 3 Sawyer (U. S.) 22.

The same is true in *California*. *Huntington v. Central Pac. R. Co.*, 2 Sawyer (U. S.) 503.

In *Texas*, a tax deed to property liable for taxation and sold in accordance with law, gives a good and perfect title which can only be impeached for actual fraud. Such a deed would, therefore, cast a cloud upon the title of lands regularly sold, but not liable for the tax, to remove which equity may be invoked. *Cassiano v. Ursuline Academy*, 64 Tex. 673.

"The true test," says Field, C. J., for the court, in *Pixley v. Huggins*, 15 Cal. 129, "by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property in an action of ejectment, brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight without proof in rebuttal, no occasion could arise for the equitable interposition of the court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions arising upon instruments of that character must necessarily fail." See also similar observations by Chancellor Walworth in *Van Doren v. New York*, 9 Paige (N. Y.) 388.

Where the defendant, in an action to set aside the sale, asserts the validity of the sale, he may not, on appeal, claim that the plaintiff is not entitled to equitable relief because the tax sale proceed-

A sale of the lands by the owner, pending a suit to remove a cloud from the title, will not operate to defeat the suit; the decree obtained will enure to the benefit of his grantee.<sup>1</sup>

An attaching creditor may maintain a bill in equity to remove the cloud of a tax deed upon the title of land of the debtor which he has attached.<sup>2</sup>

c. CONDITIONS OF RELIEF.—When the owner seeks in a court of equity to have a tax deed set aside, and the cloud created thereby removed from his title, the familiar maxim, "he who asks equity must do equity," will be applied, and he will be required to pay the amount for which the land was sold, and all subsequently paid taxes, with interest, as a condition to relief.<sup>3</sup>

Where, in an action to set aside a tax sale and certificate on the ground of the illegality of a portion of the taxes, the record discloses no means of determining what amount of the tax was valid, the court will not require payment of any amount as a condition of relief.<sup>4</sup> If there is doubt as to which of several

ings have not progressed far enough to be entitled to a presumption of regularity, and, therefore, to cast a cloud on the title of the plaintiff. *Wilcox v. Rochester*, 129 N. Y. 247.

1. *Gage v. Schmidt*, 104 Ill. 106.

2. *Perham v. Haverhill Fibre Co.*, 64 N. H. 2.

3. *Smith v. Gage*, 11 Biss. (U. S.) 217; *Dillon v. Merriam*, 22 Neb. 151; *Wood v. Helmer*, 10 Neb. 65; *Boeck v. Merriam*, 10 Neb. 199; *Adams v. Castle*, 30 Conn. 404; *Montgomery v. Trumbo*, 126 Ind. 331; *Gage v. Caraher*, 125 Ill. 447; *Challiss v. Hekelnkamper*, 14 Kan. 474; *Smith v. Prall*, 133 Ill. 308; *Peacock v. Carnes*, 110 Ill. 99; *Gage v. Arndt*, 121 Ill. 491; *Ragsdale v. Alabama Great So. R. Co.*, 67 Miss. 106; *Blanton v. Ludeling*, 30 La. Ann. 1232; *Hickman v. Kempner*, 35 Ark. 505; *Peckham v. Millikan*, 99 Ind. 352.

In *Indiana*, a complaint to set aside the tax sale and to cancel the certificate, on the ground that the plaintiff had tendered the amount of the taxes and the interest thereon to the purchaser, is insufficient upon demurrer, unless the plaintiff also brings the money into court, or offers to pay it to the purchaser upon obtaining the relief sought. *Lancaster v. DuHadway*, 97 Ind. 565.

Where the party attacking the tax title avers that he is ready and willing, and offers to pay the holder the amount paid by him at the tax sale, together with all subsequent taxes, interest, and costs, it is error for the court to render judgment setting the tax sale aside,

without requiring the payment of the sum so tendered. *Corbin v. Woodbine*, 33 Iowa 297.

In *Kansas*, before a suit is commenced to set aside a tax-sale certificate, the plaintiff must pay or tender all taxes embraced therein which the records show are valid, and which he is under obligation to pay. *Miller v. Ziegler*, 31 Kan. 417; *Lawrence v. Killam*, 11 Kan. 499; *Challiss v. Atchison County*, 15 Kan. 53; *Hagaman v. Cloud County*, 19 Kan. 395; *Knox v. Dunn*, 22 Kan. 684; *Pritchard v. Madren*, 24 Kan. 489; *Franz v. Krebs*, 41 Kan. 223.

But where the holder of the tax title sues for partition, and the owner of the patent title pleads, in bar of the action, a former adjudication declaring the tax title invalid, he should not be required to refund the taxes paid by the plaintiff, as he is not asking for affirmative relief. *Thomsen v. McCormick*, 136 Ill. 135.

And when a mortgagee of real estate asserts in equity his right as against the tax sale of the same, alleged by him to have been made collusively in conjunction with the mortgagor, for the purpose of getting rid of the mortgage for the mortgagor's benefit, whether he proceed against the purchaser alone, or against the purchaser and the mortgagor, it is not necessary for him to tender payment of the taxes for which the lands were sold. *Mendenhall v. Hall*, 134 U. S. 559.

4. When no Payment Required as Condition of Relief.—*Hebard v. Ashland County*, 55 Wis. 145.

defendants is entitled to the money, it should be ordered to be paid into court for the benefit of the parties entitled.<sup>1</sup>

**VIII. LIMITATION OF ACTIONS**—(See also **LIMITATION OF ACTIONS**, vol. 13, p. 667).—In many of the states there are what are known as special or short statutes of limitations, confining the right to institute actions for the recovery of real estate sold for the non-payment of taxes to a period of time much shorter than that which existed at the common law for the trial of land titles. The design of these statutes is to encourage purchases at tax sales, by forcing an early determination of the legality of the sale and of the title founded thereon. The statutes designate the time from which the period begins to run; the most usual being from the time the deed is recorded.<sup>2</sup>

1. *Johnson v. Huling*, 127 Ill. 14.

2. *Edwards v. Simmons*, 40 Kan. 235; *West v. Cameron*, 39 Kan. 736; *Bowman v. Cockrill*, 6 Kan. 311; *Campbell v. Stogg*, 37 Kan. 420; *Beebe v. Doster*, 36 Kan. 666; *Harris v. Curran*, 32 Kan. 580; *Estes v. Stebbins*, 25 Kan. 315; *Austin v. Jones*, 37 Kan. 327; *Hill v. Lund*, 13 Minn. 451; *Baker v. Kelley*, 11 Minn. 480; *Skinner v. Williams*, 85 Mo. 489; *Barrett v. Holmes*, 102 U. S. 651; *Webster v. Schwears*, 69 Wis. 89; *Gunnison v. Hoehne*, 18 Wis. 268; *Lawrence v. Kenney*, 32 Wis. 281.

In some cases the period commences from the time of sale. *Gomer v. Chaffee*, 6 Colo. 314; *McDougall v. Monlezum*, 39 La. Ann. 1005.

In some jurisdictions the true date of sale is held to be the time when the purchaser receives his deed, and not when the lands are struck off. The term sale is construed to mean a complete sale, which vests the title in the purchaser, and places him in a position to have the legality thereof tested in the courts. *Eldridge v. Kuehl*, 27 Iowa 160; *Henderson v. Oliver*, 28 Iowa 20; *McCready v. Sexton*, 29 Iowa 356; 4 Am. Rep. 214; *Hurley v. Street*, 29 Iowa 429; *Thomas v. Stickle*, 32 Iowa 71; *Douglass v. Tullock*, 34 Iowa 262; *Jeffrey v. Brokaw*, 35 Iowa 505; *Barrett v. Love*, 48 Iowa 103; *Jones v. Randle*, 68 Ala. 258; *Lassitter v. Lee*, 68 Ala. 287; *Pugh v. Youngblood*, 69 Ala. 296.

Under the *Pennsylvania Act of 1804*, limiting the action to five years from the sale, it was held, in opposition to the previous decision of *Parish v. Stevens*, 3 S. & R. (Pa.) 298, that, as ejectment would not lie against a vacant or unoccupied tenement, the statute should be construed not to begin until the premises were occupied, upon

the principle that it could not have been intended to apply to a condition of affairs that precluded the right of action. *Waln v. Shearman*, 8 S. & R. (Pa.) 357; 11 Am. Dec. 624; *Cranmer v. Hall*, 4 W. & S. (Pa.) 37.

Subsequently, however, when the right to maintain ejectment for unoccupied premises had been conferred by statute, it was held that the statute began to run in favor of the purchaser at the time the sale was perfected by deed; he being constructively in possession from that time. *Robb v. Bowen*, 9 Pa. St. 71; *Johnston v. Jackson*, 70 Pa. St. 164; *Sheik v. McElroy*, 20 Pa. St. 31; *Burd v. Patterson*, 22 Pa. St. 219.

In *Arkansas*, the statute begins to run against the former owner, unless he is within the saving clause, at the date of sale, whether the purchaser is in the actual possession or not. *Mitchell v. Etter*, 22 Ark. 178.

In *Nebraska*, the statute commences from the time the tax-title claimant takes actual possession, and not from the time the deed is recorded. *Baldwin v. Merriam*, 16 Neb. 199.

The *Illinois* statute provides that "hereafter every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall for seven successive years after the passage of the act continue in such possession, and shall also, during such time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title." For cases arising under this act, see *Irving v. Brownell*, 11 Ill. 402; *Goeway v. Urig*, 18 Ill. 238; *Schenck v. White*, 53 Ill. 358; *Clark v. Lyon*, 45 Ill. 388;



In general, these provisions are applicable only to actions instituted for the recovery of the land, and not to equitable suits to quiet title thereto.<sup>1</sup> Nor have they any application, as against the original owner, where the person purchasing the tax title is precluded by his relation from becoming a purchaser; as, in such case, the question involved is one of fraud, and not the validity of the tax-sale proceedings.<sup>2</sup> Generally speaking, the intention and

*Bride v. Watt*, 23 Ill. 455; *Wettig v. Bowman*, 47 Ill. 17; *Hale v. Gladfelder*, 52 Ill. 91; *Webster v. Webster*, 55 Ill. 325; *McConnell v. Street*, 17 Ill. 253; *Hardin v. Crate*, 78 Ill. 533; *Elston v. Kennicott*, 46 Ill. 187; *Jaudon v. McDowell*, 56 Ill. 53; *Ross v. Coat*, 58 Ill. 53; *Chickering v. Failes*, 26 Ill. 507; *Jayne v. Gregg*, 42 Ill. 413; *Fell v. Cessford*, 26 Ill. 522; *Higgins v. Crosby*, 40 Ill. 261; *O'Neal v. Boone*, 53 Ill. 35; *Dickenson v. Breeden*, 30 Ill. 279; *Allen v. Munn*, 55 Ill. 486; *Morrison v. Norman*, 47 Ill. 477; *Moore v. Titman*, 44 Ill. 367; *Chiles v. Davis*, 58 Ill. 411; *Hinchman v. Whetstone*, 23 Ill. 185; *McConnell v. Knoepel*, 46 Ill. 519.

Under the *Missouri* Rev. Law of 1872, which does not confer upon the holder of a tax certificate the right of possession before receiving the deed, when such holder goes into possession under his certificate, he is a trespasser and his possession adverse, and the right of action against him accrues so soon as the entry is made, and the period of limitation begins to run from such event. *Parsons v. Viets*, 96 Mo. 408.

In *Kansas*, where the original owner in possession commences an action challenging the validity of a tax deed within the time prescribed by the statute, and the action fails otherwise than upon the merits, he may commence a new action therefor at any time within one year thereafter, although the period of limitations has expired, or if sued by the holder of the tax title, he may assert his rights in an answer by way of counter-claim. *Myers v. Coonradt*, 28 Kan. 211.

And if the holder of a tax deed begins his action for the recovery of the premises within the time limited by law, and transfers his title to another party and dismisses his action by leave of court, his transferee may commence a new action within one year after the dismissal. *Thornburgh v. Cole*, 27 Kan. 490; *Shively v. Beeson*, 24 Kan. 352.

Where, under the statute, the purchaser

can bring no suit for possession after five years from the sale, and the owner cannot, after that time, question the validity of the sale, and such purchaser has been prevented from asserting his rights in a court of law by unfounded and protracted litigation, until the statute has run against him, he is not without remedy in equity. *Union Mut. L. Ins. Co. v. Dice*, 14 Fed. Rep. 523.

1. *Farrar v. Clark*, 85 Ind. 449; *Gabe v. Root*, 93 Ind. 256; *Bowen v. Striker*, 87 Ind. 317; *Kraus v. Montgomery*, 114 Ind. 103; *Earle v. Simons*, 94 Ind. 573; *Stevenson v. Bonesteel*, 30 Iowa 286; *Walker v. Boh*, 32 Kan. 354. See also *Smith v. Smith*, 150 Mass. 73; *Tabler v. Callanan*, 49 Iowa 362; *Patton v. Luther*, 47 Iowa 236; *Shawler v. Johnson*, 52 Iowa 472.

The ten years limitation in the *Michigan* Laws 1842, p. 133, is not applicable in favor of one in possession under some other claim at the time of obtaining the tax deed; it intends that the party seeking the benefit shall enter into the actual possession under the tax deed. *Gilman v. Riopelle*, 18 Mich. 145.

The special limitation contained in section 1709, *Mississippi* Code 1871, has reference to sales by tax collectors, and to no others. *Clay v. Moore*, 65 Miss. 81. See also *Lewis v. Siebles*, 65 Miss. 251.

And the special limitation imposed by section 902 of the *Iowa* Code, applies only to actions between the holder of the tax title and the owner of the land at the time of the sale, or those claiming through him. Actions between the former and other claimants are controlled by the general Statute of Limitations. *Lockridge v. Daggett*, 54 Iowa 332; *Knight v. Campbell*, 76 Iowa 730.

2. *Jordan v. Brown*, 56 Iowa 281.

Thus in *Duffitt v. Tuhan*, 28 Kan. 292, it was held that where a tenant in the actual possession of lands fraudulently acquires a tax title thereto, the statute applicable to bar his landlord from maintaining an action to set aside

effect of these statutes are to cure all irregularities in the mode or manner of assessment, levy, and sale which, within the limitation fixed, might have invalidated the title;<sup>1</sup> they do not operate as a bar where there was no assessment, levy, or sale, in fact, or where the taxes were paid prior to the sale, or the land was not subject to taxation, or the like.<sup>2</sup> As a rule, these provisions operate in favor of the party in possession to bar the title of whichever

such title is the one for relief on the ground of fraud; and in such case the statute does not commence to run until the fraud is discovered, and for this purpose there is no constructive discovery; if the tenant fraudulently obtains a deed in his own name and records it, it is not notice to the landlord which would put the statute in motion; the landlord and his grantees would be entitled to the full time limited by law after the actual discovery. To the same effect are *Doyle v. Doyle*, 33 Kan. 721; *Carithers v. Weaver*, 7 Kan. 10; *Taylor v. Miles*, 5 Kan. 498; 9 Am. Dec. 558; *McGee v. Holmes*, 63 Miss. 50.

The same principle has been applied to the case of a purchase by an agent in fraud of his principal, *McMahon v. McGraw*, 26 Wis. 614; *Krutz v. Fisher*, 8 Kan. 90; a tenant in common in fraud of his co-tenants, *Austin v. Barrett*, 44 Iowa 488; and a trustee in fraud of the co-tenants of his *cestuis que trustent*, *Sorenson v. Davis*, 83 Iowa 405.

1. *Peirce v. Weare*, 41 Iowa 378; *Thomas v. Stickle*, 32 Iowa 71; *Monk v. Corbin*, 58 Iowa 503; *Bullis v. Marsh*, 56 Iowa 747; *Douglass v. Tullock*, 34 Iowa 262; *Harris v. Curran*, 32 Kan. 580; *Dodge v. Emmons*, 34 Kan. 732; *Francis v. Grote*, 14 Mo. App. 324; *Ensign v. Barse*, 107 N. Y. 329; *Coulter v. Stafford*, 48 Fed. Rep. 266; *Sprague v. Coenen*, 30 Wis. 209; *Morris v. Carmichael*, 68 Wis. 133; *Urquhart v. Wescott*, 65 Wis. 35.

In *Iowa*, failure to carry forward upon the tax list the delinquent taxes for which the sale sought to be avoided was made, is cured by the running of the statute. *Griffin v. Bruce*, 73 Iowa 126; *Collins v. Valleau*, 79 Iowa 626.

In *Pennsylvania*, the statute cures failure to file a surplus bond. *Iddings v. Cairns*, 2 Grant Cas. (Pa.) 88; *Burd v. Patterson*, 22 Pa. St. 219; *Rogers v. Johnson*, 67 Pa. St. 43.

In *Mississippi*, the running of the statute protects the title against any defective or irregular compliance with legislative, and not constitutional, requirements in connection with the sale;

as, for example, the failure of the board of supervisors to examine and receive the assessment roll at the required time, or sale of land on a wrong day. *Nevin v. Bailey*, 62 Miss. 433.

2. *Patton v. Luther*, 47 Iowa 236; *Early v. Whittingham*, 43 Iowa 162; *Nichols v. McGlathery*, 43 Iowa 189; *Case v. Albee*, 28 Iowa 277; *McNamara v. Estes*, 22 Iowa 246; *Taylor v. Miles*, 5 Kan. 498; 7 Am. Dec. 558; *Paine v. Spratley*, 5 Kan. 550; *Florida Sav. Bank v. Brittain*, 20 Fla. 507; *Townsend v. Edwards*, 25 Fla. 582; *Bradley v. Edwards*, 18 W. Va. 598; *Burdick v. Bingham*, 38 Minn. 482; *Wederstrandt v. Freyhan*, 34 La. Ann. 705; *Surget v. Newman*, 42 La. Ann. 777; *Swope v. Purdy*, 1 Dill. (U. S.) 349; *Feller v. Clark*, 36 Minn. 338; *Sanborn v. Cooper*, 31 Minn. 307; *Metcalfe v. Perry*, 66 Miss. 68.

Where the assessment was made by the officers of the town in which the lands were not, and never had been situated, and whose officers had never before exercised jurisdiction over the land, a deed issued upon a sale based upon such assessment is void, and the Statute of Limitations cannot be invoked in its support. *Wadleigh v. Marathon County Bank*, 58 Wis. 546; *Smith v. Sherry*, 54 Wis. 114.

In *Iowa*, the statute does not cure the failure to give the requisite notice of the expiration of the period of redemption. *Wilson v. Russell*, 73 Iowa 395. Where the deed recites as proof of service of the expiration notice, an affidavit of the publisher of a newspaper, showing the publication of the same, it is sufficient, although the proper proof of service was not filed with the treasurer, to put the statute in motion. *Bolin v. Francis*, 72 Iowa 619; *Trulock v. Bentley*, 67 Iowa 602.

In *Louisiana*, the assessment of the land in the name of another than the true owner is a radical defect not cured by the statute. *Lague v. Boagni*, 32 La. Ann. 912; *Davenport v. Knox*, 34 La. Ann. 407.

But in *Barrow v. Wilson*, 39 La. Ann.

party—the original owner, or the tax-title claimant—is, during the period prescribed, under the necessity of resorting to legal proceedings to obtain possession.<sup>1</sup>

When neither party is in actual possession, a valid tax deed draws after it constructive legal possession, and makes it incumbent upon the original owner to bring his action within the period prescribed; and failing to do this, the title of the grantee in the tax deed becomes perfect, as if he had been in actual possession.<sup>2</sup>

403, where the property belonged to one Hanley, and the assessment was made in the name of Handley, and the purchaser had open and notorious possession under the tax title for the requisite period, the defect in the assessment was held to be cured by the statute. In this case, it was also held that the want of personal notice to the owner, his agent or curator, was only a relative nullity, and cured by the statute, *Aff'g Allen v. Courett*, 24 La. Ann. 24; *Munholland v. Scott*, 33 La. Ann. 1045, and *overruling Person v. O'Neal*, 32 La. Ann. 237.

Under section 92 of the *Alabama* Rev. Laws 1858, making the deed, when executed in substantial conformity to its provisions, *prima facie* evidence that the land described therein was subject to taxation for the years stated therein, and that the taxes were not paid prior to the sale, the Statute of Limitations of five years is a good defense to the purchaser in possession, although the taxes had been paid at the time of sale. *Lassitter v. Lee*, 68 Ala. 287. See also *Pugh v. Youngblood*, 69 Ala. 296.

And in *Missouri*, where the deed is valid on its face and has been recorded for more than three years before the institution of the suit, the special Statute of Limitations is a complete defense, and evidence is inadmissible to show that there was no assessment or levy of taxes on the land, or any judgment therefor, for the year for which the land was sold. *Hill v. Atterbury*, 88 Mo. 114.

In *Kansas*, a tax deed regular on its face, containing a perfect description of the land, and of record, the time prescribed, is protected by the statute from impeachment by evidence that the description on the assessment roll and in the certificate of sale are fatally defective. *Maxson v. Huston*, 22 Kan. 643. But the statute has no application to a case where there had been a tender of the full amount required to redeem before

the execution and delivery of the tax deed. *Wilson v. Reasoner*, 37 Kan. 663.

In *Wisconsin*, it is held that where the grantee has been in the possession under his deed for three years next succeeding the record thereof, the deed may not be impeached because of an invalid assessment, *Oconto County v. Jerrard*, 46 Wis. 317; *Marsh v. Clark*, County, 42 Wis. 502; or because the price of a *United States* revenue stamp was included in the amount for which the land was sold. *Milledge v. Coleman*, 47 Wis. 184.

In *Knox v. Cleveland*, 13 Wis. 245, it is suggested by the chief justice, that the only condition of things to which the statute will not apply is the want of authority *ab initio* of the taxing officers to put the taxing power in motion.

1. *Knox v. Cleveland*, 13 Wis. 245; *Falkner v. Dorman*, 7 Wis. 388; *Parish v. Eager*, 15 Wis. 532; *Swain v. Comstock*, 18 Wis. 463; *Lybrand v. Haney*, 31 Wis. 230; *Barrett v. Holmes*, 102 U. S. 651; *Lewis v. Disher*, 32 Wis. 504; *Stephenson v. Wilson*, 50 Wis. 95; *Wilson v. Henry*, 40 Wis. 594; *Pepper v. O'Dowd*, 39 Wis. 538; *Coleman v. Eldred*, 44 Wis. 210; *Smith v. Ford*, 48 Wis. 117; *Brown v. Painter*, 38 Iowa 456; *Hintrager v. Hennessy*, 46 Iowa 600; *Brett v. Farr*, 66 Iowa 684; *LaRue v. King*, 74 Iowa 288; *Wallace v. Sexton*, 44 Iowa 257; *Laverty v. Sexton*, 41 Iowa 435; *Peck v. Sexton*, 41 Iowa 566; *Hubbard v. Johnson*, 9 Kan. 632; *Griffith v. Carter*, 64 Iowa 193; *Ellsworth v. Low*, 62 Iowa 178; *McCaughan v. Tatman*, 53 Iowa 508; *Spurlock v. Dougherty*, 81 Mo. 171; *Groesbeck v. Seeley*, 13 Mich. 329; *Case v. Dean*, 16 Mich. 12; *Waddill v. Watton*, 42 La. Ann. 763; *Parr v. Matthews*, 50 Ark. 390; *Thornburgh v. Cole*, 27 Kan. 490; *Bowman v. Cockrill*, 6 Kan. 311; *Corbin v. Bronson*, 28 Kan. 532; *Smith v. Jones*, 37 Kan. 292; *Hole v. Rittenhouse*, 19 Pa. St. 305.

2. *Hill v. Kricke*, 11 Wis. 442; *Whitney v. Marshall*, 17 Wis. 174; *Austin*

It has been held that when the actual possession is disputed, and the original owner constantly contests with the tax-title claimant for it, and exercises frequent and numerous acts of ownership and possession during the period of limitation, the necessity for action within the prescribed time is upon the tax-title claimant.<sup>1</sup>

If, however, the deed is void on its face, the statute will not run in favor of the holder thereof, although he has been in actual, open and notorious possession of the premises for the full statutory period.<sup>2</sup>

The statute prescribing a period of limitation may be made retrospective, and apply to titles founded upon sales made when there was no limitation;<sup>3</sup> and the period existing at the time of sale may be shortened by subsequent legislation;<sup>4</sup> provided, in

*v. Holt*, 32 Wis. 478; *Warren v. Putnam*, 63 Wis. 414; *Lawrence v. Kenney*, 32 Wis. 281; *Gunnison v. Hoehne*, 18 Wis. 268; *Cutler v. Hurlbut*, 29 Wis. 152; *Parish v. Eager*, 15 Wis. 532; *Dean v. Earley*, 15 Wis. 100; *Knox v. Cleveland*, 13 Wis. 245; *Goslee v. Tearney*, 52 Iowa 455; *Moingona Coal Co. v. Blair*, 51 Iowa 447; *Rice v. Had-dock*, 70 Iowa 318; *Bullis v. Marsh*, 56 Iowa 747; *Monk v. Corbin*, 58 Iowa 503; *McCaughan v. Tatman*, 53 Iowa 508; *Hill v. Atterbury*, 88 Mo. 114; *Bronson v. St. Croix Lumber Co.*, 44 Minn. 348; *Harris v. Curran*, 32 Kan. 580; *Myers v. Coonradt*, 28 Kan. 215; *Case v. Frazier*, 30 Kan. 345; *McFadden v. Goff*, 32 Kan. 415; *Doyle v. Doyle*, 33 Kan. 725; *Coleman v. Pash-tigo Lumber Co.*, 30 Fed. Rep. 317.

In *Wisconsin*, if the deed is void on its face, and the premises remain vacant and unoccupied for the statutory period, the tax title is barred, as the constructive possession is with the original owner, and the necessity for action on the tax-title claimant. *Cutler v. Hurlbut*, 29 Wis. 152. See also *Lain v. Shepardson*, 18 Wis. 59.

1. *Jones v. Collins*, 16 Wis. 594; *Taylor v. Rountree*, 28 Wis. 391.

2. *Waterson v. Devoe*, 18 Kan. 223; *Larkin v. Wilson*, 28 Kan. 513; *Red-field v. Parks*, 132 U. S. 239; *Moore v. Brown*, 11 How. (U. S.) 414; *Bendexen v. Fenton*, 21 Neb. 184; *Housel v. Boggs*, 17 Neb. 94; *Towle v. Holt*, 14 Neb. 221; *Berrendo Stock Co. v. Kaiser*, 66 Tex. 352; *Hopkins v. Scott*, 86 Mo. 140; *Pearce v. Tittsworth*, 87 Mo. 635; *Callahan v. Davis*, 90 Mo. 78; *Duff v. Neilson*, 90 Mo. 93; *Mason v. Crowder*, 85 Mo. 526; *Richards v. Thompson*, 43 Kan. 209; *Daniels v. Case*, 45 Fed.

Rep. 843; *Kilpatrick v. Sisneros*, 23 Tex. 113; *Wofford v. McKinna*, 23 Tex. 36; 76 Am. Dec. 53; *Beltram v. Vil-lere* (La. 1888), 4 So. Rep. 506; *Clay v. Moore*, 65 Miss. 81; *Sheehy v. Hinds*, 27 Minn. 259; *Hurd v. Brisner*, 3 Wash. 1; *McGavock v. Pollack*, 13 Neb. 535; *Shoat v. Walker*, 6 Kan. 65; *Sapp v. Morrill*, 8 Kan. 677; *Hubbard v. John-son*, 9 Kan. 634; *Hall v. Dodge*, 18 Kan. 280; *Entrekin v. Chambers*, 11 Kan. 368.

In *Gomer v. Chaffee*, 6 Colo. 314, *Elbert, C. J.*, said: "It is difficult to see how the Statute of Limitations can avail a defendant holding a void deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void. It did not give him constructive possession, nor the right of actual possession."

But in *Wisconsin*, if the premises are actually occupied by the tax-title claimant for the period of limitation next after recording the deed, all opposing claims are barred, notwithstanding the deed may be void on its face. *Edgerton v. Bird*, 6 Wis. 527; 70 Am. Dec. 473; *Lindsay v. Fay*, 25 Wis. 460; *Peck v. Comstock*, 6 Fed. Rep. 22; *Leffing-well v. Warren*, 2 Black (U. S.) 599.

3. See generally, *LIMITATION OF ACTIONS*, vol. 13, p. 667; *Barrow v. Wilson*, 39 La. Ann. 403; *Smith v. Bryan*, 74 Ind. 515; *Dale v. Frisbie*, 59 Ind. 530; *State v. Clark*, 7 Ind. 468. The *Indian* cases hold that where the whole time allowed by the statute has expired before its passage, the statute does not apply until the time allowed by it has run.

4. *Howell v. Howell*, 15 Wis. 55; *Parker v. Kane*, 4 Wis. 1; 65 Am. Dec. 283; *Smith v. Packard*, 12 Wis. 371;

either case, that a reasonable portion of the time limited remains after the passage of the statute in which the right may be asserted. And when the statute existing at the time of sale has not fully run, the period may be extended, as such legislation affects the remedy and does not impair the obligation of the contract.<sup>1</sup> But when the bar is complete in favor of the tax-title claimant, there is vested in him an absolute title which may not be impaired by subsequent legislation.<sup>2</sup>

The statutes usually contain a saving clause in favor of owners under disability at the time of sale.<sup>3</sup> But a disability of the owner at the time of sale cannot have the effect to extend the time within which the tax-title claimant is required to bring his action for the recovery of the property; the time is extended to the person under disability because he is supposed not to be cognizant of his rights, or not able to assert them; but rights may be asserted against a person under disability, and the same reason exists why the claimant of the rights should be diligent in asserting them, as in a case where they are to be asserted against a person not under disability.<sup>4</sup>

Under a statute giving a minor five years after the removal of his disability to institute his action for the recovery of the land from the tax-title claimant, it was held that an action by the minor's grantee was barred in five years from the date of the conveyance.<sup>5</sup>

**TEACH; TEACHER**—(See also EDUCATION, vol. 6, p. 158; PARENT AND CHILD, vol. 17, p. 331; SCHOOLS, vol. 21, p. 748).—A teacher is not an officer in the ordinary sense of the word. He is not usually elected or appointed, but is employed—contracted with. He has duties to perform incident to his employment, but they are not official duties and he is not under oath.<sup>6</sup>

**TEAM**—(See also EXECUTIONS, vol. 7, p. 138; SPAN, vol. 22, p. 840).—A team, according to the definition given by some

Mecklem v. Blake, 22 Wis. 495; 99 Am. Dec. 68. See also Osborn v. Jaines, 17 Wis. 573.

1. Keith v. Keith, 26 Kan. 26; Long v. Wolf, 25 Kan. 522; Maxson v. Huston, 22 Kan. 643; Jordan v. Kyle, 27 Kan. 193; Martz v. Newton, 29 Kan. 331.

2. Sprecher v. Wakely, 11 Wis. 432; Hill v. Kricke, 11 Wis. 442; Knox v. Cleveland, 13 Wis. 245; Parish v. Eager, 15 Wis. 532; Smith v. Cleveland, 17 Wis. 556; Cutler v. Hurlbut, 29 Wis. 152; Pleasants v. Rohrer, 17 Wis. 577; Lindsay v. Fay, 28 Wis. 177; Sigman v. Lundy, 66 Miss. 522; Gibson v. Berry, 66 Wis. 515. But see Kipp v. Johnson, 31 Minn. 360.

3. Kearns v. Collins, 40 La. Ann. 453; Barrow v. Wilson, 39 La. Ann.

403; McConnel v. Knoepel, 46 Ill. 519; Smith v. Bryan, 74 Ind. 515.

4. McCaughan v. Tatman, 53 Iowa 508.

5. McCaughan v. Tatman, 53 Iowa 508.

6. Seymour v. Over-River School Dist., 53 Conn. 509.

**Teach and Instruct.**—In the case of an outdoor apprenticeship, there is an implication that the master is to perform his covenant "to teach and instruct" at the place where he and his apprentice and the latter's parent resided at the date of the deed; Eaton v. Western, 9 Q. B. Div. 636, overruling Royce v. Charlton, 8 Q. B. Div. 1; but it would seem there would be no such implication in an indoor appren-

authorities,<sup>1</sup> is "two or more horses, oxen or other beasts harnessed together to the same vehicle, for drawing." This definition, however, hardly coincides with the various interpretations given to the word, as used in different statutes, by the courts,<sup>2</sup> as will appear from an examination of the cases given in the note.<sup>3</sup>

ticeship. *Eaton v. Western*, 9 Q. B. Div. 636. See also APPRENTICES, vol. 1, p. 636.

1. Webster, followed in *Inman v. Chicago*, etc., R. Co., 60 Iowa 462.

2. Freeman on Ex. (2d ed.), § 227.

3. In a statute allowing damages for injury happening by reason of an insufficient highway, to any person, team or carriage, the term "team" has been held to include a horse driven with other horses unharnessed and loose along the road. *Elliott v. Lisbon*, 57 N. H. 27.

And within the same statute it was held that one may recover for injuries to a sled and load of coal thereon. The court, by Sargeant, J., said: "We have no doubt that the legislature intended to include in the word 'team,' in the first section, the animal or animals that drew or carried the load, whether one or many, or that were driven over the highway, whether in harness or otherwise." *Conway v. Jefferson*, 46 N. H. 523.

A *Connecticut* statute provided that, "When any vehicle of the above description (that is, any 'vehicle for the conveyance of persons') shall meet or overtake a *team* in the public highway and shall have occasion to pass the same, the teamster shall," etc., etc. It was contended for the plaintiff that the term "team," as used in the statute, included and described a vehicle driven by the plaintiff and not designed for nor carrying any load. The court, while admitting that ordinarily a "team" would include such a vehicle, held that in the statute in question the term meant a vehicle, with the animals drawing it, used for carrying loads, as distinguished from one used for carrying persons. It said: "It is enacted in the third section that when 'any vehicle of the above description shall meet or overtake a team, the teamster shall, when necessary and practicable, turn his team,' etc., etc. Is it possible that the legislature meant to make no distinction between a 'vehicle for the conveyance of persons,' named in the first section, and 'a team,' named in the third section? We think

the distinction is perfectly obvious. One has reference to the conveyance of persons—the other, to property. When vehicles for the conveyance of persons meet, each is to turn to the right. When such vehicles meet or overtake a team, the teamster shall, when necessary and practicable, turn his team so far on one side of the road as to give such vehicle an opportunity to pass, thus giving the teamster his choice as to the side of the road and not compelling him to turn to the right. Suppose these parties had met on the public highway, and the defendant had turned to the left in order to pass; would the plaintiff have yielded to him, and allowed him to choose his side of the road, because he was a teamster and driving a team?" *Hotchkiss v. Hoy*, 41 Conn. 577.

**The Driver is no Part of the Team.**—Webst. Dict.; *Dexter v. Canton Toll-bridge Co.*, 79 Me. 563, citing Webst. Dict. That case was upon the *Maine* statute, providing that a person should not be entitled to recover damages for the injuries sustained by the breaking down of a toll-bridge, if the weight he was transporting "exceeded forty-five hundred pounds, exclusive of the team and carriage." It was held that the driver formed no part of the team, and that his weight was to be computed as part of the load.

**Exemption Statutes.**—Within the meaning of an exemption law, a team is one or more horses, with their harness and vehicle to which they are customarily attached for use. *Dains v. Prosser*, 32 Barb. (N. Y.) 291; *Brown v. Davis*, 9 Hun (N. Y.) 44.

**One Horse.**—It has been settled that "one horse" is covered by and included in the word "team," as used in the *New York* statutes exempting the "team" of a householder, etc., from execution. *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Wilcox v. Howley*, 31 N. Y. 653; *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 505; *Knapp v. O'Neil*, 46 Hun (N. Y.) 317; *Finnin v. Malloy*, 33 N. Y. Super. Ct. 182; *Hoyt v. Van Alostyne*, 15 Barb. (N. Y.) 568; *Hutchinson v.*

**TEAMSTER.**—One who drives horses and a wagon for the purpose of carrying goods for hire.<sup>1</sup> Also one who drives a team.<sup>2</sup>

Chamberlin, 11 N. Y. Leg. Obs. 248. In the last case it was said: "If this were not so, a man so poor that he could procure but a single horse to assist in supporting his family, could not have the benefit of the exemption. But if he had two horses, they would be protected only while in actual use to make a team; it is as necessary that the horses should be harnessed together as that there should be more than one. Again, suppose that while two horses are harnessed together and in actual use, one of them should meet with an accident and be killed, or be suddenly taken sick and die, the other would thereby become instantly liable to be seized for debt."

**Harness and Vehicle.**—In *New York* it is clear that the word "team," is not confined to the beasts harnessed together. It embraces the harness and vehicle with which the beasts are commonly used, and without which they would be of comparatively little value to the debtor. *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Eastman v. Caswell*, 8 How. Pr. (N. Y.) 75; *Van Buren v. Loper*, 29 Barb. (N. Y.) 388; *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Hutchinson v. Chamberlin*, 11 N. Y. Leg. Obs. 248. *Contra*, *Morse v. Keyes*, 6 How. Pr. (N. Y.) 18.

But the vehicle must be shown affirmatively to be part of a "team," *i. e.*, it must be the vehicle to which "one or two horses are customarily attached for use." *Brown v. Davis*, 9 Hun (N. Y.) 43.

**Team-Work.**—Some of the statutes exempt a team "kept and used for team-work." "Team-work means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling, the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes. It is plainly distinguishable from family use and convenience, pleasure, exercise, or recreation; none of these uses of a horse are suggested by the expression 'kept and used for team-work.'" *Hickok v. Thayer*, 49 Vt. 370.

In *Webster v. Orne*, 45 Vt. 40, it was held, where the owner of a horse had driven it himself and let others drive it; but afterwards, and prior to the attachment, had used it upon his farm for farm work, that it was exempt as engaged in team-work. See also *Mundell v. Hammond*, 40 Vt. 647; *Sullivan v. Davis*, 50 Vt. 646; *Rowell v. Powell*, 53 Vt. 304.

A lessee's covenant in an agricultural lease, to provide "team-work," extends to other than agricultural work — *e. g.*, hauling coals; but it does not oblige the lessee to find a cart, plough, or other machine that may be necessary for the performance of the work. *Marlborough v. Osborn*, 5 B. & S. 67.

**Team Embraces the Idea of Live Stock.**—In *Inman v. Chicago*, etc., R. Co., 60 Iowa 460, the court, by Day, C. J., said: "Whilst it may be admitted that the term stock does not embrace the idea of a team, it cannot, nevertheless, be denied that the term 'team' embraces the idea of live stock. The word team means two or more horses, oxen or other beasts, harnessed together to the same vehicle for driving. A team, therefore, is composed of live stock, and cannot exist without it. It would be exceedingly technical to hold that two horses, when harnessed and hitched together to a wagon, cease to fall under the designation of live stock."

1. He is liable as a common carrier. *Story on Bailments*, § 496. See also *CARRIERS OF GOODS*, vol. 2, p. 770.

2. **Teamster in an Exemption Statute.**—In *Elder v. Williams*, 16 Nev. 416, it was said: "The court instructed the jury that, 'To be a teamster, within the meaning of the law and of the statute concerning exemptions, a man need not necessarily drive his team. In the same sense of the statute, one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one.' We think the instruction is correct." And see generally, upon the construction of the term "teamster," as used in an exemption statute, the following *California* cases: *Brusie v. Griffith*, 34 Cal. 306; 91 Am. Dec. 695; *Dove v. Nunan*, 62 Cal. 400; *Forsyth v. Bower*, 54 Cal. 639. See also **TEAM**.

## TELEGRAPHS AND TELEPHONES.

- I. Definition, 745.
- II. Legal Status of Telegraphs and Telephones, 747.
  1. *As a Public Use*, 747.
  2. *As Common Carriers*, 747.
  3. *Are Not Insurers*, 748.
  4. *Are Public Servants and Must Serve the Public Impartially and in Good Faith*, 750.
  5. *As Ordinary Bailees for Hire*, 751.
- III. Corporate Rights and Franchises (See also CORPORATIONS, vol. 4, p. 184; FRANCHISES, vol. 8, p. 584; FOREIGN CORPORATIONS, vol. 8, p. 329), 751.
  1. *Power of Company to Alienate Franchise*, 751.
  2. *Stocks, Bonds, and Mortgages* (See RAILROAD SECURITIES, vol. 19, p. 694; STOCK, vol. 23, p. 582; STOCKHOLDERS, vol. 23, p. 776), 752.
- IV. Construction and Maintenance of Telegraph and Telephone Lines, 752.
  1. *Right of Way*, 752.
    - a. *In Streets and Highways*, 752.
    - b. *On Railroad Right of Way*, 756.
    - c. *Federal and State Grants of Right of Way*, 758.
    - d. *In General*, 760.
  2. *Liability for Injuries Caused by Improper Construction*, 761.
  3. *Injury to Telegraph or Telephone Lines*, 763.
  4. *Interference of Other Electric Appliances with the Telephone*, 764.
- V. State Regulation and Control, 767.
  1. *Generally*, 767.
  2. *Regulation of Charges*, 771.
  3. *Municipal Control—License Fees*, 773.
- VI. Federal Control, 774.
- VII. Duty of Telephone Companies to Furnish Equal Facilities to All, 775.
- VIII. Liability of Telegraph Companies for Negligent Transmission or Delivery, 778.
  1. *General View of Company's Duty*, 778.
    - a. *Duty to Transmit Without Error or Delay*, 780.
      - b. *Duty to Deliver*, 780.
  2. *The Company's Duty and Liability as Affected by Regulations or Contractual Stipulations*, 783.
    - u. *Right of Company to Provide Reasonable Rules and Regulations as to Conduct of Its Business*, 783.
      - (1) *Regulations as to Office Hours*, 785.
    - b. *Stipulations in Contract of Sending*, 786.
      - (1) *General Rule as to Validity*, 786.
      - (2) *Stipulations as to Repeating Messages*, 790.
      - (3) *Requiring Claims to be Presented Within a Certain Time*, 798.
      - (4) *Limiting Liability to a Specified Amount—Night Messages*, 803.
      - (5) *Other Stipulations*, 803.
    - c. *Evidence of Assent of Sender or Addressee to Printed Stipulations*, 804.
- IX. Actions for Damages Resulting From Negligent Transmission or Delay, 824.
  1. *Parties to the Action*, 824.
    - a. *Right of Sender to Sue*, 824.
    - b. *Right of Addressee*, 824.
    - c. *Right of Third Party*, 828.
    - d. *Under Special Statutes*, 829.
  2. *Matters of Pleading, Practice, and Evidence* (See also SERVICE OF PROCESS, vol. 22, p. 107 et seq.), 830.



- a. *Character of the Action*, 830.
- b. *Presumption of Negligence—Burden of Proof* (See also BURDEN OF PROOF, vol. 2, p. 649; OPEN AND CLOSE, vol. 17, p. 195), 831.
- c. *Pleading*, 832.
  - (1) *In Actions for Damages*, 832.
  - (2) *In Actions for Statutory Penalty*, 833.
- d. *Evidence*, 834.
- e. *Instructions* (See INSTRUCTIONS, vol. 11, p. 236; NEGLIGENCE, vol. 16, pp. 463–68; QUESTIONS OF LAW AND FACT, vol. 19, p. 598), 836.
- 3. *Measure of Damages*, 836.
  - a. *General Rule*, 836.
  - b. *What are Remote or Speculative Damages*, 838.
  - c. *Effect of Special Circumstances*, 841.
  - d. *Where Message is in Cipher or is Otherwise Unintelligible*, 842.
    - (1) *The General Doctrine*, 842.
    - (2) *Where the Message Itself Contains the Only Evidence of Its Importance*, 845.
    - (3) *Where the Company Has External Evidence of the Importance of the Message*, 846.
  - e. *Loss of Expected Profits in Transactions of Sale*, 848.
  - f. *Loss of Expected Employment or of Professional Fees*, 852.
  - g. *Losses Which Might Have Been Prevented but for the Negligence of the Company*, 854.
  - h. *Recovery for Mental Anguish*, 855.
  - i. *Exemplary and Excessive Damages*, 864.
- X. *Statutory Penalties*, 867.
  - 1. *Generally*, 867.
  - 2. *Particular Statutes*, 869.
- XI. *Taxation*, 871.
  - 1. *Of Telegraph Companies*, 871. [875.]
  - 2. *Of Telephone Companies*, 875.
- XII. *Telegrams in Evidence*, 876.
  - 1. *Admissibility*, 876.
  - 2. *Primary and Secondary Evidence* (See also LOST PAPERS, vol. 13, p. 1059; SECONDARY EVIDENCE, vol. 21, p. 984), 877.
  - 3. *Presumptions Arising from the Sending of a Telegram*, 881.
  - 4. *Telegrams as Privileged Communications*, 882.
- XIII. *Telephonic Communications as Evidence*, 885.
- XIV. *Contracts by Telegraph*, 886.
  - 1. *In General*, 886.
  - 2. *Telegraph Company Ordinarily Agent of Sender*, 890.
- XV. *District Telegraph Companies*, 893.

**I. DEFINITION.**—A telegraph is an apparatus or machine used to transmit intelligence to a distance by means of electricity. A telegram is a message or dispatch transmitted by the telegraph.<sup>1</sup>

**1. Of Telegraphs.**—Gray on Telegraphs, § 1; Chesapeake, etc., Teleph. Co. v. Baltimore, etc., Tel. Co., 66 Md. 399; 16 Am. & Eng. Corp. Cas. 213; 59 Am. Rep. 167; Anderson's L. Dict. "An instrument or apparatus, which by means of iron wires, conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning." Webster's Dict.

The word was at one time used to indicate "a machine for communicating intelligence from a distance by various signals or movements previously agreed on; which signals represent letters, words or ideas, which can be transmit-

ted from one station to another as far as the signals can be seen." Webster's Dict.

"The word 'telegraph' is now generally understood as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: 1st, a battery or other source of electric power; 2d, a line wire or conductor for conveying the electric current from one station to another; 3d, the apparatus for transmitting, interrupting, and if necessary, reversing, the electric current at pleasure; and 4th, the indicator, or signalling instrument. See Imperial Dict." Hock-

The term telephone, in a general sense, applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. Technically it is restricted to an instrument or device which transmits the voice of the speaker by means of electricity.<sup>1</sup>

A question as to the exact meaning of the word "telegraph" is whether, when used in a statute, it includes telephones. The definition given above would include a telephone, and, as a rule, a statute concerning telegraphs, in the absence of special controlling conditions, may apply to telephones as well.<sup>2</sup>

ett v. State, 105 Ind. 250; 11 Am. & Eng. Corp. Cas. 577; 55 Am. Rep. 210.

1. Of Telephones. — Anderson's L. Dict.

An *Indiana* statute regulating telephones provided that the charge for a single telephone for one person should not exceed three dollars per month. The company exceeded this charge, and when indicted for so doing, defended on the ground that they had furnished more than one instrument to the relator. But all the instruments furnished, together constituted nothing more than the apparatus ordinarily used for telephonic communication. It was held that the word "telephone" embraced the whole instrument, as made up of these parts, and that the statute had been violated. The court, by Niblack, J., said: "In a general sense, the word telephone applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tubes used for conveying the sounds of the voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or discs, by which the voice is carried to a distant point, are, strictly speaking, telephones. But since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraph wires. In a secondary sense, however, being the sense in which it is most commonly understood, the word 'telephone' constitutes a generic term, having reference to the art of telephony as an institution, but more particularly to the apparatus as an entirety, ordinarily used in the transmission, as well as in the reception, of telephonic messages." *Hockett v. State*, 105 Ind. 559; 11 Am. & Eng. Corp. Cas. 577; 55 Am. Rep. 209. See also *Central Union Teleph. Co. v. Bradbury*, 106 Ind. 1.

2. "Telegraph" Embraces Telephones.

—*Bell Teleph. Co. v. Com.* (Pa. 1886), 3 Atl. Rep. 825; *Cumberland Teleph., etc., Co. v. United Electric R. Co.*, 42 Fed. Rep. 273; 43 Am. & Eng. R. Cas. 194; *Roake v. American Teleph., etc., Co.*, 41 N. J. Eq. 35; 12 Am. & Eng. Corp. Cas. 342; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Roberts v. Wisconsin Teleph. Co.*, 77 Wis. 589; 20 Am. St. Rep. 143. Telegraph "includes any apparatus for transmitting messages or other communications by means of electric signals." Anderson's L. Dict. Thus, under an "act to incorporate and regulate telegraph companies," a corporation may be organized to operate a telephone line and may condemn a route for it. *State v. Central New Jersey Teleph. Co.*, 53 N. J. L. 341; 35 Am. & Eng. Corp. Cas. 1; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32; 8 Am. & Eng. Corp. Cas. 538. And this, although the telephone was not known when the act was passed. *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *Atty. Gen'l v. Edison Teleph. Co.*, 6 Q. B. Div. 244; 29 Moak's Rep. 602. So, also, a statute providing for the locality of suits against telegraph companies, includes telephone companies. *Franklin v. Northwestern Teleph. Co.*, 69 Iowa 97.

Telephone companies are also held to come within the provisions of statutes concerning the taxation of telegraph companies. *Iowa Union Teleph. Co. v. Board of Equalization*, 67 Iowa 250.

Telephone companies are bound by the provisions of a statute forbidding discrimination by telegraph companies. And, under such a statute, letters patent to the telephone company afford no excuse for discrimination. *Chesapeake, etc., Teleph. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399; 16 Am. & Eng. Corp. Cas. 213; 59 Am. Rep. 167; *State v. Bell Teleph. Co.*, 36 Ohio St. 296; 38 Am. Rep. 583; *infra*, this title, *Duty*

**II. LEGAL STATUS OF TELEGRAPHS AND TELEPHONES**—1. **As a Public Use.**—The telegraph is such a public use as to justify the exercise of the right of eminent domain in its behalf; the same is true of the telephone, where it is not wholly a private affair, the use of which is denied to the public.<sup>1</sup> Whatever may be the character of any particular line, its owners, by accepting the benefits of a law extending to them the right of eminent domain, make it a public use and place themselves under obligations to permit the use of their lines by all persons, under proper and reasonable regulations.<sup>2</sup> A telegraph or telephone company is engaged in a business "affected with a public interest," within the principle which authorizes the state to regulate the charges of companies engaged in such business.<sup>3</sup>

2. **As Common Carriers.**—Various theories have been propounded as to the legal status of telegraph and telephone companies, and as to their analogy to common carriers, in order to determine whether or not telegraph companies are insurers of the correct transmission of messages, and whether such companies, and telephone companies as well, are bound to serve all who apply to them offering compliance with their regulations. The rule is that they are not insurers, but are so far common carriers as to be bound to serve the public with impartiality, and to exercise due diligence in the discharge of their public duties.<sup>4</sup>

*of Telephone Companies to Furnish Equal Facilities to All.*

**Message Through a Telephone Considered a Telegram.**—In *Atty. Gen'l v. Edison Teleph. Co.*, 6 Q. B. Div. 244; 29 Moak's Rep. 602, in construing the Telegraph Acts of 1868 and 1869, empowering the postmaster-general to work and maintain telegraphs for the benefit and use of the public (31 & 32 Vict., ch. 110), it was held that a conversation through a telephone was a "message," or, at all events, a "communication transmitted by a telegraph," and therefore a "telegram" within the meaning of those acts; and that since the company made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privilege of transmitting telegrams granted to the postmaster-general by those acts.

1. **Eminent Domain.**—New Orleans, etc., *R. Co. v. Southern, etc.*, Tel. Co., 53 Ala. 211; *State v. American, etc.*, News Co., 43 N. J. L. 381; *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401; *Pierce v. Drew*, 136 Mass. 75; 8 Am. & Eng. Corp. Cas. 85; 49 Am. Rep. 7; **EMINENT DOMAIN**, vol. 6, p. 525; *Lewis on Em. Dom.*, § 172; *Mills on Em. Dom.*, § 21. See also *Chicago, etc.*,

*Bridge Co. v. Pacific Mut. Tel. Co.*, 36 Kan. 113; 16 Am. & Eng. Corp. Cas. 271; *Tiffany v. U. S. Illuminating Co.*, 67 How. Pr. (N. Y. Super. Ct.) 73; *American Teleph., etc., Co. v. Pearce*, 71 Md. 535; 28 Am. St. Rep. 227.

**Character of Property in Electric Appliances.**—See *Keating Imp. Co. v. Marshall Electric Light, etc., Co.*, 74 Tex. 605, holding that the poles, wires and lamps used in an electric light line are real property. But in another case it is held that telegraph wires, when fixed to the poles, do not lose their character as personal property and become part of the realty, so as to be covered by a pre-existing mortgage, where it is the intention of the parties, as fixed by agreement, that they shall remain personalty and be subject to removal. *Boston Safe Deposit, etc., Co. v. Bankers', etc., Tel. Co.*, 36 Fed. Rep. 288. See also in this connection, *Mulholland v. Thomson-Houston Electric Light Co.*, 66 Miss. 339.

2. *State v. American, etc., News Co.*, 43 N. J. L. 381; *infra*, this title, *State Regulation and Control*.

3. See *infra*, this title, *Regulation of Charges*.

4. See *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp.

**3. Are Not Insurers.**—The question in this connection can relate only to telegraph companies.<sup>1</sup> There is authority for the view that such companies are common carriers, possessing the rights and subject to the obligations belonging to that relation, and that they are insurers of the correctness of messages transmitted, and are liable for all losses resulting from an incorrect transmission, unless occasioned by an act of God or of the public enemy.<sup>2</sup> The reasons, however, which gave rise to the stringent rule of liability imposed upon carriers of goods at common law, do not apply to telegraph companies, and there are material differences in the methods in which the business of the two agencies is conducted. The proposition that telegraph companies are insurers of the correctness of dispatches transmitted is therefore now regarded as unsound, and their liability is limited to losses caused by their negligence or willful default.<sup>3</sup> Telegraph companies, however,

Cas. 568; 15 Am. St. Rep. 917; Western Union Tel. Co. v. Reynolds, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 182; 46 Am. Rep. 715.

1. The telephone companies do not offer to transmit messages, but merely furnish to subscribers the means of transmitting their own by word of mouth. Some cases have arisen in which the parties were not able to communicate directly, and the person at the central office of the company volunteered to act as a go-between; but the liability of the company in such a case has never been adjudicated. See *Oskamp v. Gadsden*, 35 Neb. 7; *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901; *infra*, this title, *Telephonic Communications as Evidence*.

2. **Authorities Holding that a Telegraph Company is a Common Carrier and Therefore an Insurer.**—The leading case in support of this view is that of *Parks v. Alta*, etc., Tel. Co., 13 Cal. 422; 73 Am. Dec. 589, decided in 1859. The court, by Baldwin, J., said: "The rules of law which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain thing for a given price. There is no difference, in the general nature of the legal obligation of the contract, between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of

the contract, in the one case or in the other, is, or may be, attended with the same consequences, and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both cases is the same. In both cases the contract is binding, and the responsibility of the parties is governed by the same general rules." See also *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3; 84 E. C. L. 3; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Bowen v. Lake Erie Tel. Co.* (Ohio, 1853), 1 Am. L. Reg. 685; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433. In *Gray on Telegraphs*, §§ 6-7, the argument in favor of this view is set out. *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Bell v. Dominion Tel. Co.*, 25 L. C. J. 248; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Shear. & Red. on Neg.* (4th ed.), § 554 *et seq.*

The rule established in *California* by the case of *Parks v. Alta*, etc., Tel. Co., 13 Cal. 422; 73 Am. Dec. 589, has been changed by special statutory provisions, and the authority of the other cases is weakened by the fact that in most of them what was said about such companies being insurers, was unnecessary to the decision of the case.

3. **Are not Insurers.**—See *Gray on Telegraphs*, § 8; *Thompson on Electricity*, § 138, *quoting* from *Breese v. U. S. Tel. Co.*, 45 Barb. (N. Y.) 292; 31 How. Pr. (N. Y.) 86; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 232. See also the concurring opinion of Hunt, J., in *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 571; 1 Am. Rep. 446. In *Smith v. Western Union Tel. Co.*, 83 Ky. 104;

are so far common carriers that they cannot by contract provide for their exemption from liability for the consequences of their own negligence or that of their servants.<sup>1</sup>

8 Am. & Eng. Corp. Cas. 20; 4 Am. St. Rep. 126, the court, by Holt, J., says: "The current of authority is not in this direction, and properly so, because the transmission of messages is necessarily subject to the risk of mistake and interruption. The wire is exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or an irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice, and climatic influence when the company has not the actual immediate custody of the messages, as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated not only as a bailee, but as an insurer." See also *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102; *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 24; 56 Am. Rep. 119 (rule changed by Civil Code, §§ 2162, 2168); *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 16 Am. & Eng. Corp. Cas. 232; 1 Am. St. Rep. 222; *Central Union Teleph. Co. v. Bradbury*, 106 Ind. 1; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 458; 1 Am. Rep. 285; *Aiken v. Western Union Tel. Co.*, 69 Iowa 31; 13 Am. & Eng. Corp. Cas. 585; 58 Am. Rep. 210; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; 71 Am. Dec. 461; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547; 30 How. Pr. (N. Y.) 403; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 157; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 310; 41 Am. Rep. 500; *New York, etc., Print. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358;

*Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; 8 Am. & Eng. Corp. Cas. 70; *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 565; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Abraham v. Western Union Tel. Co.*, 23 Fed. Rep. 315; 8 Am. & Eng. Corp. Cas. 130; 11 Sawyer (U. S.) 28; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 269; *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470.

The liability of a telegraph company for error or failure in the transmission of a dispatch is quite unlike that of a common carrier. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or deliver, which has no relation to any value which can be put on the message itself. *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485. See *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165.

**1. Cannot Contract Against Liability.**—In the case of *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 269, the court, by Strong, J., said: "Telegraph companies, though not common carriers, are engaged in a business that is, in its nature, almost, if not quite, as important to the public as that of carriers. Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence." See *infra*, this title, *General Rule as to Validity*; *CARRIERS OF GOODS*, vol. 2, p. 818.

Generally speaking, the same rules of law which limit the liability of common carriers apply to telegraph companies. Thus, if the limitation is by notice, such

The true rule, then, as to the status of telegraph companies seems to be that they are analogous to common carriers in their obligations to serve the public in good faith and with impartiality; but responsible only for failure to exercise proper care.<sup>1</sup>

**4. Are Public Servants and Must Serve the Public Impartially and in Good Faith.**—Although telegraph companies are not liable as insurers, they are so far common carriers that they are under a legal obligation to serve with impartiality all who apply to them and offer compliance with their regulations. They must transmit all proper messages correctly and without unreasonable delay, and, with certain exceptions, in the order in which they are received.<sup>2</sup> In many jurisdictions the enforcement of these duties is provided for by statutes.<sup>3</sup>

Telephone companies, like telegraph companies, are to some extent common carriers, and are bound to afford equal facilities to all. They can be compelled by *mandamus* to furnish facilities to one offering to comply with their regulations, even though such a party is a rival company.<sup>4</sup>

notice must have been assented to by the sender, either impliedly or expressly. See *infra*, this title, *Evidence of Assent of Sender or Addressee to Printed Stipulations*; *CARRIERS OF GOODS*, vol. 2, p. 815 *et seq.* In the case of telegraphic messages, however, this rule is simplified by the fact that the sender is required to affix his signature to the printed contract containing the limitation.

1. This is the conclusion arrived at by Mr. Gray in his work on Telegraphs, and supported by the overwhelming weight of authority. Gray on Telegraphs, § 8; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 15; 4 Am. St. Rep. 126; *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102; *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 24; 56 Am. Rep. 119; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 458; 1 Am. Rep. 285; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Baldwin v. U. S. Tel. Co.*, 1 Lans. (N. Y.) 125; 54 Barb. (N. Y.) 505; 45 N. Y. 751; 6 Am. Rep. 165; *Breese v. U. S. Tel. Co.*, 45 Barb. (N. Y.) 292; 48 N. Y. 132; 8 Am. Rep. 526; *New York, etc., Print. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Abraham v. Western Union Tel. Co.*, 23 Fed. Rep. 315; 8 Am. &

Eng. Corp. Cas. 130; 11 Sawyer (U. S.) 28; *Thompson on Electricity*, § 136 *et seq.*

**Compared With Carriers of Passengers.**—The status of telegraph companies is practically that of ordinary carriers of passengers. "Although there may be no analogy between the business of telegraph companies and that of public carriers of passengers for hire, yet we regard their legal status as practically the same. Both are engaged in a business of a public nature. Both must serve all who come. Neither are insurers, nor liable as such, but both are liable for negligence." *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 568; 15 Am. St. Rep. 917. See also *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; Gray on Telegraphs, § 11, note.

2. Gray on Telegraphs, § 45; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 182; 46 Am. Rep. 715; *Reuter v. Electric Tel. Co.*, 6 El. & Bl. 341; *Mackay v. Western Union Tel. Co.*, 16 Nev. 223; *infra*, this title, *Duty of Telephone Companies to Furnish Equal Facilities to All*.

3. See *infra*, this title, *Statutory Penalties*.

4. *State v. Nebraska Teleph. Co.*, 17 Neb. 126; 8 Am. & Eng. Corp. Cas. 1; 52 Am. Rep. 404; *Chesapeake, etc., Teleph. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399; 16 Am. & Eng. Corp. Cas. 219; 59 Am. Rep. 167; *infra*, this title,

5. As Ordinary Bailees for Hire.—The proposition has been advanced that telegraph companies are ordinary bailees for hire, and therefore governed by the rules which control the rights and duties of such bailees. This idea, however, has received only slight recognition, and is wrong.<sup>1</sup>

III. CORPORATE RIGHTS AND FRANCHISES.—(See also CORPORATIONS, vol. 4, p. 184; FRANCHISES, vol. 8, p. 584; FOREIGN CORPORATIONS, vol. 8, p. 329)—1. **Power of Company to Alienate Franchise.**—It is a general rule that the grant of a franchise, public in nature, like that of a telegraph company, is personal to the grantee and cannot be alienated, except by consent of the granting power.<sup>2</sup> Therefore a telegraph company has no power, in the absence of special authority, to alienate the privileges granted to it by the federal or state government, and an agreement to transfer such privileges is *ultra vires* and void.<sup>3</sup> Nor can such

*Duty of Telephone Companies to Furnish Equal Facilities to All.*

In *Hockett v. State*, 105 Ind. 559; 11 Am. & Eng. Corp. Cas. 577; 55 Am. Rep. 201, the court, in upholding the right of the state to regulate the charges of a telephone company, said, by Niblack, C. J.: "The telephone is one of the most remarkable productions of the present century, and although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed toward the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well-defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to a public use." See also *Central Union Teleph. Co. v. State*, 118 Ind. 194; 25 Am. & Eng. Corp. Cas. 481; 10 Am. St. Rep. 114; *Central Union Teleph. Co. v. Bradbury*, 106 Ind. 1. The cases uniformly hold telephone companies to be common carriers of

news, in denying their right to discriminate. See *infra*, this title, *Duty of Telephone Companies to Furnish, etc.*

1. As Ordinary Bailee for Hire.—See *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607; *Smithson v. U. S. Tel. Co.*, 29 Md. 162; *Pinckney v. Western Union Tel. Co.*, 19 S. Car. 71; 45 Am. Rep. 765; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433.

"The argument is that as the ground of their liability is the same as that of bailees, the legal status of the two must be the same. But this doctrine is justly criticised, because telegraph companies are engaged in a business of a public nature, and are precluded by rights and duties incident thereto from occupying the legal status of an ordinary bailee for hire, whose rights and duties arise wholly from the contract of employment." *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 570; 15 Am. St. Rep. 917. See also *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480.

2. See FRANCHISES, vol. 8, p. 634; *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28.

3. *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28; *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 581 (in this case there was a special statute granting the right to transfer). The first of these cases considers at great length the obligations of the Union Pacific Railway Company to operate a telegraphic line along its entire route.

In a proceeding by the *United States* to annul a contract whereby the telegraphic franchises of the Union Pacific

a company execute a valid lease of its franchises,<sup>1</sup> though it has been held that it may lease its lines and equipments for a reasonable length of time.<sup>2</sup>

**2. Stocks, Bonds, and Mortgages**—(See RAILROAD SECURITIES, vol. 19, p. 694; STOCK, vol. 23, p. 582; STOCKHOLDERS, vol. 23, p. 776).—Besides the authorities cited in these references, see note 3 for several recent cases.

**IV. CONSTRUCTION AND MAINTENANCE OF TELEGRAPH AND TELEPHONE LINES**—**1. Right of Way**—(See also RAILROADS, vol. 19, p. 839; EMINENT DOMAIN, vol. 6, p. 525 *et seq.*; STREET RAILWAYS, vol. 13, p. 940).—The general rules in this connection are analogous to those governing railroads and street railways.

*a. IN STREETS AND HIGHWAYS.*—The right to construct a telegraph or telephone line along and upon a street or highway must be derived from an express grant of authority. It cannot exist from implication merely.<sup>4</sup> The power to grant such authority rests ultimately in the legislature, by virtue of its power of control over all streets and highways;<sup>5</sup> it may, however, be delegated to municipalities. In general, a municipal corporation has power

Ry. Co. were transferred to the Western Union Tel. Company, the intention and power of Congress to prevent such transfer being clear, the court cannot consider any arguments based upon the alleged fact that the contract is beneficial to the pecuniary interests of both the railway company and the public. *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28.

In *Benedict v. Western Union Tel. Co.*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 214, it is said that an agreement entered into by a telegraph company to divide earnings and expenses with another company, is neither *ultra vires* nor against public policy. See *ULTRA VIRES*. And under *New York Laws* of 1870, ch. 568, a telegraph company may sell to another company all of its property, rights, privileges and franchises, each company being incorporated under the *New York* law. *Hatch v. American Union Tel. Co.*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 223; *Reiff v. Western Union Tel. Co.*, 49 N. Y. Super. Ct. 441.

Rev. Stat. U. S., § 5265, prohibits the transfer of any of the privileges granted by the federal statute authorizing the occupation of post roads by telegraph lines.

1. See RAILROADS, vol. 19, p. 895. Therefore, while a company may, in some cases, lease its lines and fixtures, the lease would not confer any privileges, and the lessee would have no

right to construct new lines. *Philadelphia v. Western Union Tel. Co.*, 11 Phila. (Pa.) 327.

2. *Philadelphia v. Western Union Tel. Co.*, 11 Phila. (Pa.) 327; *Reiff v. Western Union Tel. Co.*, 49 N. Y. Super. Ct. 441. See also *Western Tel. Co. v. Baltimore, etc.*, R. Co., 69 Md. 211.

3. See also *Farmers' L. & T. Co. v. Bankers', etc.*, Tel. Co., 119 N. Y. 15 (where the foreclosure of telegraph bonds is considered at length); *Williams v. Western Union Tel. Co.*, 93 N. Y. 162; 9 Abb. N. Cas. (N. Y.) 437; 3 Am. & Eng. Corp. Cas. 139 (issue of stock).

4. *New York, etc., Teleph. Co. v. East Orange Tp.*, 42 N. J. Eq. 490; *Atty. Gen'l v. United Kingdom Tel. Co.*, 30 Beav. 287.

**Unauthorized Occupation of Street a Nuisance.**—“Legislative sanction directly given or mediately conferred through proper municipal action is necessary to authorize the use of streets for the posts of a telegraph company. If such posts be erected within the limits of a street or highway without such sanction, they are nuisances; but if the erection be thus authorized, they are not,” 2 Dill. on Mun. Corp. (3d ed.), § 698 [552]; *citing* Com. v. Boston, 97 Mass. 555; *Young v. Yarmouth*, 9 Gray (Mass.) 386; *Reg. v. United Kingdom Tel. Co.*, 9 Cox C. C. 174.

5. *Hudson Teleph. Co. v. Jersey City*, 49 N. J. L. 303; 16 Am. & Eng. Corp. Cas. 289; *Irwin v. Great Southern*



to grant to a telegraph or telephone company the right to construct a line upon the streets within its limits, provided such construction will not interfere with the free use of the street by the public.<sup>1</sup> A telegraph or telephone line, consisting of wires strung upon poles, when constructed along and upon a street, constitutes a new use of the street, and an additional burden upon it. Owners of abutting property are entitled to compensation for such use,<sup>2</sup>

Teleph. Co., 37 La. Ann. 63; *STREETS*, vol. 24, p. 1.

**1. Right of City to Authorize Occupation of Streets by Telegraph Company.**

—2 Dill. on Mun. Corp. (4th ed.), § 719; *State v. Hoboken*, 35 N. J. L. 205; *Johnson v. Thompson-Houston Electric Co.*, 54 Hun (N. Y.) 469; *Sheffield v. Central Union Teleph. Co.*, 36 Fed. Rep. 164. *Compare* *Domestic Tel., etc., Co. v. Newark*, 49 N. J. L. 344; 16 Am. & Eng. Corp. Cas. 293. The *New Jersey* statute requiring the consent of the town authorities to the placing of poles in streets, extends to townships where the ways are streets and not roads. *Broome v. New York, etc., Teleph. Co.*, 49 N. J. L. 624.

The consent of a municipality to the erection of telegraph poles in the public streets, contemplated by the *New Jersey* Act of April 9, 1875, "to incorporate and regulate telegraph companies," can be given only to corporations organized under that act. *State v. Newark* (N. J. 1887), 8 Atl. Rep. 128.

A legislative act or municipal ordinance authorizing the construction of the line upon a street, is void if it fails to provide for compensation to abutting owners. *Stowers v. Postal Tel. Co.*, 68 Miss. 559; 35 Am. & Eng. Corp. Cas. 9; 24 Am. St. Rep. 290; *Chesapeake, etc., Teleph. Co. v. Mackenzie*, 74 Md. 36; 28 Am. St. Rep. 227; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585.

The legislative grant to occupy city streets may be conditioned upon company's obtaining the consent of the city, and the city may impose restrictions and conditions. 2 Dill. on Mun. Corp. (4th ed.), § 706; *STREET RAILWAYS*, vol. 23, p. 940. But where the legislative grant is not conditional, the city cannot impose restrictions, nor can municipal authorities interfere with the exercise of the company's rights. *State v. Flad*, 23 Mo. App. 185.

A city's charter authority to "license, tax and regulate," telephone companies and "all their branches of business," carries with it power to grant to such

companies the right to erect poles in the streets. *Hershfield v. Rocky Mountain Bell Teleph. Co.*, 12 Mont. 102.

**2. Telegraph Line in Highway Imposes an Additional Burden on the Fee.**

—*Western Union Tel. Co. v. Williams*, 86 Va. 696; 30 Am. & Eng. Corp. Cas. 564; 19 Am. St. Rep. 908; *Broome v. New York, etc., Teleph. Co.*, 42 N. J. Eq. 141; *State v. New York, etc., Teleph. Co.*, 51 N. J. L. 83; 25 Am. & Eng. Corp. Cas. 497; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; 8 Am. & Eng. Corp. Cas. 81; 47 Am. Rep. 453; *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559; 35 Am. & Eng. Corp. Cas. 9; 24 Am. St. Rep. 290; *Metropolitan Teleph., etc., Co. v. Colwell Lead Co.*, 50 N. Y. Super. Ct. 488; *Tiffany v. U. S. Illuminating Co.*, 51 N. Y. Super. Ct. 280; 67 How. Pr. (N. Y.) 73; *Eels v. American Teleph., etc., Co.* (Supreme Ct.), 20 N. Y. Supp. 600; *Chesapeake, etc., Teleph. Co. v. Mackenzie*, 74 Md. 36; 28 Am. St. Rep. 227, 229, note; *Willis v. Erie Tel., etc., Co.*, 37 Minn. 347 (decision of lower court affirmed, court being equally divided); *Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71; *Pacific Postal Tel. Cable Co. v. Irvine*, 49 Fed. Rep. 113; 2 Dill. on Mun. Corp. (4th ed.), § 698, a; *Keasbey on Electric Wires*, pp. 69-85; *Scott & Jar. on Tel.*, § 23.

The right must be acquired by condemnation proceedings or by voluntary consent of the abutting landowners. *Bashfield v. Empire State Teleph., etc., Co.* (Supreme Ct.), 18 N. Y. Supp. 254; *Dusenbury v. Mutual Tel. Co.*, 11 Abb. N. Cas. (N. Y.) 440. See also *Lewis on Em. Dom.*, § 124; 12 N. J. L. Jour. 133; *STREET RAILWAYS*, vol. 23, p. 940.

In *Roake v. American Teleph., etc., Co.*, 41 N. J. Eq. 35; 12 Am. & Eng. Corp. Cas. 342, the only injury imminent to complainant's property was that which would result from the wires passing over the street in front of the premises. It was held that the case did not authorize an injunction against the erection of the poles and wires.

"On the other hand, it is insisted the proprietary rights of the plaintiff have been interfered with in a manner detrimental to his interests as owner of the fee, and that the action of defendant in taking possession of his land forcibly and against his will comes within the constitutional inhibition that 'private property shall not be taken or damaged without just compensation.' This position is the one best sustained by authority, and rests on sounder principles. It is for this reason that the construction and maintenance of a telegraph line upon the highway is a new and additional burden upon the fee to which it was not contemplated it should be subjected, and for which the owner is entitled to additional compensation." Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; 8 Am. & Eng. Corp. Cas. 81; 47 Am. Rep. 453. See Indianapolis, etc., R. Co. v. Hartley, 67 Ill. 439; 16 Am. Rep. 624, for the doctrine of the court. See STREET RAILWAYS, vol. 23, p. 940, where similar cases are discussed.

In Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. Rep. 113, Ross, J., said: "Where the fee of the highway is vested in the public, there can be no valid legal objection to the grant by the public of a right to erect such poles and wires without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and only its use for purposes of public travel has been granted, I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to the law."

In 2 Dill. on Mun. Corp. (4th ed.), § 608, a, it is said: "The author considers the true doctrine to be, that the rights of the abutter, as between himself and the public, are substantially the same, whether the fee is in lien subject to the public use, or in the city in trust for street use proper. On the whole, the safer, and perhaps sounder view is that such a use of the street or highway (placing a telegraph line thereon) attended, as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles the owner to compensation for such use or for any actual injury to his prop-

erty caused by poles and lines of wire placed in front thereof."

**Effect of Grant by State.**—Consent of the state by law, to the erection of telegraph or telephone poles in highways is only intended to protect the telegraph company from indictment for maintaining a public nuisance in so doing. It gives the company no right to erect such poles unless the owner of the fee consents or receives compensation. *Eels v. American Teleph., etc., Co.* (Supreme Ct.), 20 N. Y. Supp. 600.

**Authorities Contra.**—The doctrine of the text is not universally recognized. In *Pierce v. Drew*, 136 Mass. 75; 8 Am. & Eng. Corp. Cas. 85; 49 Am. Rep. 7, it was held that *Massachusetts* Pub. Stats., ch. 109, §§ 4, 12, authorizing the construction of telegraph lines upon highways, did not provide for compensation to abutting owners; that the statute was nevertheless constitutional and valid, since an additional servitude was not imposed by the erection of poles and wires along the highway. The court said: "No right to take the private property of the owner of the fee is conferred by this act; all that is given is the right to use land, by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continual enjoyment of the privilege or any presumption of a grant raised thereby." *Gray, J.*, in *Boston v. Richardson*, 13 Allen (Mass.) 160, was quoted: "When land, once duly appropriated to a public use, which requires the occupation of its whole surface, is applied by authority of the legislature to another similar public use, no new claim for compensation, unless expressly provided for, can be sustained by the owner of the fee." See *Young v. Yarmouth*, 9 Gray (Mass.) 386; *Chase v. Sutton Mfg. Co.*, 4 Cush. (Mass.) 167; *Com. v. Temple*, 14 Gray (Mass.) 77. Compare dissenting opinion of C. Allen, J., concurred in by W. Allen, J.: "There is another reason for holding that the right to establish electrical lines is not included in the laying out of a highway. When land is taken for a highway, the payment of damages is to be made by the city or town within which it lies. But a city or town has no legal right to appropriate money for the establish-

and to damages for any material injury to easement of access and passage over the street. Ownership of the fee of the soil occupied does not affect their rights.<sup>1</sup>

Where the company has acquired no right to occupy the street with its lines, its occupation thereof is unlawful and amounts to a public nuisance, and the abutting owners may have an injunction against it or may bring an ordinary action for damages.<sup>2</sup>

A grant of a right of way along a street confers upon a telegraph company no right to trespass upon private property abutting thereon, to cut limbs of trees projecting over the sidewalk,<sup>3</sup>

ment of a line of telegraph for the general public use."

See, as upholding the doctrine of the *Massachusetts* court, *Julia Bldg. Assoc. v. Bell Teleph. Co.*, 88 Mo. 258; 57 Am. Rep. 398; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 491; *State v. St. Louis, etc., R. Co.*, 86 Mo. 288; *Irwin v. Great Southern Teleph. Co.*, 37 La. Ann. 63; *Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.) 424; 16 Am. & Eng. Corp. Cas. 276; 54 Am. Rep. 284 (in this case the fee of the street was not in the abutting owner). See also dissenting opinion of Lewis, C. J., concurred in by Richardson, J., in *Western Union Tel. Co. v. Williams*, 86 Va. 696; 30 Am. & Eng. Corp. Cas. 573; 19 Am. St. Rep. 900; also the argument of Robert Stiles, Esq., an attorney in this last named case.

**Measure of Damages.**—The measure of damages to the abutting owner is the extent to which the rental and salable value of the property has been diminished, or the difference in the value of the property before and after the construction of the line. *Chesapeake, etc., Teleph. Co. v. Mackenzie*, 74 Md. 36; 28 Am. St. Rep. 227. See *Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71.

1. *Chesapeake, etc., Teleph. Co. v. Mackenzie*, 74 Md. 36; 28 Am. St. Rep. 227; *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559; 35 Am. & Eng. Corp. Cas. 9; 24 Am. St. Rep. 290; *McQuaid v. Portland, etc., R. Co.*, 18 Oregon 237; 40 Am. & Eng. R. Cas. 308; *Tiffany v. U. S. Illuminating Co.*, 67 How. Pr. (N. Y. Super. Ct.) 73; *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 288; 38 Am. & Eng. R. Cas. 462; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485; 42 Am. St. Rep. 564; *Schurmeier v. St. Paul, etc., R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; 7 Wall. (U. S.) 272; *McLain v. Brush Electric Light Co.*, 9 Cinc. L. Bull. 65; *Forsythe v. Baltimore, etc., Tel. Co.*, 12 Mo. App. 494;

*STREET RAILWAYS*, vol. 23, p. 940; *Keasbey on Electric Wires*, pp. 63, 84, 91; 12 New Jersey L. Jour. 133 (article by Mr. Randolph).

2. **Remedy of Abutting Owner.**—*Broome v. New York, etc., Teleph. Co.*, 42 N. J. Eq. 141 (injunction granted); *Western Union Tel. Co. v. Williams*, 86 Va. 696; 30 Am. & Eng. Corp. Cas. 564; 19 Am. St. Rep. 908 (ejectment); *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453; 8 Am. & Eng. Corp. Cas. 81.

A company, acting on the assumption that it had the legal right, constructed its line on the highway without asking or obtaining the consent of abutting owners, or seeking to acquire their rights by negotiation or condemnation. Such abutting owners are not estopped to maintain their action on the ground of acquiescence. *Blashfield v. Empire State Teleph., etc., Co.* (Supreme Ct.), 18 N. Y. Supp. 250; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461.

As a rule, however, the courts are slow to compel the removal of a public work or the suspension of its operation. If an injunction is granted at all, it is usually conditioned to be inoperative provided the company makes proper compensation within a reasonable time. See *STREET RAILWAYS*, vol. 23, p. 940. Injunctions of this character constitute the remedy uniformly granted in *New York* against the elevated railway companies.

3. **Liability for Cutting Trees Overhanging Sidewalk.**—*Memphis Bell Teleph. Co., v. Hunt*, 16 Lea (Tenn.) 456; 57 Am. Rep. 237. In *Tissot v. Great Southern Teleph., etc., Co.*, 39 La. Ann. 996; 21 Am. & Eng. Corp. Cas. 53; 4 Am. St. Rep. 248, it was held that removal of trees overhanging a sidewalk was unnecessary, and that the company must answer in damages for the trespass. See also *Clay v. Postal Tel. Co.*, 70

or so to place its poles as to incommode or injure the public in its use of the street;<sup>1</sup> and the company is liable in damages for such trespasses.

Where a telephone or telegraph company occupies private property with its poles and wires, there can be no question as to the landowner's right to compensation. The right to such occupation can only be acquired by contract with the landowner, or by condemnation proceedings.<sup>2</sup> It has been held that a landowner is entitled to compensation, where the wires extend over his land, though there is no actual occupation of the soil.<sup>3</sup>

*b. ON RAILROAD RIGHT OF WAY.*—The construction of a telegraph line on a railroad company's right of way, imposes an additional burden upon the land covered by it, for which the original owner of the land, if he retains the fee, may recover compensation.<sup>4</sup> There is an exception to this rule, however, where the line is constructed by the railroad company in good faith, for its own use, and is shown to be reasonably necessary for the proper operation of the road.<sup>5</sup>

A telegraph line is also regarded as subjecting the easement of the railroad company to an additional servitude, for which the company is entitled to compensation, under the constitutional provisions against the taking of private property.<sup>6</sup> There is no

Miss. 406; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; 8 Am. & Eng. Corp. Cas. 79; 47 Am. Rep. 453.

1. **Must not Incumber Street.**—But the company cannot be required so to locate its poles as to provide against all possible injuries that might happen under extraordinary circumstances. *Sheffield v. Central Union Teleph. Co.*, 36 Fed. Rep. 164.

2. See *EMINENT DOMAIN*, vol. 6, p. 563.

3. See 28 Am. Law. Reg. 69; Pollock on Torts, 281; 2 Blackstone's Com., 17; 2 Minor's Insts. (3d ed.), p. 4. It may be questioned, however, whether courts would recognize such an injury. See *Roake v. American Teleph., etc., Co.*, 41 N. J. Eq. 35; 12 Am. & Eng. Corp. Cas. 342. It would be a case for the application of the rule *de minimis lex non curat*.

4. **Compensation to Owner of Fee.**—*American Teleph., etc., Co. v. Pearce*, 71 Md. 535; 28 Am. St. Rep. 227; *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 158; *Western Union Tel. Co. v. American Union Tel. Co.*, 9 Biss. (U. S.) 72; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *New Orleans, etc., R. Co. v. South, etc., Tel. Co.*, 53 Ala. 211; *Keasbey on Electric Wires*, p. 137.

5. *American Teleph., etc., Co. v. Pearce*, 71 Md. 535; 28 Am. St. Rep. 227; *Western Union Tel. Co. v. Rich*, 19 Kan. 517; 27 Am. Rep. 159.

In *Taggart v. Newport St. R. Co.*, 16 R. I. 688; 43 Am. & Eng. R. Cas. 214, the court, by Durfee, J., said: "It has been held, for reasons which we consider irrefragable, that a telegraph line erected by a railroad company within its location, for the purposes of its railroad, to increase the safety and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired. *Western Union Tel. Co. v. Rich*, 19 Kan. 517; 27 Am. Rep. 159."

6. *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585; *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 158; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Biss. (U. S.) 367; *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806. See also *Baltimore, etc., Tel. Co. v. Morgan's, etc., Louisiana R., etc., Co.*, 37 La. Ann. 883; *South European, etc., R. Co. v. European Electric Tel. Co.*, 9 Exch. 363 (right of telegraph company to cross a railroad with its lines).

The provision of the *Virginia Code*

rule of law to prevent a telegraph company from acquiring, by contract with a railroad company,<sup>1</sup> a right of way over the land covered by the railroad's right of way, though it cannot contract for an exclusive right. Such exclusive rights are not favored in law; and, moreover, the railroad companies, having usually nothing more than a mere easement in the land covered by their right of way, have no power to grant exclusive privileges as to it.<sup>2</sup>

(1887), § 1287, providing that telegraph companies may construct their lines "along and parallel to any of the railroads of the state," does not authorize the condemnation of a right of way by a telegraph company along and upon the right of way of a railroad company. *Postal Tel. Cable Co. v. Norfolk, etc.*, R. Co., 88 Va. 920; 39 Am. & Eng. Corp. Cas. 533. See also *Laws New York* 1853, ch. 471, § 2; *New York City, etc., R. Co. v. Central Union Tel. Co.*, 21 Hun (N. Y.) 261.

In *Mississippi*, whenever any telegraph company secures the right to construct its line upon a railroad company's right of way, it shall be the duty of the railroad to receive and transport such material, construction cars, etc., as is necessary in constructing the line, and to distribute the material along the road as the telegraph company may direct, "upon such terms and conditions as may be reasonable and just." *Laws of Mississippi* (1890), ch. 63, p. 72.

**Contract as to Use of Wire.**—In *Western Union Tel. Co. v. Western, etc., R. Co.*, 91 U. S. 283, the telegraph company contracted with a railroad corporation to put up a special wire for the exclusive use of the railroad, and to connect it with all the offices along the route. It was held that this contract did not amount to a sale of the wire to the railroad company, and a lessee of the road would have no right to the wire other than to use it in its telegraphic service.

**1. Right of Way Acquired by Contract.**—The right of a telegraph company to maintain its line along the right of way of a railroad company, under a contract whereby, upon dissolution or discontinuance of operations by the telegraph company, the railroad company became entitled to the property, is lost by a surrender of its charter by the telegraph company, just prior to its expiration, and its reincorporation under a subsequent statute, although such statute provides that the new company shall take all the property of the old. *Latrobe v. Western Tel. Co.*, 74 Md.

232; *Western Tel. Co. v. Baltimore, etc., R. Co.*, 69 Md. 211.

So a license by a railroad company to maintain a telegraph line along its road, so long as the licensee existed as a telegraph company, expires with expiration of the telegraph patents held by the licensee; its reincorporation does not affect the case. *Western Union Tel. Co. v. Baltimore, etc., R. Co.*, 20 Fed. Rep. 572; 5 Am. & Eng. Corp. Cas. 223. See also *Western Tel. Co. v. Baltimore, etc., R. Co.*, 69 Md. 211.

**2. Exclusive Right Cannot be Acquired.**—*Western Union Tel. Co. v. Baltimore, etc., Tel. Co.*, 19 Fed. Rep. 660; 22 Fed. Rep. 133; 8 Am. & Eng. Corp. Cas. 99 (construing *Rev. Stat. Texas*, art. 624); *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; 38 Am. Rep. 781; *Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R. etc., Co.*, 37 La. Ann. 883; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 2 Woods (U. S.) 643; 96 U. S. 1 (grant of exclusive right given by legislature held void); *Pacific Postal Tel. Cable Co. v. Western Union Tel. Co.*, 50 Fed. Rep. 493; *Keasbey on Electric Wires*, p. 135. See also *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585; *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *Western Union Tel. Co. v. Burlington, etc., R. Co.*, 11 Fed. Rep. 1; 3 McCrary (U. S.) 130.

Under U. S. Rev. St., § 5263, a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way, so as to exclude other companies whose lines would not interfere with those of the first company. *Western Union Tel. Co. v. American Union Tel. Co.*, 9 Biss. (U. S.) 72.

A railroad company, maintaining telegraph wires, granted to a telegraph company the right to place a wire on the poles of the railroad company, and to establish stations and to do business with points off the road, the railroad company reserving to itself the right to the local business. *Held*, that the right

c. **FEDERAL AND STATE GRANTS OF RIGHT OF WAY.**—By the statutes of the *United States*, a right of way over the public lands and the military and post roads of the *United States*, is granted to all telegraph companies complying with certain conditions.<sup>1</sup> This statute was enacted under the congressional power of control over inter-

granted was not exclusive, and that the railroad could put up and maintain another wire for its own use or for the use of a third party. *Marietta, etc., R. Co. v. Western Union Tel. Co.*, 38 Ohio St. 24; 10 Am. & Eng. R. Cas. 387.

*Compare California, etc., Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, holding the *California* act granting to one company an exclusive privilege between certain points, to be constitutional and valid.

**Authorities Contra.**—See *Canadian Pac. R. Co. v. Western Union Tel. Co.*, 17 Sup. Ct. Can. 151; 33 Am. & Eng. Corp. Cas. 1. It was held on appeal that the agreement made in 1869, between the W. U. Tel. Co. and the E. & N. R. Co., is binding on the present owners of the road; that the contract with the W. U. Tel. Co. was consistent with the purposes of its incorporation and not prohibited by its charter or by local laws; its right to enter into such a contract and to carry on the business provided for thereby is a right recognized by the comity of nations, and that the exclusive right granted to the W. U. Tel. Co. does not void the contract as being against public policy, nor as being a contract in restraint of trade. *Canadian Pac. R. Co. v. Western Union Tel. Co.*, 17 Sup. Ct. Can. 151; 33 Am. & Eng. Corp. Cas. 1.

So a contract by a railroad company with a telegraph company for exclusive rights in favor of the latter, is not void so far as it excludes other competitors from the line of poles occupied by the telegraph company. *Western Union Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246; 29 Am. Rep. 28. See *RAILROADS*, vol. 19, p. 825, note 4.

In *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Biss. (U. S.) 367, a contract between a railroad company and a telegraph company binding the former not to construct or allow to be constructed another telegraph line along and upon its right of way, is not void as against public policy.

**State Cannot Authorize Grant of Exclusive Privileges.**—In view of the Act of Congress, hereafter referred to in the next note *Rev. Stat. U. S.*, §§

5263–68), a state cannot grant to a telegraph company exclusive rights in the right of way of any railroad within the state. “The statute amounts to a prohibition of all state monopolies in this particular.” *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, *aff’d* 2 Woods (U. S.) 643.

**1. United States Statute Authorizing Occupation of Post Roads by Telegraph Lines.**—U. S. Rev. Stat., §§ 5263–5268; 14 U. S. Stat. at Large, 221; Act of July 24, 1866.

Any telegraph company organized under the laws of any state, shall have the right to construct, maintain and operate telegraph lines over any part of the public domain, over and along any of the military or post roads of the *United States*, and under or across any of its navigable streams or waters; provided such lines are not so placed as to obstruct navigation, or interfere with the proper use of the military or post roads. U. S. Rev. Stat., § 5263.

Any such company may take from the public lands through which its line passes, the necessary stone, timber and other material for its poles, stations or other needful uses in constructing its line, and may preempt such portion of the unoccupied public land as may be necessary for its stations, not exceeding forty acres for each station; such stations to be not within fifteen miles of each other. U. S. Rev. Stat., § 5264.

The rights and privileges granted by the act of July 24, 1866, are not to be transferred “by any company acting thereunder to any other corporation, association or person.” U. S. Rev. Stat., § 5265. See *supra*, this title, *Corporate Rights and Franchises*.

Telegrams between the several departments of the government and their officers and agents are to have priority over all other business of such lines, at such rates as the postmaster general shall annually fix. And no part of the appropriation for the several departments of the government shall be paid to any company refusing to comply with this section. U. S. Rev. Stat., § 5266; U. S. v. *Union Pac. R. Co.*, 45 Fed. Rep. 221.

state commerce, and there is no question as to its constitutionality. It supersedes all conflicting state legislation on the same subject.<sup>1</sup> It does not, however, authorize telegraph companies which come within its terms to occupy a railroad company's right of way without compensation, but grants all privileges subject to the prior rights of other companies.<sup>2</sup> It prevents the exclusive use of any railroad company's right of way by a single telegraph company.<sup>3</sup> A company acquires no right to any of the privileges conferred by this statute until it has filed with the postmaster-general its written acceptance of all the conditions contained therein.<sup>4</sup> Statutes granting a right of way to telegraph companies

The *United States* may, for postal, military or other purposes, purchase all the telegraph lines and other property of such companies, at an appraised value to be ascertained by five competent, disinterested persons, two to be chosen by the postmaster-general, two by the company, and one by these four. U. S. Rev. Stat., § 5267.

Before any telegraph company exercises any of the powers and privileges conferred, it shall file its written acceptance with the postmaster-general, "of the restrictions and obligations required." U. S. Rev. Stat., § 5268.

Whenever any telegraph company, after having filed its written acceptance (provided in § 5268), shall refuse or neglect to transmit any proper messages offered by the government, or its officers or agents, concerning governmental affairs, the meteorological observations, etc., it shall be liable to a penalty of not less than one hundred dollars, and not more than one thousand dollars, for each such refusal or neglect; such penalty to be recovered by an action at law in any federal district court. U. S. Rev. Stat., § 5269; 19 U. S. Stat. at L. 232, 252.

By another statute, all railroads in the country are declared to be post roads. U. S. Rev. Stat., § 3964; *POSTAL LAWS*, vol. 18, p. 865. And being a "post road," a railroad cannot grant to any telegraph company an exclusive right of way. *Western Union Tel. Co. v. Baltimore, etc., R. Co.*, 19 Fed. Rep. 660.

1. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 2 Woods (U. S.) 643; *aff'd* 96 U. S. 1; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Nev. 102. *Compare* *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552.

**Streets of District of Columbia.**—The streets of the *District of Columbia* are "post roads," within the meaning of the statute, and telegraph companies

may construct their lines thereon without compensation to abutting owners. *Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.) 424; 16 Am. & Eng. Corp. Cas. 276.

2. "We cannot suppose it was the intention of Congress by these enactments, even if it had the power to do so, to put the right of way of every railroad company in the country at the mercy of the telegraph companies, and allow the latter to use them for the construction of their lines, without making compensation to any one therefor. Such a construction was wholly repudiated by Judge Drummond in the case of *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 158, and by Judge Harlan in *Western Union Tel. Co. v. American Union Tel. Co.*, 9 Biss. (U. S.) 72. In the latter case it is expressly said that under this act, telegraph companies must obtain the consent of the owners of the right of way, or condemn the same for telegraph purposes and make compensation therefor." *American Teleph., etc., Co. v. Pearce*, 71 Md. 535; 28 Am. St. Rep. 227. See also *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, *aff'd* 2 Woods (U. S.) 643; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585.

3. The legislature of *Florida* granted an exclusive right to a certain company to construct its line along the right of way of a railroad. It was held, however, that such a grant was in conflict with the act of Congress which was specially intended to secure to all companies equal privileges and to prevent monopolies, and that it could not stand. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, *aff'd* 2 Woods (U. S.) 643.

4. U. S. Rev. Stat., § 5268. Therefore a telegraph company has no right to carry its line over a bridge across a

under certain conditions and restrictions, exist in all of the states.<sup>1</sup> A state may grant to one company exclusive privileges between certain points, but such a grant must be held subject to prior acquired rights of other companies.<sup>2</sup>

d. IN GENERAL.—The rules of law applicable to a railroad company's right of way apply in general to telegraph companies, subject, however, to the modifications which the differences in the structures demand.<sup>3</sup> In several jurisdictions statutes exist which require the company to make an effort to contract with the landowner for a right of way before resorting to condemnation proceedings. In such cases, the company may condemn a right of way if, after having made a proposition to the landowner, it has

navigable river until it has filed the acceptance. *Chicago, etc., Bridge Co. v. Pacific Mut. Tel. Co.*, 36 Kan. 113; 16 Am. & Eng. Corp. Cas. 271.

1. *State Statutes.*—See *Georgia Acts of 1886-7*, p. 111 (not affected by Acts of 1888-9, pp. 141, 175); *Virginia Code* (1887), § 1287; *Laws of Mississippi* (1890), ch. 63, p. 72; *Western Union Tel. Co. v. Cooledge*, 86 Ga. 104.

Under *Missouri Rev. St.*, § 879, telephone companies may place their poles along city streets, subject to regulation by ordinance as to the location and kind of posts, piers and abutments, and the height of the wires. And if a city board of public improvements attempts to interfere, it will be coerced by *mandamus*. *State v. Flad*, 23 Mo. App. 185.

There being serious doubt as to the validity of a statute (N. Y. Acts of 1887, ch. 716), in that it permits the telegraph company to be deprived of its right to maintain its wires on the structures of an elevated railroad, which is a post road, an injunction against any interference with the wires thereon, should be granted until the question can be passed on by the court of last resort, the maintenance of wires thereon not being attended with any public inconvenience. *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552.

The *Virginia* statute (Code of 1887, §§ 1287-90), authorizing the construction of telegraph lines along any of the state or county roads, does not authorize the occupation of a highway, without compensation to owners of abutting property who retain the fee of the soil. *Western Union Tel. Co. v. Williams*, 86 Va. 696; 30 Am. & Eng. Corp. Cas. 564; 19 Am. St. Rep. 908. See also *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 88 Va. 920; 39 Am. & Eng. Corp. Cas. 533.

2. *California, etc., Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

3. See generally *EMINENT DOMAIN*, vol. 6, p. 509; *RAILROADS*, vol. 19, p. 839 *et seq.*; *STREET RAILWAYS*, vol. 23, p. 940; *State v. Central New Jersey Teleph. Co.*, 53 N. J. L. 341; 35 Am. & Eng. Corp. Cas. 1; *Winter v. New York, etc., Teleph. Co.*, 51 N. J. L. 83; 25 Am. & Eng. Corp. Cas. 497; *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401.

The company's petition for the assessment of damages under the *New Jersey* act, must indicate the size of the poles to be erected, and the positions in which they will be placed. *Broome v. New York, etc., Teleph. Co.*, 49 N. J. L. 624. Under the same act interests in several pieces of land belonging to different owners may be condemned in one procedure. *State v. Central New Jersey Teleph. Co.*, 53 N. J. L. 341; 35 Am. & Eng. Corp. Cas. 1.

*Crossing Navigable Waters.*—Before a telegraph company can secure, by condemnation or otherwise, the right to construct its line across navigable waters, under U. S. Rev. Stat., §§ 5263-68, it must file with the postmaster-general its written acceptance of the obligations imposed by that statute. *Chicago, etc., Bridge Co. v. Pacific Mut. Tel. Co.*, 36 Kan. 113; 16 Am. & Eng. Corp. Cas. 271. And in constructing the line along a bridge over navigable water, the company may not interfere with the opening of the draw span of the bridge, or otherwise obstruct navigation. *Pacific Mut. Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 113; 16 Am. & Eng. Corp. Cas. 268. See also *City of Richmond*, 43 Fed. Rep. 85, where the telegraph company, having laid its line along the bottom of a navigable river, was held liable for injuries caused



waited a reasonable time without receiving a reply.<sup>1</sup> The judgment obtained by a telegraph company, through commissioners appointed to fix the compensation to a railroad company upon whose right of way the telegraph line is to be constructed, is not necessarily final.<sup>2</sup> A telegraph company, by condemnation proceedings for a right of way, does not acquire the fee of the soil. It can use the land only to erect and maintain in repair its telegraph poles and wires thereon.<sup>3</sup>

**2. Liability for Injuries Caused by Improper Construction.**—A telegraph or telephone company must exercise proper care to prevent injury to persons using the street. It is responsible for all injuries which result as a consequence of an improper construction or maintenance.<sup>4</sup> It is not liable, however, when the proximate cause of

to vessels by having their anchors caught in it.

1. Louisville, etc., R. Co. v. Postal Tel. Cable Co., 68 Miss. 806.

2. Postal Tel. Cable Co. v. Norwalk, etc., R. Co., 87 Va. 349; Louisville, etc., R. Co. v. Postal Tel. Cable Co., 68 Miss. 806.

3. Lockie v. Mutual Union Tel. Co., 103 Ill. 401 (strip of land half a rod in width not too much).

The original owner is therefore not deprived of his use of the land except in so far as such use is inconsistent with the rights of the company; nor is he bound to fence his land from this strip. Lockie v. Mutual Union Tel. Co., 103 Ill. 401.

4. Nichols v. Minneapolis, 33 Minn. 430; 53 Am. Rep. 56; Clay v. Postal Tel. Cable Co., 70 Miss. 406; Roberts v. Wisconsin Teleph. Co., 77 Wis. 589; 20 Am. St. Rep. 143; Dickey v. Maine Tel. Co., 46 Me. 483; Wilson v. Great Southern Teleph., etc., Co., 41 La. Ann. 1041; Central Pennsylvania Teleph. Co. v. Wilkes Barre, etc., R. Co., 11 Pa. Co. Ct. Rep. 417; Flood v. Western Union Tel. Co. (Supreme Ct.), 15 N. Y. Supp. 400; Sheffield v. Central Union Teleph. Co., 36 Fed. Rep. 164.

Where a party sues for injuries sustained from his frightened horse running his buggy against a telegraph pole, if it is shown that the pole amounted to a dangerous obstruction, authority from the city affords no immunity from liability. Wolfe v. Erie Tel., etc., Co., 33 Fed. Rep. 320; Western Union Tel. Co. v. Eyser, 2 Colo. 141; Mersey Docks, etc., Board v. Gibbs, L. R., 1 H. L. 93; Southwestern Tel., etc., Co. v. Robinson, 50 Fed. Rep. 810; 39 Am. & Eng. Corp. Cas. 520; Williams v. Louisiana

Electric Light, etc., Co., 43 La. Ann. 295; Wilson v. Great Southern Teleph., etc., Co., 41 La. Ann. 1041; United Electric R. Co. v. Shelton, 89 Tenn. 423; Pennsylvania Teleph. Co. v. Varnan (Pa. 1888), 15 Atl. Rep. 624.

The fact that a telegraph line crossing a highway is allowed to swing down so low as to obstruct ordinary travel, is some evidence of negligence on the part of the telegraph company, and, in the absence of anything to explain it, will warrant a verdict against them for damages for injuries sustained by one who, using due care, is thrown from his vehicle by means of the wire. Thomas v. Western Union Tel. Co., 100 Mass. 156.

In an action against a telegraph company, for negligence in permitting telegraph poles to fall and suspend the wires across a highway, where a question is raised as to the soundness of the poles, it is error to admit evidence of the condition of other poles 40 or 60 rods away, without any evidence to show that they were of the same kind, put up at the same time, and equally exposed. Western Union Tel. Co. v. Levi, 47 Ind. 552. See also Brush Electric Light Co. v. Kelley, 126 Ind. 220; Central Pennsylvania Teleph. Co. v. Wilkes Barre, etc., R. Co., 11 Pa. Co. Ct. Rep. 417.

**Electric Storm.**—A telephone company which for several weeks permits its wire to remain suspended across a public highway, a few feet from the ground, is liable to a traveler who comes in contact therewith during an electrical storm and is injured by a discharge of electricity which had been attracted from the atmosphere, since the electricity would have been harmless except for the wire. Southwestern Tel., etc.,

the injury is some other agency than its own negligence.<sup>1</sup> The company cannot relieve itself of liability by abandoning the property.<sup>2</sup> Where poles are so placed as to constitute a nuisance, but their location is authorized by the city, the company and the city are severally liable for injuries resulting therefrom.<sup>3</sup> City authorities have no right to authorize the erection of poles that will prove dangerous to persons properly using the street; and the company cannot claim exemption from liability on the ground that it had acted under authority from the city.<sup>4</sup> But in such cases it must clearly appear that the location of the poles is dangerous. A mere possibility of danger is not sufficient.<sup>5</sup>

If no negligence is shown on the part of the company in the construction or maintenance of its lines, it cannot be held liable for an injury, one of the concurrent causes of which was the pres-

Co. v. Robinson, 50 Fed. Rep. 810; 39 Am. & Eng. Corp. Cas. 520.

**Injury to Vessel by Submarine Cable.**—In *The City of Richmond*, 43 Fed. Rep. 85, it was held that a telegraph company which so laid submarine cables at the bottom of a river as to interfere with vessels, obstructed navigation, and was answerable for damage to a vessel.

**Guy Wire.**—In *Sheldon v. Western Union Tel. Co.*, 51 Hun (N. Y.) 591, plaintiff, in passing another wagon on a narrow road, ran into a guy wire (concealed by shrubbery), and sustained injury. It was held that the evidence showed negligence and a recovery was allowed. See *Keasbey on Electric Wires*, p. 161; *Wilson v. Great Southern Teleph., etc., Co.*, 41 La. Ann. 1041.

1. The company is bound to exercise ordinary care, and cannot be required to anticipate and provide against unusual and unexpected storms. *Ward v. Atlantic, etc., Tel. Co.*, 71 N. Y. 81; 27 Am. Rep. 10.

Where the proximate cause of the breaking of a telegraph pole was the collision of a runaway team of horses therewith, it was held that the telegraph company was not liable for damages caused by the fall of the pole, which was so placed as to render collision with it improbable. *Allen v. Atlantic, etc., Tel. Co.*, 21 Hun (N. Y.) 22. See also *Henning v. Western Union Tel. Co.*, 43 Fed. Rep. 131; *Davis v. Dudley*, 4 Allen (Mass.) 557.

2. The line ran along the street, by license from the city. A fire occurred on that street and the water thrown by the fire engines on the burning building broke the cross bars to which the telegraph wires were attached and let about forty wires down upon the street. Soon

after the fire, the company cut off the fallen wires at either end and spliced their lines over and past it, but left the broken wires lying on the street. Plaintiff, while crossing the street, fell over them and sustained serious injury. In a suit by him against the city, it was held that it was the duty of the company to have removed the wires; that it was not relieved of this duty by abandoning the property, and that it was therefore responsible for the injury. *Nichols v. Minneapolis*, 33 Minn. 430; 53 Am. Rep. 56.

3. **City's Liability for Authorized Nuisance.**—And if recovery is had against the city, it has no right to contribution from the company. *Geneva v. Brush Electric Co.*, 50 Hun (N. Y.) 581. See also *Thompson on Electricity*, §§ 29, 81.

4. **City Cannot Authorize Dangerous Construction.**—*Keasbey on Electric Wires*, p. 154; *Kowalski v. Newark Pass. R. Co.*, 15 N. J. L. Jour. 50; *Wolfe v. Erie Tel., etc., Co.*, 33 Fed. Rep. 320. In these cases the question of dangerous location was left to the jury to determine. See also *Gaslight, etc., Co. v. Vestry, etc.*, 15 Q. B. Div. 1; *Biscoe v. Great Eastern R. Co.*, L. R., 16 Eq. 636.

5. In *Roberts v. Wisconsin Union Teleph. Co.*, 77 Wis. 589; 20 Am. St. Rep. 143, the poles, though in the street, were as near the fence as possible without having the cross bars extending over private property. A runaway horse ran against one of them. The court held that the plaintiff could not recover for the injury to his horse. See also *Allen v. Atlantic, etc., Tel. Co.*, 21 Hun (N. Y.) 22; *Sheffield v. Central Union Teleph. Co.*, 36 Fed. Rep. 164.

ence of its wires, as where the poles and wires interfered with the operations of a fire company and prevented the extinguishment of the fire.<sup>1</sup>

The company must provide safe appliances and exercise due care to prevent injury to employés. If it makes use of a dangerous agency, it must use a correspondingly high degree of care to prevent injury.<sup>2</sup>

In actions against telegraph companies for injuries resulting from the improper or negligent construction of their lines, the general rules of the law of negligence prevail as to the admission of evidence, the burden of proof, etc.<sup>3</sup>

**3. Injury to Telegraph or Telephone Lines.**—The protection of the poles and wires of telegraph, telephone, and cable lines has been the subject of statutory provisions in a number of jurisdictions.<sup>4</sup>

**1. Liability Where Wires Prevent Extinguishment of Fire.**—See *Chaffee v. Telephone, etc., Const. Co.*, 77 Mich. 625; 18 Am. St. Rep. 424, where the plaintiff, owner of the burned building, on whose land the wires stood, had built by the side of them; had permitted a tenant to use one of the wires; and had never objected to them in any way prior to the fire. The court based its conclusion on the ground that the landowner had impliedly consented to the presence of the wires and that he could not object to them after so long an acquiescence. But in *Thompson on Electricity*, § 24, this conclusion is pronounced "doubtful at best" and "much weakened by the dissent of Mr. Justice Campbell."

**2. Injuries to Employés.**—See generally *MASTER AND SERVANT*, vol. 14, p. 842. In *Clairain v. Western Union Tel. Co.*, 40 La. Ann. 178, a lineman, while putting up a wire, was injured by the breaking of a cross-arm. The evidence being conflicting, the verdict in his favor was sustained. See *Flood v. Western Union Tel. Co.* (Supreme Ct.), 15 N. Y. Supp. 400.

In *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, where an employé was injured in consequence of his using a defective ladder, and it appeared that he had continued using the ladder after knowing of the defect, a recovery was denied.

For additional cases involving the liability of companies where their employés were injured by sudden turning on of the current, or by "live" wires sagging upon "dead" ones, or otherwise in connection with their employment, see *Piedmont Electric Illuminating Co. v. Patteson*, 84 Va. 747; *Colorado Electric Co. v. Lubbers*, 11 Colo. 505; 7 Am.

St. Rep. 255; *Kraatz v. Brush Electric Light Co.*, 82 Mich. 457; *Weiden v. Brush Electric Light Co.*, 73 Mich. 268.

**3. Burden of Proof—Evidence.**—See *NEGLIGENCE*, vol. 16, p. 453 *et seq.*; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 15 *et seq.*

The mere fact that the plaintiff, while walking the street in the daytime, failed to observe an electric light wire suspended a few inches above the ground, over which she fell, does not of itself constitute contributory negligence. *Brush Electric Light Co. v. Kelley*, 126 Ind. 220. See also *Woods v. Boston*, 121 Mass. 337, for an illustration of the rule.

**Evidence of Negligence.**—In *Pennsylvania Teleph. Co. v. Varnan* (Pa. 1888), 15 Atl. Rep. 624, in an action for damages for injuries sustained by being thrown over a telephone wire, evidence was admitted to show that shortly after the accident, the defendant raised his wires at that point. This case, however, does not state the general doctrine. See *NEGLIGENCE*, vol. 16, p. 457. Evidence as to the height of the wires on the Sunday prior to the accident was admitted. It was shown that other persons, with wagons loaded equally high, had passed under the same wires without injury; but this was not held to show negligence on the part of the injured person. *Pennsylvania Teleph. Co. v. Varnan* (Pa. 1888), 15 Atl. Rep. 624.

Upon an issue as to the soundness of certain poles which had fallen, it is error to admit evidence of the soundness of other poles near them, without showing some proof that their condition ought to be the same as that of the others. *Western Union Tel. Co. v. Levi*, 47 Ind. 552.

**4. Statutory Protection.**—See the statutes of *Illinois, Nebraska, Idaho, South*

Independently of these statutes, any person or corporation interfering with such lines may be held liable in trespass, as in case of invasion of other private property.<sup>1</sup>

#### 4. Interference of Other Electric Appliances with the Telephone.—

The operation of an electric street railway or an electric light system, both of which make use of powerful electric currents, seriously interferes with the proper working of a telephone system, where the wires of these systems occupy the same street. This has given rise to extensive litigation, in which the telephone company has sought to enjoin the other companies from placing their wires in close proximity to its own, and from using the earth as a return circuit.<sup>2</sup> Interference with the telephone system by the proximity of parallel wires conveying a stronger current results from induction. Injury of this character is easily preventible, and equity will grant relief against it, upon a proper showing by the

*Carolina, Texas, Vermont and Wisconsin*; also 28 Am. L. Reg. 75 *et seq.*; 8 Jac. Fish. Dig. 12916; *Tennessee Code* (1884), § 1544; *Ann. Code of Mississippi* (1890), § 1300.

1. See *Submarine Tel. Co. v. Dickson*, 15 C. B., N. S. 759; 109 E. C. L. 759, and *The Clara Killan*, 3 L. R. Adm. 161; 19 W. R. 25; 39 L. J. Adm. 50. These were cases of interference by masters of vessels with submarine cables. See also *Farnsworth v. Western Union Tel. Co.* (Supreme Ct.), 6 N. Y. Supp. 735, where a verdict of two hundred and forty thousand dollars for damages for cutting the wires of plaintiff's line was set aside as excessive, it appearing that the line could be fully repaired at an expense of a few thousand dollars.

2. **Facts Involved—Explanation of Causes of Disturbance.**—Some explanation of electrical phenomena seems essential here to a proper understanding of the cases. The telephone, in order to be successfully operated, requires a delicate, sensitive electric current with accurate pulsations, and whenever this current is strengthened, or its pulsations interfered with by the addition of electric force from extrinsic sources, its usefulness is impaired or destroyed. The interfering currents cause a buzzing sound, which almost drowns the voice and make the annunciators ring, thus materially interfering with the successful working of the apparatus at the central office. This disturbance comes from wires conveying the powerful currents employed by the electric light and railway companies, and is produced by "induction" and "leakage" or "conduc-

tion." Induction takes place where the wires of the two systems run closely parallel for long distances; the electric fluid escapes from the more powerful wire, and is inducted by the atmosphere into the adjacent telephone wires. But the atmosphere is a poor conductor, and by placing the wires a reasonable distance apart and by using proper insulation, disturbances from induction are prevented and now occur less frequently. The disturbances arising from conduction or leakage are more serious and more difficult to prevent. They result from the earth's being used by both systems as a return circuit. The more powerful current unites with and absorbs, so to speak, the more delicate one. The only known way of preventing this is by the use of a metallic return circuit by either system. The objection to it is the expense, but it can be used by the telephone companies at a comparatively small cost and is actually in use by most of the electric lighting companies. The electric railway, however, uses its rails for conductors, and these, not being insulated, affect other currents; a proper metallic circuit could be made only by a return wire kept in constant connection with each car by means of a second trolley, which is very expensive to build and is complicated in its operation. By the McClelluer device, the telephone company can use a common return wire for all its instruments, without heavy expense. It is probably for this reason that when the practical question has been presented as to which company should construct its metallic return circuit, the courts have usually imposed the burden.

telephone company; but the right to this relief will depend in a measure upon whether the complaining company has a prior right of occupancy to the space covered by its wires as against the defendant company. A company owning such prior right of occupancy will not be enjoined from the beneficial use of it in favor of a subsequent occupant.<sup>1</sup>

In cases of disturbance from conduction or leakage, which is the more serious source of injury, and which results from the use of the earth as a return circuit by both systems, the question as to the prior right of occupancy has been considered as immaterial and the injunction against the railway company denied in all cases. The decisions rest upon the ground that where a person or corporation is making lawful use of his own property or of a public franchise, and in so doing occasions injury to another, the question of his liability will depend upon whether he has made use

upon the telephone companies. See *Keasbey on Electric Wires*, p. 139 *et seq.*; *Thompson on Electricity*, §§ 43, 50 *et seq.*; *Hudson River Teleph. Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393; 56 Hun (N. Y.) 67; 61 Hun (N. Y.) 141; *Cumberland Teleph., etc., Co. v. United Electric R. Co.*, 42 Fed. Rep. 273; 43 Am. & Eng. R. Cas. 194.

Since the electric railway wires above ground are never located close to the telephone wires, no contest has arisen between the telephone and electric railway companies, based on injury by induction; on the other hand, the electric light companies make use of a metallic return circuit, and there have been no controversies between such companies and those owning the telephone, based on injuries resulting from conduction. See the two notes following.

**1. Injunction Against Proximity of Wires.**—In *Nebraska Teleph. Co. v. York Gas Light Co.*, 27 Neb. 284; 30 Am. & Eng. Corp. Cas. 547, the telephone company sued for an injunction to restrain the electric light company from occupying certain streets, and from placing the wires too close to its own. There was some contest as to which had the prior right of occupancy. The bill alleged that incandescent light wires could not be operated parallel to telephone wires at a less distance than three feet, nor arc light wires at a less distance than two feet, without seriously interfering with the telephone, and that if the arc light wires crossed the telephone wires at a less distance than ten feet without being securely boxed, there was danger of accident. The trial court enjoined the light company from using

for arc light purposes, any wires running parallel and on the same side of the street with the telephone wires, and from using for incandescent light purposes any wires running parallel with the telephone wire on the same side of the street within a less distance than eight feet, and in any case for a distance greater than three hundred feet. It was further provided in the decree that, in all cases, wires must cross each other at an angle of not less than forty-five degrees, and a strong guard wire should be suspended between the wires of the two companies to prevent the upper wires from falling on the lower. The injunction was confined, however, to those streets in which the telephone company had a prior right of occupancy, and was refused as to streets in which the electric light company had been the first occupant. The court also enjoined the telephone company from placing its wires too near those of the light company. The decision of the trial court was sustained on appeal, except as to the injunction against the telephone company; that part of the injunction was set aside on the ground that the answer had asked for no affirmative relief, and that it did not appear that the telephone wires could exert the slightest influence upon those of the light company. See *Keasbey on Electric Wires*, p. 142 *et seq.*

In *Western Union Tel. Co. v. Champion Electric Light Co.*, 14 Cin. Wkly. Bull. 327, the telegraph company sought an injunction against the electric light company to restrain it from putting up parallel wires nearer than four feet from existing telegraph wires. The injunction

of the best known means. He is not bound to adopt expensive devices nor the most recent inventions, when the person injured may protect himself by the use of an effective and inexpensive device.<sup>1</sup> To authorize the recovery of damages, or the issuance of an injunction to prevent injury, the complaining party must show that he has used reasonable care to protect himself and to

was denied, on the ground that it appeared from the testimony that there would be no sensible diminution in the current by induction caused by closer proximity of the wires; that the danger to linemen engaged in repairing the telegraph lines could be avoided by having the electric light current shut off, which could be done on notice, and would only be required during the daytime; and that the danger from falling wires in storms was too uncertain to be considered. The court, after discussing the facts and circumstances, added that if an injunction were granted, it would be with the limitations just stated, and with the reserved right to modify it after experiment.

It is the duty of a telephone company having its line along a street, so to construct its line as not to interfere with the free use of the street by the public for purposes of travel and transportation, and this duty includes the precautions necessary to keep its wires from coming in contact with those of a street railway subsequently occupying the street. *Central Pa. Teleph. Co. v. Wilkes Barre, etc., R. Co.*, 11 Pa. Co. Ct. Rep. 417.

#### 1. Injury from Conduction or Leakage.

—See general principle stated in *Hoyt v. Jeffers*, 30 Mich. 181; *Cumberland Teleph., etc., Co. v. United Electric R. Co.*, 42 Fed. Rep. 273; 43 Am. & Eng. R. Cas. 194. In this last case the doctrine was discussed at length, and the history of the controversies between electrical companies reviewed. It appeared from the evidence that the use of a metallic circuit by either company would prevent any interference between the two currents. The telephone company could use such a circuit by the adoption of a safe and comparatively inexpensive device, while the railway company could do so only at a great expense and annoyance. The question was practically as to which company should undergo the expense of such a circuit. The denial of the injunction was placed by Brown, J., upon the following grounds: "1. That the defendants are making lawful use of the fran-

chise conferred upon them by the state in a manner contemplated by the statute, and that such act cannot be considered as a nuisance in itself. 2. That in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant. 3. That the damages occasioned to the complainant are not the direct consequence of the construction of defendants' roads, but are incidental damages resulting from their operation, and are not recoverable. In a similar case, *Hudson River Teleph. Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, a like conclusion was reached. Here the franchise of the telephone company was granted on the condition that the maintenance of its lines should not interfere with the enjoyment by the street railway company of its franchises." The court went on to say that, "It (the railway company) does not leave the natural forces of matter free to go unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage. We are not prepared to hold that a person, even in the prosecution of a lawful trade or business upon his own land, can gather there, by artificial means, a natural element like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case." Preliminary questions in the case were described in *Hudson River Teleph. Co. v. Watervliet Turn-*

prevent the injury, or that it was not preventible by the exertion of reasonable effort on his part.<sup>1</sup> But it must be conceded that in the present state of the development of electrical science, the questions discussed in this section cannot be considered as conclusively settled. The effect of further developments in the field of electric appliances may necessitate changes in the propositions of law hitherto maintained and applied.<sup>2</sup>

**V. STATE REGULATION AND CONTROL—1. Generally.**—Under its inherent power of police regulation and control over persons and property within its limits, a state may regulate the management of the property of a telegraph company, impose taxes upon it, and provide for the proper conduct of the company's business;<sup>3</sup> it may impose penalties for a failure to transmit messages when

pike, etc., Co., 56 Hun (N. Y.) 67; 121 N. Y. 397; 61 Hun (N. Y.) 141.

In *East Tennessee Teleph. Co. v. Chattanooga Electric St. R. Co.* (Chancery Ct. of Hamilton County, Tenn. 1891), 30 Am. & Eng. Corp. Cas. 562; the injunction was denied, but the court required the railway company to execute a bond for ten thousand dollars conditioned to indemnify the telephone company for damages, if any should be awarded against it.

In *City, etc., Tel. Co. v. Cincinnati, etc., R. Co.* (Ohio, 1890), 23 Wkly. L. Bull. 165, the trial court granted the injunction on the ground that the telephone company had acquired a prior right to the use of the streets, and had expended money on the faith of this right, and that the defendants had no right to disturb them unless they could show that there was no other way in which they could enjoy their franchise to operate an electric railway. But the supreme court reversed this decision, for the reasons already set out. *Cincinnati, etc., R. Co. v. City, etc., Tel. Assoc.*, 48 Ohio St. 390. For other cases upholding the doctrine of the text, see *Wisconsin Teleph. Co. v. Eau Claire St. R. Co.* (Circuit Ct. of Eau Claire County, Wis. 1890); *Rocky Mountain Bell Teleph. Co. v. Salt Lake City R. Co.* (Dist. Ct. for Third Dist., Utah, 1889); *East Tennessee Teleph. Co. v. Knoxville St. R. Co.* (Chancery Court of Knox County, Tenn. 1890).

1. *NEGLIGENCE*, vol. 16, p. 440; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 18; *Cumberland Teleph., etc., Co. v. United Electric Co.*, 42 Fed. Rep. 273; 43 Am. & Eng. R. Cas. 194.

2. See 2 Dill. on Mun. Corp. (4th ed.), § 734 c, note; *Keasbey on Electric Wires*, p. 152.

3. **General Power.**—*American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 32; 42 Am. Rep. 90; *Connell v. Western Union Tel. Co.*, 108 Mo. 459; 39 Am. & Eng. Corp. Cas. 594; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; 39 Am. & Eng. Corp. Cas. 526; 21 Am. St. Rep. 764, *aff'g* 58 Hun (N. Y.) 610; *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552 (Rev. Stat. of U. S., §§ 52, 63, 68 do not affect this right); *People v. Squire*, 145 U. S. 175, *aff'g* 107 N. Y. 593; 1 Am. St. Rep. 894; *Moore v. Eufaula* (Ala. 1892), 11 So. Rep. 921.

"It cannot be doubted that there is ample power in the legislative department of the state to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition." *Cooley's Const. Lim.* (5th ed.), 718 [581].

The general statutory provisions in a state, relative to telegraph companies, apply as well to foreign corporations operating lines within the state, as to domestic companies. *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Western Union Tel. Co. v. Way*, 83 Ala. 542.

The state may provide that telegraph companies shall be "liable for the non-delivery of dispatches intrusted to their care and for all mistakes in transmitting messages made by any person in their employ;" and also, that such companies shall not be exempt from such liability by reason of "any clause, condition or agreement contained in its printed blanks." It may enforce these provisions against all companies operating lines within its borders, even where the message is sent to another state. *Kemp*

properly tendered,<sup>1</sup> may regulate the manner in which its lines shall be constructed and maintained,<sup>2</sup> and may exercise such other general control as the public interests may require.<sup>3</sup> But, like railroad companies, telegraph companies, whose lines are in more than one state, are instruments of interstate commerce, and agents of the general government, in which capacities they are

*v. Western Union Tel. Co.*, 28 Neb. 661; 30 Am. & Eng. Corp. Cas. 608.

1. There are numerous cases enforcing the statutory penalty, though the constitutional question was not raised. The penalty imposed cannot ordinarily be enforced where the failure of duty on the part of the company occurs beyond the jurisdiction of the state. *Alexander v. Western Union Tel. Co.*, 67 Miss. 386; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 18 Am. & Eng. Corp. Cas. 18; *Little Rock, etc., R. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102; *infra*, this title, *Interstate Messages*.

In *Connell v. Western Union Tel. Co.*, 108 Mo. 459; 39 Am. & Eng. Corp. Cas. 594, it appears that the *Missouri* statute makes it the duty of every telegraph company within the state, to provide sufficient facilities for the dispatch of the business of the public, to receive dispatches from and for other telegraph lines and from and for any individual, and, on tender of payment of the usual charges, to transmit the same promptly and without partiality under penalty of two hundred dollars for every neglect or failure to do so. This statute is upheld as not being in violation of the exclusive power of Congress over interstate commerce. As such a statute merely provides for the enforcement of common-law duties, it seems that it cannot be objected to. It is clearly distinguishable from the statute of *Indiana*, which was declared invalid in *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 18 Am. & Eng. Corp. Cas. 18, *reviewing* 95 Ind. 12; 8 Am. & Eng. Corp. Cas. 56; 48 Am. Rep. 692.

The *Nebraska* statute, providing for the liability of telegraph companies, and that they shall not be exempt from liability by reason of any stipulations to the contrary, is upheld in *Kemp v. Western Union Tel. Co.*, 28 Neb. 661; 30 Am. & Eng. Corp. Cas. 607.

2. *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117; *Western Union Tel. Co. v. Philadelphia* (Pa. 1888), 12 Atl. Rep. 144; 21 Am. & Eng. Corp. Cas. 40; *Forsythe v. Baltimore, etc.,*

*Tel. Co.*, 12 Mo. App. 494; *People v. Squire*, 145 U. S. 175, *aff'g* 107 N. Y. 593; 1 Am. St. Rep. 894; *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

**Right of State to Require Wires to be Placed Underground.**—The fact that telegraph lines are, in a sense, instruments of interstate commerce, and that a federal statute authorizes companies operating such lines to occupy all military or post roads, including all public roads and highways, does not deprive a state of the power to require that in large cities all such lines shall be placed underground in proper subways. A statute providing such a requirement is a valid and proper exercise of the state's power of police regulation, and cannot be objected to as conflicting with the power of Congress. *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309; *People v. Squire*, 145 U. S. 175, *aff'g* 107 N. Y. 593; 1 Am. St. Rep. 894; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; 39 Am. & Eng. Corp. Cas. 526, *aff'g* 58 Hun (N. Y.) 610; 21 Am. St. Rep. 764; *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552. See also *Connell v. Western Union Tel. Co.*, 108 Mo. 459; 39 Am. & Eng. Corp. Cas. 594. For the statute referred to, see U. S. Rev. Stat., §§ 5763, 3964.

3. In *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 18 Am. & Eng. Corp. Cas. 18, Field, J., said: "The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation—that the state does not thereby encroach upon the free exercise of the power vested in Congress by the constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles and wires of telegraph companies in its jurisdiction, which the comfort and convenience of the community may require." *Cooley v. Board of Port Wardens*, 12 How. (U. S.) 299; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; 21 Am. & Eng. Corp. Cas. 13; *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 31;



not subject to the jurisdiction of the state.<sup>1</sup> The rule in this connection is the same as that applied to interstate railroads, and has already been set out in other articles.<sup>2</sup> Therefore, a state statute, prescribing the order in which dispatches must be sent, and requiring that where the persons addressed, or their agents, reside within one mile of the station, or within the city or town in which it is located, the dispatch must be delivered by a messenger, is, in so far as it affects messages to be delivered in another state, invalid as an interference with the exclusive power of Congress over interstate commerce.<sup>3</sup>

42 Am. Rep. 90; *infra*, this title, *Taxation—Of Telegraph Companies*.

1. Western Union Tel. Co. v. Pendleton, 122 U. S. 347; 18 Am. & Eng. Corp. Cas. 18, *rev'g* 95 Ind. 12; 8 Am. & Eng. Corp. Cas. 56; 48 Am. Rep. 692; *Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 26; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460.

2. See RAILROADS, vol. 19, p. 893; FREIGHT, vol. 8, p. 918; INTERSTATE COMMERCE, vol. 11, p. 552; TICKETS AND FARES.

3. Regulation of Interstate Messages.—*Indiana* Rev. Stat., §§ 4176-78, provided that every telegraph company in the state should receive dispatches from persons or from other lines, and on payment of the usual charges "transmit the same with impartiality and good faith in the order of time in which they are received, under penalty" of one hundred dollars. The statute also provided for the preference of certain messages, and for the delivery of all messages by a messenger of the receiving office. When the validity of the statute was tested in the state court, upon the issue as to whether the sender of a dispatch from S. in *Indiana* to O. in *Iowa* could recover the penalty because the company's agent in O. failed to deliver the dispatch by a messenger as required, it was held by an undivided bench that the statute was valid and constitutional, and that the plaintiff might recover the penalty. The court recognized *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, and other cases, but considered that the statute was nevertheless valid even as to messages sent out of the state, *relying* on *Sherlock v. Alling*, 93 U. S. 99; *Mobile County v. Kimball*, 102 U. S. 691; *Munn v. Illinois*, 94 U. S. 113; *Philadelphia, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232; *Harrigan v. Connecticut River Lumber*

Co., 129 Mass. 580; 37 Am. Rep. 387; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Cooley's Const. Lim.* (5th ed.) 718; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; 8 Am. & Eng. Corp. Cas. 56; 48 Am. Rep. 692; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; 8 Am. & Eng. Corp. Cas. 54.

But the decision of the state court was reversed on a writ of error in the *United States* Supreme Court, in the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 18 Am. & Eng. Corp. Cas. 18, and the rule laid down that such a statute could be enforced only as to messages sent between points both of which were within the state. The court, by Field, J., after reviewing *Western Union Tel. Co. v. Texas*, 105 U. S. 464, and *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, said: "The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where practicable, against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different states, if each state was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each state. . . .

*Indiana* also requires telegrams to be delivered by messengers to persons to whom they are addressed, if they reside within one mile of the telegraph station or within the city or town in which such station is; and the requirement applies according to the decision of its supreme court in this case when the delivery is to be made in another state. Other states might consider that the delivery by messenger to a person living in a city many miles in extent, was an undue burden, and require the duty

As the *United States* statutes give to all telegraph companies complying with certain conditions, the right to construct their lines along all military or post roads, a state has no power to grant to any company an exclusive right to the occupation of any post road within its borders, and a grant of such a right is void.<sup>1</sup>

To insure the protection of its citizens, a state may require that no foreign corporation shall do business within its limits unless it has therein at least one known place of business, and an authorized agent upon whom process may be served.<sup>2</sup> And this, it seems, may apply as well to telegraph companies as to others, notwithstanding the fact that they are instruments of interstate commerce. While a state may not exclude absolutely any such company, it may impose reasonable restrictions and conditions upon it by virtue of its power of police regulation.<sup>3</sup>

within less limits; but if the law of one state can prescribe the order and manner of delivery in another state, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any state." See *infra*, this title, *Interstate Messages*.

On similar principles, it is held that a message sent by telephone from one state to another is within the protection of the interstate commerce laws, and cannot be regulated or prohibited by injunction from a state court, on the ground that the persons or corporation engaged in sending such messages and operating the line, have not paid state taxes. *In re Pennsylvania Teleph. Co.*, 48 N. J. Eq. 91; 35 Am. & Eng. Cas. 26.

The decision of the *United States* Supreme Court in the *Pendleton* case was confined to the particular case in hand, and is not to be given too extensive an application. Thus, where there is a refusal or total failure to transmit, the sender may enforce the statutory penalty, although the point of destination was in another state. So also, where the wrong complained of is a refusal to deliver, or a delay in delivery, the addressee, if the statute allows an action by him, may enforce the penalty, though the message is sent from a foreign state. All that was decided in the *Pendleton* case was that a state cannot enforce the performance of a duty beyond its borders, and the fact that the message is sent from one state into another does not deprive either state of the right to enforce the performance,

within its borders, of the duties of the company engaging to transmit it. This view would follow from the accepted principles that a state may enforce the performance of the obligations of a public company though it is engaged in interstate commerce, and that a state law is not invalid merely because it incidentally affects interstate commerce. *Peck v. Chicago, etc., R. Co.*, 94 U. S. 164; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; 16 Am. & Eng. R. Cas. 1; *RAILROADS*, vol. 19, pp. 884, 893.

1. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 2 Woods (U. S.) 643; *aff'd* 96 U. S. 1.

2. *Foreign Corporations—Agent for Service of Process*.—*Paul v. Virginia*, 8 Wall. (U. S.) 168; *FOREIGN CORPORATIONS*, vol. 8, p. 368.

3. In *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26; 42 Am. Rep. 90, the plaintiff, a telegraph company, filed a bill for an injunction to restrain the defendant from interfering with the construction and operation of its line. The state constitution provided that no corporation should do business within the state "without having at least one known place of business, and an authorized agent or agents therein." With this provision, the plaintiff had not complied. The injunction was denied on the ground that no right to such relief was shown to exist, but the court went on to hold that the constitutional provision quoted did not conflict with the Federal Constitution, saying: "The mandate of section 4, article 14 of the constitution of *Alabama*, which requires foreign corporations to have a known place of business and an authorized agent, is just as much a police regula-

The constitutional prohibition against the impairment of the obligation of contracts, and in favor of the protection of vested rights, affords a limitation to the state's power of control.<sup>1</sup> Thus, a municipal ordinance, granting to a particular company authority to construct and maintain telegraph lines along the streets without limitation as to time, and for a stipulated consideration, when accepted and acted on by the company by a compliance with all conditions, and by the construction of an expensive plant, acquires the features of a contract, which the city cannot afterwards annul or alter in its essential terms without the company's consent.<sup>2</sup> In this connection the same general rules as to the state's right of regulation and control, apply to telephone as to telegraph companies;<sup>3</sup> the most common instances of its exercise are seen in statutes requiring telephone companies to furnish, without discrimination,<sup>4</sup> facilities to all who apply for them, and in statutes regulating the charges of such companies,<sup>5</sup> and the manner of the construction of their lines.<sup>6</sup>

**2. Regulation of Charges.**—A telephone company is engaged in a "business affected with a public interest," within the meaning of the rule laid down in a leading case,<sup>7</sup> and the state, in the exercise of its police power, may therefore regulate the charges of

tion for the protection of the property interests of its citizens as a law forbidding vagrancy among its inhabitants. It does not impede or obstruct unreasonably any right conferred on foreign telegraph corporate companies by the act of Congress (U. S. Rev. St., §§ 5263-69), and is therefore free from constitutional objections." The court recognized that in *Paul v. Virginia*, 8 Wall. (U. S.) 168, the corporation was not one engaged in interstate commerce, but considered that, notwithstanding the decisions in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, the same rule might be applied to telegraph companies operating in more than one state. *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 33; 42 Am. Rep. 94. See also *Singer Mfg. Co. v. Hardee*, 4 N. Mex. 175; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; 8 Am. & Eng. Corp. Cas. 178; *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110; 15 Am. & Eng. Corp. Cas. 421.

**1. Protection of Vested Interests.**—*Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *FRANCHISES*, vol. 8, p. 620; *POLICE POWER*, vol. 18, p. 760; *RAILROADS*, vol. 19, p. 891.

**2.** In *New Orleans v. Great Southern Teleph., etc., Co.*, 40 La. Ann. 41; 21 Am. & Eng. Corp. Cas. 35, the city attempted to impose an additional burden on the company in the shape of a

tax. It claimed the right under a section of the original ordinance, which provided that "all the acts and doings of said company under this ordinance shall be subject to any ordinance that may hereafter be passed by the city council concerning the same." It was held, however, that the city could not thus impair the contractual obligation, the court considering that "the city's construction of this section is strained and unreasonable, and conforms neither to its spirit nor letter." See also *Hudson Teleph. Co. v. Jersey City*, 49 N. J. L. 303; 16 Am. & Eng. Corp. Cas. 297.

**3. Regulation of Telephone Companies.**—Statutes concerning telegraphs usually include telephones, unless there is something to indicate a contrary intention on the part of the legislature. See *supra*, this title, *Definition*; *Franklin v. Northwestern Teleph. Co.*, 69 Iowa 97.

**4.** See *infra*, this title, *Duty of Telephone Companies to Furnish Equal Facilities to All*; *MANDAMUS*, vol. 14, p. 163.

**5.** See *infra*, this title, *Regulation of Charges*.

**6.** See *supra*, this title, *Construction and Maintenance of Telegraph and Telephone Lines*.

**7.** *Munn v. Illinois*, 94 U. S. 113, affirming 69 Ill. 80. See the doctrine of this case reviewed and examined in

such companies, and provide a maximum rate which their charges shall not exceed.<sup>1</sup> The fact that the telephone lines are operated under patents granted by the general government in no way affects the right of the state in this regard.<sup>2</sup> Where a statute exists which regulates such charges, the telephone company cannot evade its operation. Thus, it cannot exceed the maximum rate by pretending to divide the charge into two items, one being designated as the regular rental and the other as a monthly charge for the use of the instrument by non-subscribers.<sup>3</sup> Nor can it exceed the rate prescribed by attempting to charge a certain sum for each conversation, instead of charging a regular rental.<sup>4</sup> The state may delegate its right of police regulation to a municipal corporation, but whether such a delegation has been made in any particular case, depends upon the construction of the charter or statute.<sup>5</sup> The same principles will apply to telegraph companies. The fact that they are instruments of interstate commerce, and exercise privileges under special grants of right of way from the federal government, does not remove them from the state's power of control in matters of police regulation, though

FREIGHT, vol. 8, p. 908; POLICE POWER, vol. 18, p. 752; Cooley's Const. Lim. (4th ed.), p. [594] 743; People v. Budd, 117 N. Y. 1; 29 Am. & Eng. Corp. Cas. 16.

1. Hockett v. State, 105 Ind. 559; 11 Am. & Eng. Corp. Cas. 577; 55 Am. Rep. 201; Central Union Teleph. Co. v. Bradbury, 106 Ind. 1; Johnson v. State, 113 Ind. 143; 21 Am. & Eng. Corp. Cas. 65; Central Union Teleph. Co. v. State, 118 Ind. 194; 25 Am. & Eng. Corp. Cas. 481; 10 Am. St. Rep. 114; St. Louis v. Bell Teleph. Co., 96 Mo. 623; 25 Am. & Eng. Corp. Cas. 476; 9 Am. St. Rep. 370. See also Mayo v. Western Union Tel. Co. (N. Car. 1893), 16 S. E. Rep. 1006.

"The state regulation and control of property devoted to a public use is not the taking of property for a public purpose, within the meaning of the constitution of this state. Nor is such regulation and control an interference with the guaranteed rights of the citizen in private property." Hockett v. State, 105 Ind. 559; 11 Am. & Eng. Corp. Cas. 577; 55 Am. Rep. 207. See also Chicago, etc., R. Co. v. Iowa, 94 U. S. 155; Mobile v. Yuille, 3 Ala. 137; 36 Am. Dec. 441; Com. v. Alger, 7 Cush. (Mass.) 53; Foster v. Kansas, 112 U. S. 201; Atty. Gen'l v. Chicago, etc., R. Co., 35 Wis. 425; POLICE POWER, vol. 18, p. 752; TICKETS AND FARES.

2. Effect of Grant of Patent Right.—See Hockett v. State, 105 Ind. 559; 11

Am. & Eng. Corp. Cas. 577; 55 Am. Rep. 207, and other cases cited in first part of preceding note. In Patterson v. Kentucky, 97 U. S. 507, the court, in upholding the right of a state to regulate the use and sale of a patented article within its limits, said: "We are of the opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the state established by statute." See PATENT LAW, vol. 18, p. 65; State v. Bell Teleph. Co., 36 Ohio St. 296; 38 Am. Rep. 586.

3. Schemes to Evade Statute Regulating Charges.—Johnson v. State, 113 Ind. 143; 21 Am. & Eng. Corp. Cas. 65.

4. Central Union Teleph. Co. v. State, 118 Ind. 194, 598; 25 Am. & Eng. Corp. Cas. 481; 10 Am. St. Rep. 114.

5. In St. Louis v. Bell Teleph. Co., 96 Mo. 623; 25 Am. & Eng. Corp. Cas. 476; 9 Am. St. Rep. 370, the mayor and assembly of St. Louis were authorized by the charter of the city "to license, tax and regulate telegraph companies or corporations, and all other business, trades, vocations or professions whatever," and also to provide for the "general welfare" of the city. It was held that the power to regulate telegraph companies included a similar power over telephone companies, although the latter were not in existence

it may limit the power of the state where the charges relate to interstate messages.<sup>1</sup>

**3. Municipal Control—License Fees.**—The legislature may delegate to a municipal corporation a general power to regulate the construction and maintenance of telegraph lines within its limits, and this power is included in the delegation of a general power of police control over streets.<sup>2</sup>

After the city, by virtue of its power to regulate, has designated the streets in which a company may place its wires, and the company has conformed to all the conditions, and expended money in placing its poles on such streets, the municipality cannot revoke the designation except for just and sufficient cause.<sup>3</sup> But the fact that a company has obtained permission from a city to occupy the streets, does not secure immunity for it from subsequent regulations prescribed by the legislature, which do not amount to an impairment of its substantial vested rights.<sup>4</sup>

Where the telegraph line in a street amounts to a nuisance, the

at the time of the grant of authority. But it was considered that this power did not confer on the city authorities the right to regulate by ordinance, the charges of telephone companies. Such authority has, however, been conferred by a later statute. *Missouri Acts 1889*, ch. 434, p. 270.

1. See *infra*, this title, *State Regulation and Control, Generally*; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 18 Am. & Eng. Corp. Cas. 18. The same principles which control the right of the state to regulate railroad charges, apply in the case of telegraphs. See *FREIGHT*, vol. 8, p. 906, 918; *TICKETS AND FARES*.

2. *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117; *Western Union Tel. Co. v. Philadelphia* (Pa. 1888), 12 Atl. Rep. 144; 21 Am. & Eng. Corp. Cas. 40; 2 Dill. on Mun. Corp. (4th ed.), § 698, note.

Thus a company may be compelled to put up a shapely pole, as required by ordinance. *Forsythe v. Baltimore*, etc., Tel. Co., 12 Mo. App. 494.

Under the general telegraph law of *New Jersey*, the authorities of an incorporated town cannot, before prescribing regulations for the elevation at which the wires shall cross the streets, treat such use of the streets, for that purpose, as in no way impedes or endangers their full, free, and safe use, as a nuisance. *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627.

Where a telegraph company erects poles and strings wires, under authority of an ordinance of the city council,

which provides that such privilege shall expire on a certain day, the mayor has no right, without direction from the council and without notice to the company, to cut and remove the wires after the expiration of the time limited, and he will be liable as a trespasser for so doing. *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

3. *Hudson Teleph. Co. v. Jersey City*, 49 N. J. L. 303; 16 Am. & Eng. Corp. Cas. 291. In this case Reed, J., said: "That the common council has the power, at its mere will, to amend the act which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance which can be at once abated and their business thus destroyed, I cannot admit. The power of a common council to revoke its permission, given by statutory authority, to the location of a railroad in the streets of a city, was expressly denied in the case of *People's Pass. R. Co. v. Baldwin*, 37 Leg. Int. (Pa.) 424, and in *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358. I also understand the rule laid down in *Com. v. Boston*, 97 Mass. 555, in reference to the right of municipal authorities to proceed against telegraph poles in a street, as nuisances, after permission to so place them has once been granted, is in the same direction." See also *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627; *Suburban Light, etc., Co. v. Boston*, 153 Mass. 200.

4. *People v. Squire*, 145 U. S. 175, *aff'd* 107 N. Y. 593; 1 Am. St. Rep. 894.

municipal authorities have a right to abate it, by virtue of their general power to protect the public interest in the streets.<sup>1</sup>

Under its power to regulate, a municipal corporation has no authority to tax a telegraph or telephone company operating lines within its limits, and therefore may not impose license fees, except so far as may be necessary for the expenses of inspection, etc.<sup>2</sup> Where, under express authority from the legislature, a municipal corporation is authorized to impose a license tax on the business of telegraph companies done within the city, the tax must be confined to such business as is not interstate in its character.<sup>3</sup>

**VI. FEDERAL CONTROL.**—The fact that a telegraph company whose lines extend into several states is an instrument of interstate commerce, subjects it to the control of Congress, so far as regards matters connected with commerce between the states.<sup>4</sup> And Congress has a further right of control, by virtue of the conditions incorporated into the grants of franchises to certain companies which constructed lines through the territories and along the Pacific railroads.<sup>5</sup>

**1. Nuisance.**—New York, etc., *Teleph. Co. v. East Orange*, 42 N. J. Eq. 490. In this, an injunction to restrain the authorities from removing the poles was denied, on the ground that the company's authority to occupy the street was doubtful. See *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

**2. License Fees.**—See *Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 27; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32; 8 Am. & Eng. Corp. Cas. 538. Thus an ordinance requiring all telegraph poles within the city to be inspected by the police department and licensed, and imposing a license fee of one dollar per annum for each pole, and two dollars and a half per mile of wire, is not unreasonable or invalid, and is within the city's power of "regulation." *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117; *Philadelphia v. Postal Tel. Cable Co.* (Supreme Ct.), 21 N. Y. Supp. 556; *Chester v. Western Union Tel. Co.*, 152 Pa. St. 464; *Western Union Tel. Co. v. Philadelphia* (Pa. 1888), 12 Atl. Rep. 144; 21 Am. & Eng. Corp. Cas. 40. Compare *Philadelphia v. Western Union Tel. Co.*, 40 Fed. Rep. 615. So where the state has imposed an annual license fee in lieu of all taxes, a city cannot impose additional taxes in the form of license fees. *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32; 8 Am. & Eng. Corp. Cas. 538.

But a privilege or license tax of five dollars a year on each pole within the

city, cannot be upheld under the city's power to "regulate." *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59; *New Orleans v. Great Southern Teleph., etc., Co.*, 40 La. Ann. 41; 21 Am. & Eng. Corp. Cas. 35. See also generally, *LICENSE*, vol. 13, p. 532; *TAXATION*, vol. 25, p. 1; *infra*, this title, *Taxation—Of Telegraph Companies*; *New York v. Second Ave. R. Co.*, 32 N. Y. 262, *aff'g* 34 Barb. (N. Y.) 41; 12 Abb. Pr. (N. Y.) 364. Compare *Thompson on Electricity*, § 128, questioning the correctness of the last rule; 27 Am. L. Reg. N. S. 426.

**3.** *Charleston v. Postal Tel. Co.* (S. Car. 1891), 9 Ry. & Corp. L. J. 129 (a case in the Charleston court of common pleas). See also *Moore v. Eufaula* (Ala. 1892), 11 So. Rep. 921.

**4.** *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. See also *INTERSTATE COMMERCE*, vol. 11, p. 539 *et seq.*

**5.** See *RAILROADS*, vol. 19, p. 894; *supra*, this title, *Federal and State Grants of Right of Way*; *U. S. v. Union Pac. R. Co.*, 91 U. S. 72.

Thus, in view of the fact that the telegraphic franchises granted by the Union Pacific acts were inalienable by the grantees, and also of the express reservation therein of the right to "add to, alter, amend or repeal," Congress had power to pass the act of August 7th, 1888, directing the railroad and telegraph companies which received government aid, henceforth to

**VII. DUTY OF TELEPHONE COMPANIES TO FURNISH EQUAL FACILITIES TO ALL.**—Telephone companies, whether corporations or individuals, are engaged in a public employment and their business is affected with a public interest. They are bound, therefore, to serve impartially and without discrimination, all who apply for service and who tender a compliance with their regulations. The telephone, though of recent discovery, has become almost indispensable to the commercial and business public; it is a vehicle of public intelligence and its owners cannot refuse to discharge the obligations incumbent upon them as public servants.<sup>1</sup> Nor can they evade these obligations on the ground that they own and operate their lines under license from the holders of the patent, the terms of which license require that service shall not be furnished to certain rival companies. Owners of patents and persons holding under them must exercise their rights subject to the obligations imposed by the common or statute law, and cannot by contract or otherwise evade such obligations.<sup>2</sup>

operate their telegraph lines by themselves alone and through their own officers and employés. *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28. See also *supra*, this title, *Corporate Rights and Franchises*.

1. In *State v. Nebraska Teleph. Co.*, 17 Neb. 126; 8 Am. & Eng. Corp. Cas. 1; 52 Am. Rep. 409, it appeared that the relator, an attorney at law, applied to the local company for a telephone with the usual connections. The instrument was furnished, together with all the appliances, excepting a directory, the absence of which materially impaired the beneficial use of the telephone. After continued applications, a directory was furnished, but on pay day, the subscriber refused to pay except for the time during which he had been furnished with a directory; the company insisted on full payment. Neither would yield, so the company removed the instrument. Subsequently the relator applied for service, offering to comply with their reasonable regulations, but was refused. He then applied for *mandamus* to compel the company to render the service. It was held that the *mandamus* should issue. The court, after reviewing the status of the telephone companies and the public character of the obligations they assume, concluded that the company had "assumed the responsibility of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier." That

the duty to the relator was one growing out of its office as carrier and not out of contract; and that its relations with the relator as to the misunderstanding between them concerning the directory, could not affect the case. See also *Delaware v. Delaware, etc., Tel., etc., Co.*, 47 Fed. Rep. 633; 35 Am. & Eng. Corp. Cas. 15; *aff'd* 50 Fed. Rep. 677; *Central Union Teleph. Co. v. Bradbury*, 106 Ind. 1; *Budd v. New York*, 143 U. S. 517; 36 Am. & Eng. Corp. Cas. 31; *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136. The telephone company cannot evade this obligation by alleging that it does not rent telephones, but furnishes such service by means of public stations only. *Central Union Teleph. Co. v. State*, 123 Ind. 113; *Central Union Teleph. Co. v. State*, 118 Ind. 194; 25 Am. & Eng. Corp. Cas. 481; 10 Am. St. Rep. 114.

2. **Effect of Contract with Parent Company Owning Patent Right.**—The American Bell Telephone Company owns the telephone patents, and its custom has been, in granting to local companies the right to operate lines, to provide in the grant that the grantee shall not afford telephone facilities to any telegraph company except with the grantor's consent. In *State v. Bell Teleph. Co.*, 36 Ohio St. 206; 38 Am. Rep. 584, the terms of the grant were as stated, and the parent company had provided that the Western Union Telegraph Company should have a monopoly of all telegraphic transmissions in connection with the telephone. The court held that such a contract could not re-

In many of the states, statutes exist which provide for the enforcement of these obligations, but it seems that the rule would be the same, whether the obligation was declared by statute or considered as arising from the common law.<sup>1</sup>

lieve the local company from its obligation to serve the public impartially, and issued a *mandamus* to compel the company to supply the relators (other telegraph companies), with telephone facilities. In this case a statute provided specifically as to the duties incumbent upon telephone and telegraph companies. In the case of *Chesapeake, etc., Teleph. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399; 59 Am. Rep. 167; 16 Am. & Eng. Corp. Cas. 221, a similar state of facts existed. The case arose under the statute declaring the duties of telegraph companies, which, the court held, included telephone companies. A *mandamus* was issued to compel the telephone company to extend its service to the complainant telegraph company. So in *Bell Teleph. Co. v. Com.* (Pa. 1886), 3 Atl. Rep. 825; Central Dist., etc., *Teleph. Co. v. Com.*, 114 Pa. St. 592; Commercial Union Tel. Co. v. New England Teleph., etc., Co., 61 Vt. 241; 15 Am. St. Rep. 893; Central Union Teleph. Co. v. State, 118 Ind. 194; 25 Am. & Eng. Corp. Cas. 481; 10 Am. St. Rep. 114; Central Union Teleph. Co. v. State, 123 Ind. 113. See also *State v. Bell Teleph. Co.* (Mo. 1880), 22 Alb. L. J. 363; *State v. Bell Teleph. Co.*, 23 Fed. Rep. 539; 8 Am. & Eng. Corp. Cas. 7; *Louisville Transfer Co. v. American Dist. Teleph. Co.* (Ky.), 24 Alb. L. Jour. 283. In this last case the plaintiff carried on a passenger transfer business in public omnibuses and carriages, while the defendant operated a telephone exchange, and organized as a part of its business, a system of public transfer by carriages and coupés. The defendant had placed a telephone in plaintiff's office and threatened to remove it, whereupon plaintiff applied for an injunction. It was held that, the defendant being engaged in two distinct employments, there was no rivalry between him and the plaintiff as to the telephone business, and that he occupied the same relation to the plaintiff as toward the rest of the public and could not discriminate against him. See also *CARRIERS OF GOODS*, vol. 2, p. 788.

**Authorities Contra.**—The rule of the text is opposed by a single case. *American Rapid Tel. Co. v. Connecticut Teleph. Co.*, 49 Conn. 352; 1 Am. &

Eng. Corp. Cas. 378; 44 Am. Rep. 237. The facts were the same as in the first case set out in this note. The court held that the parent company in *Massachusetts*, owning the patent, had a right, in granting licenses for its use, to impose whatever restrictions it chose; that the *Connecticut* corporation, therefore, acquired a right only to the restricted use of the patented device, and its duty to the public did not extend beyond that restricted use; that the statute requiring all telegraph and telephone companies to receive dispatches from all other telegraph and telephone lines, and transmit them on payment of the usual charges, could not operate to compel the *Connecticut* corporation to do what it had no right to do; and that a *Massachusetts* statute to the same effect was to be regarded as applying to the action of the *Massachusetts* corporation as a carrier of speech in that state, and not as affecting its right to manufacture its instruments and sell or lease them in other states as the owner of the patent. No authorities are cited in the opinion.

In *People v. Hudson River Teleph. Co.*, 19 Abb. N. Cas. (N. Y. Supreme Ct.) 466, the rule is stated to be that "a telephone company may not withhold from one citizen, facilities which it grants to another. It may, however, make and enforce a regulation that a subscriber shall not use his instrument in transmitting messages for a rival company. But it may not insist that he shall not call messengers except from its office."

In *St. Louis, etc., R. Co. v. Southern Express Co.*, 117 U. S. 3; 23 Am. & Eng. R. Cas. 545, it is held that a railroad company may refuse to serve an express company, or may prefer one company to others. See *EXPRESS COMPANIES*, vol. 7, p. 542. But the reasons which called for the holding in that case cannot be applied to the cases under consideration. The distinction between the two classes of cases is stated in *Delaware v. Delaware, etc., Tel., etc., Co.*, 47 Fed. Rep. 633; 35 Am. & Eng. Corp. Cas. 23; *aff'd* 50 Fed. Rep. 680.

**1. Effect of Statutes.**—"So far as the obligations of telegraph companies are



The rule of law thus recognized does not conflict with the provisions of the statutes of the *United States*, or the decisions rendered thereunder in regard to the rights of patentees.<sup>1</sup> It is true that the value of a patent right lies in its exclusiveness; it is a species of property consisting of the exclusive right to manufacture, to sell and to use. The patentee may dispose of just that portion of his property in the patent which he may find convenient or profitable, and the licensee or grantee will have no further rights than those granted.<sup>2</sup> The franchise secured by the patent holds the licensee under the operation of the patent, and restrains him from all use beyond that which the licensor has granted by the express terms of the license. The use of a patent is never allowed against the will of the patentee, nor can any power compel a larger grant from the patentee than he chooses to make.<sup>3</sup> But the telephone patent is practically valueless except when subjected to a public use,<sup>4</sup> and the owners of the patent, by subjecting it to such use and accepting the benefits flowing therefrom, must be held impliedly to have assumed the corresponding obligations, principal among which is the duty to serve the public without discrimination. They cannot ask of the state that the right of eminent domain be granted in their behalf, and that authority be given them to occupy streets and highways with their poles and wires, and at the same time insist upon immunity from public duties and from state regulation and control; their rights in the patent, in so far as they conflict with the new duties, are waived by their acceptance of such privileges.<sup>5</sup>

defined by the act (except the payment of the penalty) they are simply declaratory of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say that they existed only by force of the statute; and the same is true of the clause in the act making its provisions applicable to telephones." *State v. Nebraska Teleph. Co.*, 17 Neb. 126; 8 Am. & Eng. Corp. Cas. 1; 52 Am. Rep. 409.

1. **Effect of Grant of Patent from United States.**—*Commercial Union Tel. Co. v. New England Teleph., etc., Co.*, 61 Vt. 241; 15 Am. St. Rep. 893; *Patterson v. Kentucky*, 97 U. S. 501.

2. **Rights of Patentees.**—*Gayler v. Wilder*, 10 How. (U. S.) 478; *Seymour v. Osborne*, 11 Wall. (U. S.) 533; *Wilson v. Rousseau*, 4 How. (U. S.) 674; *Bloomer v. McQuewan*, 14 How. (U. S.) 549; *Seymour v. McCormick*, 16 How. (U. S.) 480; *Adams v. Burke*, 17 Wall. (U. S.) 453; *Mitchell v. Hawley*, 16 Wall. (U. S.) 550; **PATENT LAW**, vol. 18, p. 130 *et seq.*

3. *Pope Mfg. Co. v. Owsley*, 27 Fed.

Rep. 100; *Adams v. Burke*, 17 Wall. (U. S.) 453; *Allen v. New York*, 7 Fed. Rep. 483; *Campbell v. James*, 18 Pat. Off. Gaz. 1111; *Cammeyer v. Newton*, 94 U. S. 234; *Colgate v. Western Union Tel. Co.*, 15 Blatchf. (U. S.) 365; *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788; *Emigh v. Chicago, etc., R. Co.*, 2 Fish. Pat. Cas. 387; *American Rapid Tel. Co. v. Connecticut Teleph. Co.*, 49 Conn. 352; 1 Am. & Eng. Corp. Cas. 378; 44 Am. Rep. 237.

4. The construction of telephone lines would be practically impossible without the exercise of the right of eminent domain, and the right to occupy public streets. But such rights are never granted except in favor of a public use; hence, telephone companies are compelled to subject their patent to a public use in order to reap any benefit from it. See **EMINENT DOMAIN**, vol. 6, p. 524; **FRANCHISES**, vol. 8, pp. 588, 612.

5. *State v. American, etc., News Co.*, 43 N. J. L. 381; *Commercial Union Tel. Co. v. New England Teleph., etc., Co.*, 61 Vt. 241; 15 Am. St. Rep. 893;

A company may, however, refuse to furnish its service to one who violates its reasonable regulations, as, for example, one who uses obscene language in talking over the line.<sup>1</sup>

The duty of the company in any particular case being established, *mandamus* is the proper remedy to enforce its performance,<sup>2</sup> and in such a proceeding the owner of the patent, under whom the defendant company holds, is not a necessary party, although the company's defense may be that its contract with the parent company, the owner of the patent, forbids the particular service in dispute to be furnished.<sup>3</sup>

**VIII. LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENT TRANSMISSION OR DELIVERY.**—A telegraph company, upon accepting a message tendered it for transmission, is under a legal duty to transmit and deliver it without error or delay, and is liable in damages for any injury of which its negligence in the performance of this duty is the proximate cause. The questions in this connection are the duty of the company in the particular case, and proximate cause.<sup>4</sup>

**1. General View of Company's Duty.**—The first duty of the company is to accept all proper messages tendered it for transmission by persons who have complied with its reasonable regulations. For a willful breach of this duty, it can be held liable for exem-

Delaware, etc., Tel., etc., Co. v. Delaware, 50 Fed. Rep. 677; 39 Am. & Eng. Corp. Cas. 516, *aff'd* 47 Fed. Rep. 633; 35 Am. & Eng. Corp. Cas. 15; Jordan v. Dayton, 4 Ohio 295; Vannini v. Paine, 1 Harr. (Del.) 65; Munn v. Illinois, 94 U. S. 113.

**Effect of Interstate Commerce Clause.**—Statutes of a state, declaring the duties of telephone companies, are intended to apply only to the service within the state. The company cannot, therefore, defend against the application for a *mandamus* on the ground that it is engaged in interstate commerce, merely because, in furnishing the complainant with telephone service, it would put him in connection with the company's offices outside the state. Central Union Teleph. Co. v. State, 118 Ind. 194; 25 Am. & Eng. Corp. Cas. 481; 10 Am. St. Rep. 114. See *supra*, this title, *State Regulation and Control*.

1. Pugh v. City, etc., Teleph. Co. (Ohio, 1883), 27 Alb. L. J. 163; FRANCHISES, vol. 8, p. 613, note; *infra*, this title, *Immoral Messages*.

2. **Remedy is by Mandamus.**—"The remedy by *mandamus* is the appropriate one. The duty is of a public character, and there is no other adequate mode of relief." State v. Nebraska Teleph. Co., 17 Neb. 126; 8 Am. & Eng. Corp. Cas. 1; 52 Am. Rep. 409, *citing*

Vincent v. Chicago, etc., R. Co., 49 Ill. 33; State v. Hartford, etc., R. Co., 29 Conn. 538; People v. Albany, etc., R. Co., 24 N. Y. 261; 82 Am. Dec. 295; State v. Bell Teleph. Co., 36 Ohio St. 296; 38 Am. Rep. 583. See the same view upheld in *MANDAMUS*, vol. 14, p. 163; Chesapeake, etc., Teleph. Co. v. Baltimore, etc., Tel. Co., 66 Md. 399; 16 Am. & Eng. Corp. Cas. 213; 59 Am. Rep. 167.

If a complainant is already supplied with telephone facilities, his remedy to prevent the removal of the instruments is by injunction. Louisville Transfer Co. v. American Dist. Teleph. Co. (Ky.), 24 Alb. L. Jour. 283. See Central Dist., etc., Teleph. Co. v. Com., 114 Pa. St. 592, as to matter of pleading and sufficiency of answer.

3. Bell Teleph. Co. v. Com. (Pa. 1886), 3 Atl. Rep. 825. In State v. Bell Teleph. Co., 23 Fed. Rep. 539; 8 Am. & Eng. Corp. Cas. 7, the court was divided as to whether or not the owner of the patent, the American Bell Telephone Company, was a necessary party; Brewer, J., considering that it was not, while Treat, J., dissented. *Compare* as to the rule of the text, Commercial Union Tel. Co. v. New England Teleph., etc., Co., 61 Vt. 241; 15 Am. St. Rep. 893.

4. This section should be considered

plary damages,<sup>1</sup> though it is not liable for such damages where its refusal to transmit arises from a misunderstanding as to its duty in the case involved.<sup>2</sup> Or *mandamus* can be had to compel it to discharge this duty.<sup>3</sup> Having accepted the message, the duty of the company is to exercise due care to secure its prompt and correct transmission and delivery; it is not, like a common carrier, made to insure correctness in transmission, but is bound only to the exercise of proper care.<sup>4</sup> But the status of the telegraph companies as *quasi* public institutions, and their acceptance of special privileges from the state and federal governments, impose upon them unusual duties and obligations, and they are bound to exercise a degree of care commensurate with such duties; they cannot claim that the standard of their duty and liability is the same as that of private individuals. Their obligations as to the transmission of messages do not therefore arise entirely out of the contract of sending.<sup>5</sup> In cases where, from any cause, it is impossible to send the dispatch, or where considerable delay will be necessary, it is the duty of the company to inform the sender, particularly where the message shows on its face the necessity or importance of its speedy transmission.<sup>6</sup>

in connection with the general view of the subject in the article NEGLIGENCE, vol. 16, p. 386 *et seq.*

1. See EXEMPLARY DAMAGES, vol. 7, p. 448.

2. Thus in the case of *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495, the company refused to send a message because it had reason to believe that it was intended to promote an illegal purpose. The court held that it was liable in damages, but could not be held liable for exemplary or punitive damages. See *infra*, this title, *Immoral Messages*.

3. See MANDAMUS, vol. 14, p. 163; *Friedman v. Gold, etc.*, Tel. Co., 32 Hun (N. Y.) 4.

4. *Pinckney v. Western Union Tel. Co.*, 19 S. Car. 71; 45 Am. Rep. 765. See *supra*, this title, *Legal Status of Telegraphs and Telephones—As Common Carriers*.

5. See *supra*, this title, *Legal Status of Telegraphs and Telephones*; NEGLIGENCE, vol. 16, pp. 427-428; RAILROADS, vol. 19, pp. 780, 899, note 2; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 231.

In *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 20; 4 Am. St. Rep. 126, Holt, J., observes: "Its liability for neglect is not founded purely upon contract. It is chartered purely for public purposes;

extraordinary powers are, therefore, conferred upon it; it has the power of eminent domain; if it did not serve the public, it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges it is required to receive and transmit messages, and is liable for neglect, independent of any express contract." See also *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 182; 46 Am. Rep. 715.

6. **Duty to Inform Sender When Delay is Unavoidable.**—*Western Union Tel. Co. v. Harding*, 103 Ind. 505; 10 Am. & Eng. Corp. Cas. 617, where the court said: "It might well be that in a case where a message was delivered, which showed upon its face the importance of speedy transmission, and other means of making the communication were available to the sender, which might be resorted to, if he was informed that the one chosen was ineffectual, or his conduct might otherwise be materially controlled thereby, the company would be bound at its peril to ascertain and disclose its inability to serve him, or render itself liable to respond in damages."

In the case of a passenger who purchases a ticket entitling him to be carried, it is his duty to inquire, before embarking upon the train, whether it

a. DUTY TO TRANSMIT WITHOUT ERROR OR DELAY.—The company's obligation, as a public servant, imposes upon it the duty to transmit all messages, properly offered for transmission, without error or delay, and it becomes liable for damages resulting from failure to exercise proper care.<sup>1</sup> But it is not, like a common carrier, liable as an insurer, and cannot, therefore, be held responsible for errors or delays caused by atmospheric disturbances or other causes beyond its control.<sup>2</sup> Where such causes prevent a direct transmission, the company is not guilty of negligence in selecting a circuitous route;<sup>3</sup> and if it is necessary that the message pass through a repeating office, a reasonable allowance must be made in the company's favor for the delay caused by other business at such office.<sup>4</sup> At small stations, it is not the duty of the company to keep more than one operator and a messenger boy, and if a slight delay occurs, owing to the operator's absence at his meals, the company cannot be held guilty of negligence, if the message is forwarded immediately on his return.<sup>5</sup> A failure by the sender to comply with the reasonable and proper regulations as to sending messages, will relieve the company of its liability for an incorrect or delayed transmission, where it appears that the sender knew or ought to have known of such regulations.<sup>6</sup>

b. DUTY TO DELIVER.—The telegraph company owes an active duty to make use of reasonable diligence and effort to find the person to whom the message is addressed, and deliver to him a copy in writing. It can be excused from this duty only by showing that the person addressed was not within the ordinary delivery limits, or that delivery was prevented by the intervention of influ-

will carry him to the point of his destination. Ohio, etc., R. Co. v. Applewhite, 52 Ind. 540; Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141; 19 Am. Rep. 703.

1. Bartlett v. Western Union Tel. Co., 62 Me. 209; 16 Am. Rep. 437.

2. Western Union Tel. Co. v. Fontaine, 58 Ga. 433; Fowler v. Western Union Tel. Co., 80 Me. 381; 6 Am. St. Rep. 211; *supra*, this title, *Legal Status of Telegraphs and Telephones. Compare* Western Union Tel. Co. v. Cohen, 73 Ga. 522, where it is held that for an error in transmission, the company must respond in damages; that if by reason of atmospheric disturbances, the message cannot be correctly transmitted, the attempt to transmit should not be made.

3. Beasley v. Western Union Tel. Co., 39 Fed. Rep. 381.

4. Behm v. Western Union Tel. Co., 8 Biss. (U. S.) 131.

5. Behm v. Western Union Tel. Co., 8 Biss. (U. S.) 131. *Compare* Western Union Tel. Co. v. Henderson, 89 Ala.

510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148.

But this proposition is true only as to small stations, and where it is manifest that a single operator cannot attend to the business, the court will not allow the company to evade its just liability, by alleging the inadequacy of its means for transmission. Western Union Tel. Co. v. Scircle, 103 Ind. 227; 10 Am. & Eng. Corp. Cas. 616. In this case there was a delay of five hours and a half.

6. Western Union Tel. Co. v. Dozier, 67 Miss. 288; *infra*, this title, *Contributory Negligence*. Thus the mere delivery of a message written on a leaf torn from a blank book, without any word spoken either by the plaintiff's messenger or the company's operator concerning the sending of the message, and an absence of any payment made or tendered of the price for transmission, is insufficient to create a liability against the company for failure to send such message. Western Union Tel. Co. v. Liddell, 68 Miss. 1.

ences beyond its control.<sup>1</sup> In determining whether or not the company has properly discharged its duty in any particular case, the facts involved must be adverted to, and the general rules of law as to negligence applied.<sup>2</sup> In all cases delivery must be made to the addressee or his authorized agent.<sup>3</sup> The addressee is entitled to a written copy of the message, and the company does not fully discharge its duty by transmitting the contents of the message over the telephone.<sup>4</sup> And the company is not relieved of its obligation to deliver messages by the fact that the business of its office at the receiving station is not sufficient to justify the employment of an additional agent to make de-

1. A telegraph company is not responsible for the non-delivery of a night message if, before it could be delivered, the copy was destroyed by a fire caused by atmospheric influences, and not resulting from negligence or imperfection in instruments. *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211.

The burden of proof rests upon the plaintiff to show that the addressee resided within the delivery limits. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148.

2. See NEGLIGENCE, vol. 16, p. 386 *et seq.*

**Instances.**—Going to a doctor's office twice, to deliver a telegram summoning the doctor to attend at a childbirth, was not the extent of the messenger's duty, where it appeared that the doctor might have been found at his residence near by. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *Pope v. Western Union Tel. Co.*, 9 Ill. App. 283.

In an action for failure to deliver a message addressed to T., for plaintiff, the company made defense that the message was sent by a boy, who made inquiry, but did not find plaintiff nor T., who were unknown to defendant's agents. The sender was then notified, but failed to give any better address of T. who, however, had resided for six years in the same house, within one mile of defendant's office. *Held*, that the search was not sufficient. *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 133.

In the case of *Western Union Tel. Co. v. Lindley*, 62 Ind. 371, the message having been received at the telegraph office on Saturday afternoon, the messenger made an attempt to deliver it, but could not, because the addressee's office at his place of business was closed;

an attempt to deliver on Sunday failed for a like reason, and no further effort was made to deliver. It was held that the two attempts were no excuse for a failure to deliver on Monday. See also *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624.

**3. Delivery Must Be to Addressee or His Authorized Agent.**—In *Pearsall v. Western Union Tel. Co.*, 44 Hun (N. Y.) 532; *aff'd* 124 N. Y. 256; 35 Am. & Eng. Corp. Cas. 31; 21 Am. St. Rep. 662, the message was directed to "T. W. P. & Co.," but the company delivered it in an envelope addressed to "T. W. P." It was therefore regarded at the office of T. W. P. & Co. as Mr. P.'s private mail and was not opened until his arrival. It was an important message requiring immediate attention, and would have been attended to promptly had it been addressed to the firm instead of to Mr. P. personally. In consequence of the delay thus occasioned, the plaintiff suffered damage for which it was held that he could recover of the company.

In the case of *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 118; 8 Am. & Eng. Corp. Cas. 107, the company was considered to have discharged its duty when it telephoned to the addressee's place of business and learning that he was out of town for several days, caused the message to be delivered to his wife at his residence, and then informed the sender of what had been done. So in *Western Union Tel. Co. v. Trissal*, 98 Ind. 566, it is said that there is an implied authority on the part of a hotel clerk to receive a telegram for a guest, and the company cannot be held responsible for the negligence of the clerk in failing to deliver it.

**4. Brashears v. Western Union Tel. Co.**, 45 Mo. App. 433. Here the telephone message was incorrect.

livery.<sup>1</sup> But where it can be shown that the proximate cause of the failure to deliver was the negligence of the sender in not giving a sufficiently definite address, there can be no recovery.<sup>2</sup> And where a message is sent addressed to one person in care of another, it has been held that the company performs its full duty by delivery to the person in whose care the message was sent;<sup>3</sup> but this doctrine cannot always be applied, since if the residence of the addressee is a matter of common knowledge in the locality, and within easy reach of the office, the company would be bound to make some effort to deliver the message to him.<sup>4</sup> The company may assume additional obligations by contract; thus, it may contract to forward to a person, who has removed from one city to another, all messages received by it for him. But such an agreement is binding on the company only for a reasonable time.<sup>5</sup> And an obligation to deliver messages to an addressee at a particular place, cannot be thrust upon the company by a mere verbal instruction to one of its messengers, that addressee desired messages to him, when received during certain hours, to be delivered at a specified place.<sup>6</sup> The delivery must be as speedy as is reasonably practicable; this duty of early delivery is as imperative as that of prompt transmission,<sup>7</sup> and the company is responsible for damages which result as a proximate consequence of delay in delivery.<sup>8</sup> The company cannot excuse

1. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148. This case is to be distinguished from that of *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131.

2. *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183; 21 Am. & Eng. Corp. Cas. 158; *infra*, this title, *Contributory Negligence*.

3. **Message Sent "Care of" Third Party.**—*Western Union Tel. Co. v. Young*, 77 Tex. 245; 30 Am. & Eng. Corp. Cas. 612; 19 Am. St. Rep. 751.

4. Thus in *Western Union Tel. Co. v. Houghton*, 82 Tex. 562; 39 Am. & Eng. Corp. Cas. 577, a message was sent to H., the addressee, "care of Mrs. Basal." No such person as Mrs. Basal resided in the town and the company made no effort to deliver to H., although he was well known, and lived within two hundred yards of the telegraph office. It was held that the company was guilty of negligence in not making an effort to find H.

5. **Contract to Forward Dispatches.**—And it is for the jury to say what is such reasonable time. *Thorp v. Western Union Tel. Co.*, 84 Iowa 190.

6. In the case of *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119; 8 Am. & Eng. Corp. Cas. 107, the plain-

tiff, the private secretary of the governor, claimed that the company was negligent in leaving a dispatch at his residence with his wife, instead of leaving it for him at the governor's office. He claimed that he had given verbal instructions to a messenger to have all messages sent to him at his office. The court held that such an instruction could not be binding on the company; the messenger in such case was the plaintiff's agent, not the company's. Besides, the proper method of directing the company in such a case, was by notice in writing.

7. **Delay in Delivery.**—*Bliss v. Baltimore, etc., Tel. Co.*, 30 Mo. App. 103. A dispatch delivered in its regular order, and within thirty minutes from the time when received at the office of destination, is seasonably delivered. *Julian v. Western Union Tel. Co.*, 98 Ind. 327. But a delay of three days after receipt of the message, if unexplained, is evidence of negligence. *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; 21 Am. & Eng. Corp. Cas. 182; 5 Am. St. Rep. 672. A failure to deliver is a failure to transmit. *Western Union Tel. Co. v. Gongar*, 84 Ind. 176.

8. *Western Union Tel. Co. v. Virginia Paper Co.*, 88 Va. 418 (two

a delay by contending that the sender should have sent the message sooner, instead of waiting until the last moment;<sup>1</sup> nor by setting up that the message as offered was not in writing;<sup>2</sup> nor by showing that the price of transmission was not paid in advance.<sup>3</sup>

**2. The Company's Duty and Liability as Affected by Regulations or Contractual Stipulations**—*a. RIGHT OF COMPANY TO PROVIDE REASONABLE RULES AND REGULATIONS AS TO CONDUCT OF ITS BUSINESS.*—Like every corporation or individual engaged in a public business, a telegraph company has the right to provide reasonable rules and regulations with which those desiring to employ its services must comply.<sup>4</sup> This right, however, is subject to the restriction that the regulations shall not be unreasonable, or relieve the company of the obligations which law and public policy impose upon it.<sup>5</sup> The reasonableness of any particular regulation is a question for the decision of the court,<sup>6</sup> though there are complicated cases in which it has been submitted to the jury.<sup>7</sup> A regulation ordinarily reasonable may operate unreasonably in a particular case, and in such case it will not be enforced.<sup>8</sup> The company may require that all messages offered for transmission shall be fully and clearly written, without the use of numerals, and in the language prevailing at the place of contract;<sup>9</sup> and that the contract of sending shall be made at one of its transmitting offices, so that if a message is sent to the office by one of the

messages were sent, but the first was delayed so that it arrived after the second, and plaintiff was misled); *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300; 21 Am. & Eng. Corp. Cas. 124; 6 Am. St. Rep. 590; *infra*, this title, *Measure of Damages*.

1. *Pope v. Western Union Tel. Co.*, 14 Ill. App. 531; *Western Union Tel. Co. v. Bruner* (Tex. 1892), 19 S. W. Rep. 149.

2. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32.

3. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 520.

4. *Hewlett v. Western Union Tel. Co.*, 28 Fed. Rep. 181; 14 Am. & Eng. Corp. Cas. 134; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Gray on Telegraphs*, § 13 *et seq.*

5. **MUST NOT BE UNREASONABLE.**—*Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 182; 46 Am. Rep. 715; *Western Union*

*Tel. Co. v. Griswold*, 37 Ohio St. 313; 41 Am. Rep. 500; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; 21 Wall. (U. S.) 267.

6. **QUESTION OF REASONABLENESS FOR THE COURT.**—*Shepard v. Gold, etc., Tel. Co.*, 38 Hun (N. Y.) 338; *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454; *Gray on Telegraphs*, § 13; *QUESTIONS OF LAW AND FACT*, vol. 19, p. 645. *Compare Heimann v. Western Union Tel. Co.*, 57 Wis. 562.

7. *Brown v. Western Union Tel. Co.* (Utah, 1889), 21 Pac. Rep. 988 (Sunday office hours).

8. "Reasonable regulations of public corporations like these must be reasonably applied, and a rule which is generally fair may, under special circumstances, become oppressive and unreasonable, as applied in the particular case; and so these corporations must exercise ordinarily prudent discretion in relaxing their regulations." *Hewlett v. Western Union Tel. Co.*, 28 Fed. Rep. 181; 14 Am. & Eng. Corp. Cas. 134.

9. *Gray on Telegraphs*, § 13.

**Oral Message.**—The company is, therefore, not bound to receive for transmission an oral message, and it cannot be held responsible for a failure to trans-

company's messengers, such messenger acts as the agent of the party sending the message.<sup>1</sup> The company may also require that the price of every message shall be prepaid,<sup>2</sup> together with a deposit to pay extra charges of delivery where the addressee is beyond the regular delivery limits;<sup>3</sup> and may provide that, where the message asks for an answer, a deposit shall be made sufficient to pay for the answer.<sup>4</sup> A regulation that messages shall not be indecent in language nor immoral in character is not unreasonable.<sup>5</sup> The cases afford other instances.<sup>6</sup> The company cannot, however, under the guise of regulations, escape from the obligations which public policy imposes upon it or insist upon harsh

mit it. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; *Western Union Tel. Co. v. Dozier*, 67 Miss. 288. So when the message as offered to the operator is incorrect and he attempts, at the dictation of the sender, to correct it, the company is not liable if he make a false correction. *Western Union Tel. Co. v. Foster*, 64 Tex. 220; 53 Am. Rep. 754.

1. Gray on Telegraphs, § 13.

2. **May Require the Prepayment of Charges.**—*Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 15; 4 Am. St. Rep. 126; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; 21 Am. & Eng. Corp. Cas. 182; 5 Am. St. Rep. 672; *Langley v. Western Union Tel. Co.*, 88 Ga. 777.

3. **Including Charges for Delivery.**—In *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148, there was a regulation printed on the blanks to the effect that "messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery." The sender of the message neither paid nor tendered the extra charge. It appearing that the sendee lived beyond the free delivery limits, it was held in an action against the company for non-delivery, that the regulation was a reasonable one; that the burden rests upon the sender to know whether or not the addressee lives within the delivery limits; and that such a regulation was binding on the illiterate as well as the intelligent. See also *Anderson v. Western Union Tel. Co.*, 83 Tex. 17.

4. **May Require Deposit to Pay for Answer.**—*Western Union Tel. Co. v. McGuire*, 104 Ind. 130; 54 Am. Rep. 296 (deposit required, sufficient to pay for answer of ten words); *Hewlett v.*

*Western Union Tel. Co.*, 28 Fed. Rep. 181; 14 Am. & Eng. Corp. Cas. 134. In this latter case, the regulation was that "Transient persons sending messages which require answers, must deposit in advance an amount sufficient to pay for a reply of ten words." The plaintiff sent from his hotel, which he was just about to leave, a message, by a messenger, to the telegraph office with money for prepayment for his own message, but not for the answer. In a suit by him against the company, it was held that he could not recover. The court approved the case of *Western Union Tel. Co. v. McGuire*, 104 Ind. 130; 54 Am. Rep. 296, though it did not entirely adopt its reasoning. It was said that in the latter case, the ruling was placed "too entirely upon a mere question of etiquette between the parties."

5. **Immoral Messages.**—*Western Union Tel. Co. v. Ferguson*, 57 Ind. 495; *Archambault v. Great N. W. Tel. Co.*, 11 Montreal Leg. News 368; 14 Quebec L. R. 8; *infra*, this title, *Immoral Messages*.

6. **Other Instances of Reasonable Regulations.**—In *Atlantic, etc., Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527, a regulation was considered reasonable which required the name of the company from which a message is received, together with the date of its receipt, to be added to every message accepted from other companies for transmission to *Europe* and which required extra pay to be made for the transmission of such addition. Gray on Telegraphs, § 14.

The stipulations in the printed contract are practically nothing more than regulations, and their validity is governed by the same principles. See *infra*, this title, *Stipulations in Contract of Sending*.

**Office Hours.**—The company may pro-



or unreasonable conditions.<sup>1</sup> Thus, it cannot require its patrons to inform its employes of the true import and meaning of every message offered for transmission;<sup>2</sup> nor insist that every message shall bear the autograph signature of its sender, or the production of a power of attorney from him.<sup>3</sup> But in case the message is not properly transmitted, the failure of the sender to inform the company of its character and importance will limit his recovery to nominal damages only.<sup>4</sup>

(1) *Regulations as to Office Hours.*—The company has the right to provide reasonable regulations as to the hours during which its offices shall be open for the transmission and delivery of messages;<sup>5</sup> the reasonableness of the regulations varying with the character of the locality where the particular office is located, and ordinarily being a question for the court,<sup>6</sup> though there is authority for the proposition that such a question is for the jury.<sup>7</sup> It is not necessary that all offices should have the same office hours; such a rule would involve the necessity of all offices being kept open all the time.<sup>8</sup> Nor can the employes at one office be required to know the office hours of all the other offices of the country; to exact such a requirement would be unreasonable, if not impossible.<sup>9</sup> But there are cases which hold that the fact that the com-

vide office hours for its offices, during which time alone dispatches may be offered for transmission. *Brown v. Western Union Tel. Co.* (Utah, 1889), 21 Pac. Rep. 988; *infra*, this title, *Regulations as to Office Hours*. See also *infra*, this title, *Sunday Messages*.

1. *Unreasonable Regulations.*—Tyler *v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; 44 Am. Rep. 776; *Stiles v. Western Union Tel. Co.* (Arizona, 1887), 15 Pac. Rep. 712; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; 9 Am. Rep. 136.

2. *Gray on Telegraphs*, § 14; *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

3. *Requiring Sender's Signature.*—Atlantic, etc., Tel. Co. *v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527; *Gray on Telegraphs*, § 14.

But in view of the fact that the company is liable often for forged messages, it may well be questioned whether it may not enforce such a regulation. See Code of Tennessee, § 1324, b.

4. See *infra*, this title, *Where Message is in Cipher or is Otherwise Unintelligible*.

5. *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119; 8 Am. & Eng. Corp. Cas. 107; *Western Union Tel. Co. v.*

*Harding*, 103 Ind. 505; 10 Am. & Eng. Corp. Cas. 617.

6. *Gray on Telegraphs*, § 13. See also QUESTIONS OF LAW AND FACT, vol. 19, p. 645 *et seq.*

7. *Heimann v. Western Union Tel. Co.*, 57 Wis. 562; *Brown v. Western Union Tel. Co.* (Utah, 1890), 21 Pac. Rep. 988 (Sunday office hours).

8. *Office Hours Need Not Be the Same Everywhere.*—The pressure of business in large cities requires the office to be always open; and to insist that the same office hours as are observed in the cities should be kept at every way station would render the right of the company to regulate its office hours, a nullity and a mockery. See *Western Union Tel. Co. v. Harding*, 103 Ind. 505; 10 Am. & Eng. Corp. Cas. 619, where the rule of the text is upheld.

9. *Employees at One Office Not Bound to Know Hours Observed at Other Offices.*—In *Thompson on Electricity*, § 300, the author has to say: "It is a mere judicial assumption to say, as was said in one case, that the employes in a telegraph office are not required to know the hour at which an office of the company in another city closes. On the contrary, it is an obvious suggestion that in any properly regulated telegraph system, the offices would be classified and there would be a uniform time established for the closing of

pany's office at the point to which the message is directed was closed when the message was received for transmission, is no defense to an action for delay.<sup>1</sup>

*b. STIPULATIONS IN CONTRACT OF SENDING.—(1) General Rule as to Validity.*—Messages offered for transmission are almost invariably written on blanks provided by the company, so that in affixing his signature to the message, the sender thereby signs a contract printed on the back of the blank containing certain stipulations intended to release the company from liability for mistakes or delay in transmission.<sup>2</sup> The question as to the validity of these stipulations has arisen in many cases, and the general rule deducible seems to be that while the company may, by regulations or special contract, fix reasonable limitations to its liability for errors in transmission, or for a failure to transmit, it cannot stipu-

those of each class, of which time every agent receiving dispatches would be apprised," etc. But with great respect, it seems that the doctrine of the text, as laid down by Justice Miller, in the case of *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119; 8 Am. & Eng. Corp. Cas. 113, is more consonant with reason. Justice Miller, speaking for the court in that case, said: "Nor do we see that it is the duty of this telegraph company to keep the employes of every one of its offices in the *United States* informed of the time when every other office closes for the night. The immense number of these offices all over the *United States*, the frequent changes among them as to the time of closing, and the prodigious volume of a written book on this subject, seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same state than those four thousand miles away, for the communication is between them all, and of equal importance." See *Western Union Tel. Co. v. Harding*, 103 Ind. 505; 10 Am. & Eng. Corp. Cas. 617 (*quoting* Justice Miller's language); *Stephenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 539. And see also *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 197.

**1. Cases Impliedly Contra.**—In the case of *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843, the message was delivered for transmission at half-past six o'clock in the afternoon, but was not transmitted until half-past eight the next morning;

it announced that plaintiff would arrive on a midnight train bringing with him the corpse of addressee's relative. At the trial, the jury were instructed that the company could not be excused for the delay on the ground that the office to which the message was addressed was closed when the message was offered for transmission. The appellate court said: "We think the court did not err in giving this charge. The contract to transmit the message was made by appellant through its agent, who was fully authorized and empowered to make it; we do not think appellant can excuse its failure to perform the contract upon the ground that another one of its servants, acting under authority from appellant, rendered the performance of the contract impracticable." In *Western Union Tel. Co. v. Bruner* (Tex. 1892), 19 S. W. Rep. 149, the company accepted a message and undertook to deliver it about nine o'clock at night. It was held, following the *Broesche* case, that the fact that the office of destination was closed against the receiving office was no defense, especially since it appeared that no effort was made to send the message until next morning, when it was entirely too late. But in neither of these cases does the point here mentioned appear to have been much considered. The opinions contain nothing more than a mere statement of the rule.

**2. See *Western Union Tel. Co. v. Carew***, 15 Mich. 525.

The distinction between the special contract as contained in the printed stipulations, and the general rules and regulations of the company, is adverted to elsewhere. See *supra*, this title, *Right*

late for immunity from liability for the consequences of its own negligence or that of its servants.<sup>1</sup> Nor can it by contract evade

*of Company to Provide Reasonable Rules and Regulations as to Conduct of its Business.*

As to validity of printed stipulations, where the company's blanks are not used, see *infra*, this title, *Evidence of Assent of Sender or Addressee to Printed Stipulations.*

**1. Cannot Limit Its Liability for Negligence.**—See CARRIERS OF GOODS, vol. 2, p. 818; RAILROADS, vol. 19, p. 915; TICKETS AND FARES; American Union Tel. Co. v. Daughtery, 89 Ala. 191; Stiles v. Western Union Tel. Co. (Arizona, 1890), 15 Pac. Rep. 712; Western Union Tel. Co. v. Short, 53 Ark. 434; Western Union Tel. Co. v. Graham, 1 Colo. 230; 9 Am. Rep. 136; Western Union Tel. Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480; Western Union Tel. Co. v. Fontaine, 58 Ga. 433; Tyler v. Western Union Tel. Co., 60 Ill. 421; 14 Am. Rep. 38; Western Union Tel. Co. v. Tyler, 74 Ill. 168; 24 Am. Rep. 279; Western Union Tel. Co. v. Meredith, 95 Ind. 93; 8 Am. & Eng. Corp. Cas. 54; Western Union Tel. Co. v. Adams, 87 Ind. 598; 44 Am. Rep. 776; Western Union Tel. Co. v. Meek, 49 Ind. 53; Western Union Tel. Co. v. Fenton, 52 Ind. 1; Harkness v. Western Union Tel. Co., 73 Iowa 190; 21 Am. & Eng. Corp. Cas. 182; 5 Am. St. Rep. 672; Sweatland v. Illinois, etc., Tel. Co., 27 Iowa 433; 1 Am. Rep. 285; Granville v. Western Union Tel. Co., 37 Iowa 214; 18 Am. Rep. 8; Smith v. Western Union Tel. Co., 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 15; 4 Am. St. Rep. 126; Camp v. Western Union Tel. Co., 1 Metc. (Ky.) 164; 71 Am. Dec. 461; De La Grange v. Southwestern Tel. Co., 25 La Ann. 383; Ayer v. Western Union Tel. Co., 79 Me. 493; 21 Am. & Eng. Corp. Cas. 145; 1 Am. St. Rep. 353; Bartlett v. Western Union Tel. Co., 62 Me. 209; 16 Am. Rep. 437; Western Union Tel. Co. v. Griswold, 37 Ohio St. 303; 41 Am. Rep. 500; Marr v. Western Union Tel. Co., 85 Tenn. 529; 16 Am. & Eng. Corp. Cas. 243; Pepper v. Western Union Tel. Co., 87 Tenn. 554; 25 Am. & Eng. Corp. Cas. 542; 10 Am. St. Rep. 699; Western Union Tel. Co. v. Broesche, 72 Tex. 654; 13 Am. St. Rep. 843; Wertz v. Western Union Tel. Co., 7 Utah 446; Gillis v. Western Union Tel. Co., 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 568; 15 Am. St.

Rep. 917; Thompson v. Western Union Tel. Co., 64 Wis. 531; 54 Am. Rep. 644; Candee v. Western Union Tel. Co., 34 Wis. 471; 17 Am. Rep. 452; White v. Western Union Tel. Co., 14 Fed. Rep. 710.

The principle of the text is clearly stated in 2 Redfield's Ky. Cas. 227: "Every attempt of carriers, by general notice or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and therefore based upon principles and a policy which the law will not uphold." Quoted with approval, as applicable to telegraph companies, in Gillis v. Western Union Tel. Co., 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 572; 15 Am. St. Rep. 917.

"It has long been the settled law of this state that a common carrier (including a telegraph company) cannot, either by special agreement with, or by notice brought home to, the shipper, relieve himself from liability for the consequences of his negligence." Western Union Tel. Co. v. Griswold, 37 Ohio St. 310; 41 Am. Rep. 500; Western Union Tel. Co. v. Blanchard, 68 Ga. 309; 45 Am. Rep. 480.

In Sweatland v. Illinois, etc., Tel. Co., 27 Iowa 433; 1 Am. Rep. 285, Dillon, J., said: "We have examined all the leading cases known to have been decided with respect to this subject (*i. e.*, exemption from liability by special contract), and have not found one holding, when this was the exact point in judgment, that the ordinary printed conditions as to repeating messages, have the effect to release the company from mistakes caused by its own want of ordinary care." This language is approved in Marr v. Western Union Tel. Co., 85 Tenn. 546; 16 Am. & Eng. Corp. Cas. 244. The court, by Lurton, J., said: "These limitations, contained in the agreement under which this message was sent, under any view of the power of the company to limit its liability for its own negligence, were invalid so far as the damage was a result of the negligence of the defendant or its servants."

**Reason of the Rule.**—The rule of the text is founded in the policy of the law

its liability for the statutory penalty.<sup>1</sup> There is a class of cases, however, which uphold the doctrine that the company may by special contract exempt itself from liability, except for damages resulting from "gross negligence," or wilful default,<sup>2</sup> or, as stated in other cases, from "fraud or any conduct inconsistent with good

and in view of the practical monopoly which the telegraph companies enjoy. In *Tyler v. Western Union Tel. Co.*, 60 Ill. 438; 14 Am. Rep. 38, Breese, J. said: "If it (the stipulation) be a contract, the sender entering into it was under a species of moral duress; his necessity compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company in their corporate greed might impose, and sign such a paper as the company might present." See similar language used in *Marr v. Western Union Tel. Co.*, 85 Tenn. 544; 16 Am. & Eng. Corp. Cas. 243.

In *Western Union Tel. Co. v. Graham*, 1 Colo. 237; 9 Am. Rep. 136, it is said in explanation of the reason of the rule: "Much has been said about the peculiar hazards to which telegraphs are exposed. This is all true, and courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power, and indeed that would leave the public almost entirely remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They are bound to take it as they find it, and to commit to its agents their messages, however valuable. Such being the case, public policy as well as commercial necessity require that companies engaged in telegraphing should be held to a high degree of responsibility."

**Analogous to Common Carriers.**—The rule of the text is merely an application to telegraph companies of the rule governing similar stipulation by common carriers. A common carrier may, by special contract or by actual notice, restrict its liability as insurer; but it cannot modify or limit its liability for the consequences of its negligence. See *RAILROADS*, vol. 19, p. 915;

*CARRIERS OF GOODS*, vol. 2, p. 818; *TICKETS AND FARES*; Gray on Telegraphs, § 43; Lawson on Carriers, §§ 25-28, 68; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357. Compare *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 492; 62 Am. Dec. 125.

1. *Western Union Tel. Co. v. Adams*, 87 Ind. 598; 44 Am. Rep. 776; *Western Union Tel. Co. v. Cobbs*, 47 Ark. 34; 58 Am. Rep. 756. See also *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *Western Union Tel. Co. v. Young*, 93 Ind. 118.

2. **As to Exemption from Liability For "Gross" Negligence.**—This view is stated in *Lassiter v. Western Union Tel. Co.*, 89 N. Car. 336; 5 Am. & Eng. Corp. Cas. 230: "The exemption is not extended to acts or omissions involving gross negligence, but is confined to such as are incident to the service, and may occur when there is but slight attaching culpability in its officers and employes." *Pegram v. Western Union Tel. Co.*, 97 N. Car. 57; 21 Am. & Eng. Corp. Cas. 122. See similar views expressed in *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Grimwell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69 ("gross negligence or fraud"); *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 24; 56 Am. Rep. 119; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; 5 McCrary (U. S.) 103; *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3; 84 E. C. L. 3; 3 Suth. on Dam. 296.

In *Nebraska*, a new rule has been established by statute, which eliminates considerations of degrees of negligence in this connection. *Kemp v. Western Union Tel. Co.*, 28 Neb. 661; 30 Am. & Eng. Corp. Cas. 607.

In *Texas*, it is held that the stipulations against liability will not extend to injuries caused by "the misconduct, fraud, or want of due care on the part of the company, its servants or agents."

faith."<sup>1</sup> But the doctrine of degrees of negligence, or that there is any practical difference between negligence and gross negligence, has not the support of the better authorities,<sup>2</sup> and the rule accepted by the weight of authority is that a telegraph company, exercising a public employment, is liable for failing to exercise that degree of care and skill which a careful and prudent man would, under the circumstances, employ, and that any stipulation by which it undertakes to relieve itself from this duty to exercise care in the discharge of its employment, is contrary to public policy, and therefore illegal and void, even though the other party may voluntarily assent to it.<sup>3</sup> As to what is sufficient to constitute proof of "gross negligence" within the meaning of the rule as just stated, the authorities differ. In some instances the mere fact that the message was improperly transmitted, if unexplained,

Western Union Tel. Co. v. Neill, 57 Tex. 283; 44 Am. Rep. 589; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614.

In *Georgia*, in *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433, the court intimated that the company might restrict its liability except for "gross negligence;" but in a later case the rule is announced that the company cannot by contract limit its liability for negligence in any degree. *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480. See also *Western Union Tel. Co. v. Goodbar* (Miss. 1890), 7 So. Rep. 214.

1. U. S. Tel. Co. v. Gildersleeve, 29 Md. 232; 96 Am. Dec. 519; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 157; *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717.

"Telegraph companies may make reasonable regulations for the safe and proper conduct of their business, and have power to contract with the sender of messages so as to relieve themselves from liability from inadvertence, but not from gross negligence, misconduct or bad faith." 3 *Suth. on Dam.* 296.

2. See generally NEGLIGENCE, vol. 16, p. 426.

The opinion in *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 311; 41 Am. Rep. 500, states the doctrine: "The cases which hold that common carriers may stipulate for immunity from liability for mere negligence, all agree that they are still liable for 'gross negligence.' But just what this term means is not easily ascertained. There is authority for holding it to be equivalent to fraud or intentional wrong. *Jones on Bailments*,

8-46 *et seq.* But a majority of the cases would seem to hold it to be a failure to exercise ordinary care. In *Wilson v. Brett*, 11 M. & W. 113, it was said by Baron Rolfe, that he could 'see no difference between gross negligence and negligence; that it was the same thing with a vituperative epithet.' See also *Beal v. South Devon R. Co.*, 3 H. & C. 337; *Austin v. Manchester R. Co.*, 11 Eng. L. & Eq. 513; and comments of Parke, B., in *Wyld v. Pickford*, 8 M. & W. 443. In *Duff v. Budd*, 3 Brod. & Bing. 177, it was held by Dallas, J., that 'Gross negligence is where the defendant or his servants have not taken the same care of the property that a prudent man would take of his own.' And by Best, J., in *Batson v. Donovan*, 4 B. & Ald. 21; 6 E. C. L. 373, that they 'must take as much care of it as a prudent man would take of his own property.' . . . In *Beal v. South Devon R. Co.*, 3 H. & C. 337, it was held in the case of a carrier that 'Gross negligence includes the want of that reasonable care, skill and expedition which may properly be expected of him.' To the same effect are *Briggs v. Taylor*, 28 Vt. 181, and *Shear & Red. on Neg.* (4th ed.), § 16; all substantially agreeing with Willes, J., in *Lord v. Midland R. Co.*, L. R. 2 C. P. 344, that "Any negligence is gross in one who undertakes a duty and fails to perform it." See also *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 572; 15 Am. St. Rep. 917; *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358; *Gray on Telegraphs*, §§ 41-42; *Thompson on Electricity*, § 186.

3. See *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433; 1 Am. Rep. 285; *Western Union Tel. Co. v. Griswold*,

is considered evidence of gross negligence, though the weight of authority is the other way; the peculiar circumstances must control each case in a great measure.<sup>1</sup>

(2) *Stipulations as to Repeating Messages.*—The blanks provided by the telegraph companies, on which messages are required to be written, contain a printed stipulation to the effect that the company will not be liable for mistakes or delays in the transmission of a message beyond the amount received for sending the same, unless it is ordered to be repeated.<sup>2</sup> The courts have taken vari-

37 Ohio St. 313; 41 Am. Rep. 500; Western Union Tel. Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480.

1. *What Constitutes Gross Negligence.*

—Within the meaning of the exceptional rule, as stated in the text, there is no proof of "gross negligence" on the part of the company where the plaintiff proves the mere fact of improper transmission without showing loss, or where the actual negligence occurred. *Pegram v. Western Union Tel. Co.*, 97 N. Car. 57; 21 Am. & Eng. Corp. Cas. 123; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589 ("have" instead of "home"); *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717 (mistake of one word or figure no evidence of gross negligence). *Compare Western Union Tel. Co. v. Howell*, 38 Kan. 685; 21 Am. & Eng. Corp. Cas. 105; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165. See also *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; 21 Am. & Eng. Corp. Cas. 107; *Garrett v. Western Union Tel. Co.*, 83 Iowa 257 (failure to send message, gross negligence); *infra*, this title, *Presumption of Negligence*.

Where the only evidence of negligence is that the operator sent in the message the word "bain" for "bail," there is no proof of gross negligence within the meaning of the rule stated. *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 24; 56 Am. Rep. 119. The same is true where the word "fourths" is written instead of "eighths," in a message from an agent informing his principal of the price of cotton. *Lassiter v. Western Union Tel. Co.*, 89 N. Car. 334; 5 Am. & Eng. Corp. Cas. 230; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710.

But to make three errors in a message containing only nine simple words is gross negligence. Thus, in *Western Union Tel. Co. v. Crall*, 38 Kan. 679;

5 Am. St. Rep. 795, the message offered to be sent was: "Ship Bones, sulky and traps to Valley Falls, immediately. G. Crall." The message received by the addressee read: "Ship Beons, Sulky and traps to Neosha Falls, immediately. G. Crawley." It was held that the evidence showed gross negligence. Also *Western Union Tel. Co. v. Howell*, 38 Kan. 685; 21 Am. & Eng. R. Cas. 100, where it appeared that the message was plainly written out and not to be easily mistaken by anybody with ordinary eyesight, who should examine it with ordinary care. The operator materially changed the message by transmitting the word "Salina" for "Salem." There being no exculpatory or explanatory evidence offered by the company, the court held that it was a case of gross negligence.

Ignorance on the part of the company's employes of the locality of a well-known town to which a message is sent, is evidence of gross negligence. *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744. Indeed, it seems that the company's employes are bound to know the locality of any state to which a dispatch is directed. *Western Union Tel. Co. v. Simpson*, 73 Tex. 422.

In *Western Union Tel. Co. v. Goodbar* (Miss. 1890), 7 So. Rep. 214, the operator receiving the message was informed by the sending operator that it contained nine words; he took down only seven words and delivered it as the whole message. It was held that such an error constituted gross negligence on the part of the company's servant and rendered it liable, notwithstanding the printed stipulations exonerating the company.

2. *Language of the Stipulation.*—The stipulation has never materially varied in form and language from that now used in the blanks of the Western Union. It provides that: "To guard against mistakes, the sender of the message should order it repeated, that is,

ous views as to the validity and effect of such a stipulation. On principle it would seem that the stipulation is invalid, in that it opposes the recognized principle that an individual or corporation engaged in a public business cannot be allowed to contract against liability for the consequences of its own negligence or willful wrong doing.<sup>1</sup> And since it appears that the stipulation is not, as a matter of fact, provided with a view to securing correctness in the transmission of messages, but rather to protect the company from liability, it cannot be regarded as a reasonable regulation which it is within the company's power to provide.<sup>2</sup> Regarded as a contract, the

telegraphed back to the original office. For repeating, one half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company, that the said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any un-repeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured."

1. The whole doctrine is stated in *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 21 Am. & Eng. Corp. Cas. 145; 1 Am. St. Rep. 353: "Is such a stipulation in the contract of transmission valid, as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void. Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business ultimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good, that their duty of using care and diligence be rigidly enforced. They should no more be allowed effectually to stipulate for exemption from this duty than should a carrier of passengers, or any other party engaged in a public business. This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of a plain duty. It is no hardship upon them . . . why should they make conditions for such performance? Having taken the

message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality as a guard against their own negligence? It seems clear to us, that, having undertaken the business, they ought, without qualification, to do it carefully, or be responsible for the want of care." Language to the same effect is used in *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; 24 Am. Rep. 279; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 51; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 484; *Western Union Tel. Co. v. Short*, 53 Ark. 454.

"Any rule or regulation of the company, which seeks to relieve it from performing its duty belonging to its employment, with integrity, skill and diligence, contravenes public policy, as well as the law, and under it the party at fault cannot seek refuge. If it become necessary for the company, in transmitting messages with integrity, skill and diligence, to secure accuracy, to have such messages repeated, then the law devolves upon them that duty to meet its requirements." *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 484.

2. See *Thompson on Electricity*, § 241. "This conclusion is at once suggested," says that author, "by that part of the condition which exonerates the company from the consequences of non-delivery or delay in delivering, neither of which happenings the repeating of the message would have any tendency to prevent. This part of the stipulation is, on its face, dishonest, corrupt and oppressive." Another consideration tending to show that it was never intended that the sender should take the

stipulation is void as having been induced by a species of moral duress.<sup>1</sup> The weight of authority is therefore opposed to upholding such a stipulation and declines to sustain or enforce it.<sup>2</sup> Other cases hold that the telegraph company cannot, by such a stipula-

precaution of having his message repeated, is seen in the fact that repeating the message, greatly prolongs the time required for the ultimate delivery of the message, and people in haste will forbear to have the message repeated because it would prevent the expedition of which they are desirous. See Thompson on Electricity, § 241. A third consideration lies in the fact that the company stipulates that, even where the message is repeated, it will be liable only to the extent of fifty times the amount received for sending the message. Such a restriction of its liability is not allowable. See *infra*, this title, *Limiting Liability to a Specified Amount*; Western Union Tel. Co. v. Brown, 58 Tex. 170; 44 Am. Rep. 610.

"They (the printed stipulations) constitute, taken together, but an artful arrangement and device by which the consequences of their own negligence are thrown upon the shoulders of their customers, and they are enabled to conduct business with no responsibility beyond that of the most trivial character for their own want of due care." Marr v. Western Union Tel. Co., 85 Tenn. 545; 16 Am. & Eng. Corp. Cas. 243.

1. **Void as a Contract.**—"If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company, in their corporate greed, might impose, and sign such paper as the company might present. 'Prudential rules and regulations,' such as the company is authorized by statute to establish, cannot be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions."—Breese, J., speaking for the court in Tyler v. Western Union Tel. Co., 60 Ill. 421; 14 Am. Rep. 51. Point is given to this argument by the fact that as a matter of common knowledge, the business of telegraphy in this country is practically under the control of a single corporation. Marr v. Western Union Tel. Co., 85 Tenn. 544; 16 Am. & Eng.

Corp. Cas. 243. See opinion of Bradley, J., in New York Cent., etc., R. Co. v. Lockwood, 17 Wall. (U.S.) 378, where language similar to that quoted above is used in laying down the rule that a common carrier cannot by contract limit its liability for its negligence. See also Dorgan v. Western Union Tel. Co. (U.S.C. C. for Ala. 1874), 1 Am. L. T. Rep. N. S. 406; Western Union Tel. Co. v. Griswold, 37 Ohio St. 311; 41 Am. Rep. 500.

"Telegraph companies do not deal with their employers on equal terms. There is a necessity for their employment. . . . Neither the commercial world nor the general public can dispense with their services. It is, therefore, just and reasonable that they should not be allowed to take advantage of their situation, and of the necessities of the public, to exact exemption from that measure of duty that the law imposes upon them, and that public policy imposes." Gillis v. Western Union Tel. Co., 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 572; 15 Am. St. Rep. 917.

2. **Authorities Opposing Validity of Such Stipulation.**—Western Union Tel. Co. v. Short, 53 Ark. 434; American Union Tel. Co. v. Daugherty, 89 Ala. 191; Western Union Tel. Co. v. Graham, 1 Colo. 230; 9 Am. Rep. 136; Western Union Tel. Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480; Western Union Tel. Co. v. Meek, 49 Ind. 53; Western Union Tel. Co. v. Fenton, 52 Ind. 1; Western Union Tel. Co. v. Harris, 19 Ill. App. 347; Tyler v. Western Union Tel. Co., 60 Ill. 421; 14 Am. Rep. 38; Western Union Tel. Co. v. Tyler, 74 Ill. 168; 24 Am. Rep. 279; Sweatland v. Illinois, etc., Tel. Co., 27 Iowa 433; 1 Am. Rep. 285; Ayer v. Western Union Tel. Co., 79 Me. 493; 21 Am. & Eng. Corp. Cas. 145; 1 Am. St. Rep. 353; Western Union Tel. Co. v. Lowrey, 32 Neb. 732; Kemp v. Western Union Tel. Co., 28 Neb. 661; 30 Am. & Eng. Corp. Cas. 607 (stipulation declared invalid by statute); Brown v. Postal Tel. Cable Co., 111 N. Car. 187; 39 Am. & Eng. Corp. Cas. 581, *overruling* Lassiter v. Western Union Tel. Co., 89 N. Car. 334; 5 Am. & Eng. Corp. Cas. 230; Marr v. Western Union Tel. Co., 85 Tenn. 529; 16 Am. &



tion, secure immunity from liability for negligence, but can only protect itself from liability for accidents which result from causes beyond its control.<sup>1</sup> But as a telegraph company is not, like a common carrier, liable as an insurer, its liability in any event does not extend beyond the consequences of its negligence. The holding of the cases is virtually that the stipulation is of no effect whatever.<sup>2</sup> Still other cases maintain that the stipulation as to repeating messages is a reasonable and valid one, and is embraced within the rule that every company engaged in a public undertaking may provide for the conduct of its business reasonable rules and regulations, to which all contracts with it are made subject. These cases proceed upon the ground that the extra charge for repeating is reasonably small, and if the sender fails to order his message repeated, he is presumed to have preferred to assume the slight risk.<sup>3</sup> This last class of cases uniformly holds, however,

Eng. Corp. Cas. 243; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 25 Am. & Eng. Corp. Cas. 542; 10 Am. St. Rep. 699; *Wertz v. Western Union Tel. Co.*, 7 Utah 446; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 568; 15 Am. St. Rep. 917 (strong case); *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; 54 Am. Rep. 644; *Thompson on Electricity*, § 235 *et seq.*; *Scott & J. on Telegraphs*, § 190; 2 *Redfield on Ry's* (3d ed.) 244; *Gray on Telegraphs*, §§ 49-51. Consult also in this connection *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Western Union Tel. Co. v. Richman* (Pa. 1887), 8 Atl. Rep. 171; 16 Am. & Eng. Corp. Cas. 263; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607; *Manville v. Western Union Tel. Co.*, 37 Iowa 214; 18 Am. Rep. 8; *U. S. Express Co. v. Backman*, 28 Ohio St. 155; *Lamb v. Camden, etc., R., etc., Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *American Express Co. v. Sands*, 55 Pa. St. 140; *Southern Express Co. v. Moon*, 39 Miss. 822; *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; *RAILROADS*, vol. 19, p. 915; *CARRIERS OF GOODS*, vol. 2, p. 818.

In the case of *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433; 1 Am. Rep. 285, it is said by Dillon, J.: "We have examined all the leading cases known to have been decided with respect to this subject (exemption from liability for negligence), and have not found one

holding, when this was the exact point in judgment, that the ordinary printed conditions as to repeating messages have the effect to release the company from mistakes caused by its own want of ordinary care."

1. **Effect of Stipulation Where Mistake or Delay is Not Due to Company's Negligence.**—"The rule is that the usual regulations exempting companies from liability for errors in unrepeatable messages exempt them only from errors arising from causes beyond their own control." *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; 24 Am. Rep. 280, *aff'g Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38.

2. *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 20; 4 Am. St. Rep. 126; *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 24; 56 Am. Rep. 119; *supra*, this title, *Are Not Insurers*, where the doctrine as to the liability of telegraph companies as insurers is reviewed.

3. **Cases Upholding the Validity of Stipulation as to Repeating Message.**—*Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; 71 Am. Dec. 461 (whisky ordered for "sixteen" cents per gallon instead of "fifteen"); *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226 (direction to addressee to send "ten men \$125," transmitted "ten men \$175"); *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69 (message directed to "Owego" sent to "Oswego"); *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485 (word "answer" omitted); *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90

Am. Dec. 395 (order to "ship by sail" wrongly sent "ship by rail"); *Baldwin v. Western Union Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 157; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356 (message "we can sell at one-fifty" transmitted "we can sell at one-sixty"); *Lassiter v. Western Union Tel. Co.*, 89 N. Car. 334; 50 Am. & Eng. Corp. Cas. 230 (since overruled in *Brown v. Postal Tel. Cable Co.*, 111 N. Car. 187; 39 Am. & Eng. Corp. Cas. 583); *Pegram v. Western Union Tel. Co.*, 97 N. Car. 57; 21 Am. & Eng. Corp. Cas. 119 (offer to sell "one hundred shares at forty-three" transmitted "one hundred shares at forty"); *Passmore v. Western Union Tel. Co.*, 9 Phila. (Pa.) 90; *aff'd* 78 Pa. St. 238 ("I hold the T. contract" transmitted "I sold the T. contract"); *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614 ("close out my Decembers" transmitted "closed out" etc.); *Western Union Tel. Co. v. Hearne*, 77 Tex. 83; 30 Am. & Eng. Corp. Cas. 589 ("draw for five hundred dollars" transmitted "order five hundred dollars"); *MacAndrews v. Electric Tel. Co.*, 17 C. B. 3; 84 E. C. L. 3 (message directed to "Hull" sent by mistake to "Southampton"); *Gray on Telegraphs*, § 30.

See also *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 24; 56 Am. Rep. 119 ("Bail," a cipher meaning one hundred tons, transmitted as "Bain," a cipher meaning two hundred and twenty-five tons); *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 590 ("sold block for and home place for" a certain sum, transmitted "sold block for and half place for," etc.); *Bennett v. Western Union Tel. Co.* (Supreme Ct.), 2 N. Y. Supp. 365 ("horse" transmitted "horses." In this case sender attempted to have message repeated. It was held that his recovery was limited to fifty times the amount paid for transmission). Mr. Gray defends the stipulation: "Apart from the question whether a contract exonerating a telegraph company from liability for negligence is consonant with public policy, a contract is doubtless valid, in which a telegraph company, in consideration of a higher charge than the regular one for communicating a message, agrees to transmit that message to the office of destination and back from it. (*MacAndrews v. Electric Tel. Co.*, 17 C. B. 3; 84 E.

C. L. 3.) A telegraph company is liable only for losses occasioned by its negligence. It is not negligent in failing to repeat a message back from the office of destination to the originating office, although it might, by repeating that message, discover and obviate the consequences of a breach of contract. There is therefore a consideration for this contract, since the telegraph company undertakes additional labor for an additional sum of money." *Gray on Telegraphs*, § 30. Further on, however (§ 49), the author seems to favor a different view: "The reasonableness of the rule thus recognized by the courts must be seen and acknowledged by all who give heed to the fact sworn to on the trial by several expert witnesses and denied by none, that the only known means of reaching absolute accuracy in the transmission of messages by telegraph, is by repeating them, that is, returning them to the office from which they were sent, for comparison with the original." *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356. (The rule in *Nebraska* is now otherwise by statute.)

"Such a regulation does not undertake wholly to exempt the company from liability for loss, but merely requires the other party to the contract, if he considers the transmission and delivery of the message to be of such importance to him that he proposes to hold the company responsible in damages for a nonfulfillment of the contract on its part beyond the amount paid for the message, to increase that payment by one-half. Even a common carrier has a right to inquire as to the quality and value of goods or packages intrusted to him for carriage, and is not liable for goods of unusual value, if false answers are made to his inquiries." *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 489, *citing Phillips v. Earle*, 8 Pick. (Mass.) 182; *Dunlap v. International Steamboat Co.*, 98 Mass. 377.

**Doctrine in Texas.**—The doctrine is stated in *Western Union Tel. Co. v. Hearne*, 77 Tex. 83; 30 Am. & Eng. Corp. Cas. 588, in the opinion of the court by Acker, J.: "We think it should now be considered settled in this state that this limitation of liability by special contract is valid and binding, and that no recovery can be had for an error committed in transmitting an unrepeat message, unless it be clearly shown that the error was caused by the

that the stipulation does not release the company from liability for mistakes or delays which result from its "gross negligence or

misconduct, fraud or the want of due care on the part of the company, its servants or agents." But since a telegraph company is not liable in any instance except where the loss is occasioned by its negligence, it is difficult to see the value of the distinction made by the court. That the company is held liable for the consequences of its negligence, even though the message was not ordered repeated, is seen from the language of the court in *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739; 21 Am. & Eng. Corp. Cas. 83: "That such condition or stipulation, in so far as it undertakes to exempt the company from liability for negligence of servants and employés is void, is too well settled to require discussion here."

It is believed, therefore, that the only effect to be given to such stipulations in *Texas* is that they cast upon the plaintiff the burden of showing affirmatively, not only the fact of injury, but that it resulted from the negligence of the company or its agents. See *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614.

**Doctrine in Kansas.**—The validity of the stipulation as to repeating messages was brought up in the cases of *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795; and *Western Union Tel. Co. v. Howell*, 38 Kan. 685; 21 Am. & Eng. Corp. Cas. 100. In each case the stipulation was held void on the ground that the evidence showed "gross negligence" on the part of the company, and that, allowing to the stipulation the utmost effect ever extended, it could not be upheld in the particular cases under consideration. Whether it would have the effect to exempt the company from liability for injuries resulting from "ordinary negligence," is not decided. In the first case there were two mistakes in a short message, and an error in the name of the sender; it was considered that in such a case "the mere production of the mutilated message would have been sufficient to establish the gross carelessness of the defendant company."

**In North Carolina,** the expressions used in *Lassiter v. Western Union Tel. Co.*, 89 N. Car. 334; 5 Am. & Eng. Corp. Cas. 230; and *Pegram v. Western*

*Union Tel. Co.*, 97 N. Car. 57; 21 Am. & Eng. Corp. Cas. 119, indicate the doctrine to be, that the stipulation does not extend "to acts or omissions involving gross negligence, but is confined to such as are incident to the service and may occur where there is but slight culpability in its officers or employés." But in *Thompson v. Western Union Tel. Co.*, 107 N. Car. 449; 35 Am. & Eng. Corp. Cas. 59, the court quotes, with approval, from the case of *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 15; 4 Am. St. Rep. 126; and *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 568; 15 Am. St. Rep. 917; both of which cases hold unqualifiedly that a company cannot, by the stipulation as to repeating, limit its liability for negligence at all. But such stipulations are now held void. *Brown v. Postal Tel. Cable Co.*, 111 N. Car. 187; 39 Am. & Eng. Corp. Cas. 583 (*overruling* previous conflicting cases).

**Objection to Some of Cases Upholding Such Stipulation.**—In *Marr v. Western Union Tel. Co.*, 85 Tenn. 547; 16 Am. & Eng. Corp. Cas. 243, a number of cases usually cited as upholding the validity of the stipulation concerning the repeating of messages, are reviewed and criticised, substantially as follows: The case of *MacAndrews v. Electric Tel. Co.*, 17 C. B. 3; 84 E. C. L. 3, can hardly be regarded as authority for the proposition it is cited as sustaining, for it was an English case and based upon the English doctrine that a common carrier may contract against liability for his own negligence—a doctrine nowhere sustained in this country. See *RAILROADS*, vol. 19, p. 915; *CARRIERS OF GOODS*, vol. 2, p. 818. The case of *Western Union Tel. Co. v. Carew*, 15 Mich. 525, did not involve the negligence of the company sued, but that of an independent connecting company, for whose negligence the defendant company could not be held responsible. The case of *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226, did not involve the fact of negligence, since the court held that no negligence was proved. And in *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; 71 Am. Dec. 461, the suit was upon the contract to transmit, and no negligence was averred or proved.

misconduct," or its bad faith.<sup>1</sup> A distinction may very properly be made between negligence and willful wrong, for which latter the company may be held to a stricter liability;<sup>2</sup> but as has been pointed out, the distinction between gross and ordinary negligence is wrong in principle, valueless in practice, and repudiated by the great weight of authority,<sup>3</sup> except in one or two jurisdictions where the doctrine of comparative negligence prevails.<sup>4</sup> The effect of the stipulation as to repeating messages upon the presumption of negligence is adverted to in a subsequent section.<sup>5</sup>

But even in those jurisdictions in which stipulations as to repeating are held to be reasonable and valid, the sender's failure to have the message repeated is no bar to his action where compliance with the stipulation would not have prevented the wrong; the stipulation can apply only to such errors as are preventable by having the message repeated, although it may attempt to comprehend others.<sup>6</sup> Thus, it does not apply where there is an

1. Does Not Release Company From Liability for Gross Negligence.—*Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 488; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Pegram v. Western Union Tel. Co.*, 97 N. Car. 57; 21 Am. & Eng. Corp. Cas. 119; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614; *Western Union Tel. Co. v. Hearne*, 77 Tex. 83; 30 Am. & Eng. Corp. Cas. 588; *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717 (and a mistake of one word or figure is not alone proof of gross negligence); *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3; 84 E. C. L. 3.

What Constitutes "Gross Negligence."—See *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126. In *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 619, it is said that "the mere fact that there may have been an error in the message as received would not of itself be sufficient proof of negligence to entitle the plaintiff to recover." In this instance there was an error of a single letter, and the court held that the trial court should have held, as a matter of law, that there was no evidence of gross negligence. In *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717, a mistake of a single word was held no evidence of gross negligence. See *Lassiter v. Western Union Tel. Co.*, 89 N. Car. 334; 5 Am. & Eng. Corp. Cas. 230 ("three-eighths" transmitted "three-fourths," no negligence). So in *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng.

Corp. Cas. 24; 56 Am. Rep. 119, the substitution of "bain" for "bail," was not considered evidence of gross negligence, though the first word was the cipher for two hundred and twenty-five tons, and the other meant only one hundred tons. In this case it was held that the burden rested on the plaintiff to prove that the mistake was the result of the defendant's gross negligence. But in *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165, it is said that an error in transcribing the direction, and a consequent misdelivery, are presumptive evidence of negligence in the operator, and cast the burden upon the company to show that it occurred without fault on its part.

2. See NEGLIGENCE, vol. 16, p. 392-3.

3. See NEGLIGENCE, vol. 16, p. 426; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 571; 15 Am. St. Rep. 917; *supra*, this title, *General Rule as to Validity*.

4. See COMPARATIVE NEGLIGENCE, vol. 3, p. 367.

5. See *infra*, this title, *Presumption of Negligence*.

6. When Stipulation, though Valid, has no Application.—*Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 612; *Thompson on Electricity*, §§ 228-230.

In *New York, etc., Print. Tel. Co. v. Dryburg*, 35 Pa. St. 300; 78 Am. Dec. 338, the message as delivered to the agent for transmission was: "Send two hand bouquets," and the message actually transmitted to the addressee was, "Send two hundred bouquets." It appeared that the mistake was due solely to the

unreasonable delay or a total failure on the part of the company to transmit the message,<sup>1</sup> nor where there is a failure to deliver it after it has been properly transmitted.<sup>2</sup> Nor does it apply to an error in the name of the place from which the dispatch is sent, that

inadvertence of the clerk in mistaking the word "hand" for "hund," supposing it to be an abbreviation for "hundred." The company was held liable, notwithstanding the message was not ordered repeated and the blank on which it was written contained the usual stipulation as to unrepeatable messages, since compliance with the stipulation would not have prevented the occurrence of the error.

In *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126, it appeared that the message, when offered, was placed in the pile of messages to be sent, and when it was reached, the operator called up the agent at the point of destination, but found the wire there in use. While waiting until he could communicate with that office, his attention was diverted to something else and he inadvertently placed the message among those which had been already transmitted. His mistake was not discovered and corrected until a week afterward. It was held that the stipulation would not exempt the company from liability in such a case.

1. The stipulation is usually against liability "for mistakes or delays in the transmission or delivery, or for non-delivery." Manifestly this does not embrace a total failure to transmit. *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *Garrett v. Western Union Tel. Co.*, 83 Iowa 257; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 492. And in *Thompson v. Western Union Tel. Co.*, 107 N. Car. 449; 35 Am. & Eng. Corp. Cas. 53, it is held that it does not exempt from liability for a delay in transmission.

The stipulation does not cover a failure by the company to transmit a cipher message from a receiving office to another line. *Western Union Tel. Co. v. Way*, 83 Ala. 542.

Though the regulations of a telegraph company may exempt it from liability in certain cases, yet a failure, by neglect of all effort, to transmit a message, is not within the scope of exemption. *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607.

In *Garrett v. Western Union Tel. Co.*, 83 Iowa 257, the court, discussing this question, said: "Whatever right the

defendant may have, if any, to limit its liability, or provide against the negligence of its agents in the transmission of messages, there can be no question that the language of the stipulation cannot be held to excuse the defendant for a failure to send the message, or to make the attempt to do so. . . . It would be a marvelous doctrine to hold in this case that the defendant could fail to attempt to send the message, as it contracted to do, and exonerate itself by paying back to the plaintiff the nominal sum it received for the service. If its liability is to be measured by that standard, its contract is a sham and deception. It could perform or not perform at pleasure, and escape all liability for the consequences of non-performance."

**Whether Error was Preventable.**—In *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 238, it is intimated by Bigelow, C. J., that it would be a question of fact for the jury as to whether the mistake in the dispatch would have been prevented or corrected by the repetition of the message; and that of course the company would be liable for any negligence causing damage which would not have been prevented by a compliance with the rules. These limitations are pronounced *obiter dicta* by Gray, C. J., in *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 492, and as being "somewhat wanting in precision."

**2. Does Not Apply to Failure to Deliver.**—*Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; 9 Am. Rep. 136; *Western Union Tel. Co. v. Fenton*, 52 Ind. 6; *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732; *Manville v. Western Union Tel. Co.*, 37 Iowa 214; 18 Am. Rep. 8; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Baldwin v. U. S. Tel. Co.*, 54 Barb. (N. Y.) 505; 1 Lans. (N. Y.) 125; *Western Union Tel. Co. v. Broesch*, 72 Tex. 654; 13 Am. St. Rep. 843; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739; 21 Am. & Eng. Corp. Cas. 80.

In this last case *Acker, J.*, said: "We can conceive no sound reason in support of the requirement that the message shall be repeated when the injury resulted from a failure to deliver, and

being not properly a part of the message, but rather a statement of a fact peculiarly within the knowledge of the company's agent.<sup>1</sup>

Whether the sender actually ordered the message repeated is a question of fact to be determined by the jury from the evidence.<sup>2</sup> Stipulations as to repeating are said to be immaterial where the suit is brought by the addressee of the message, since they are binding only upon the sender.<sup>3</sup> But whether or not this proposition is correct, must depend upon the view in which the addressee's right of action is regarded.<sup>4</sup>

(3) *Requiring Claims to be Presented Within a Certain Time.*—The stipulation contained in the usual contract of sending, to the effect that the company will not be liable for damages in any

we therefore hold with the great weight of authority, that the condition or stipulation here insisted upon as an exemption of the company from liability for damages resulting from a failure to deliver, is not reasonable, nor valid, nor binding;" citing *Hibbard v. Western Union Tel. Co.*, 33 Wis. 564, and other cases.

In *Manville v. Western Union Tel. Co.*, 37 Iowa 214; 18 Am. Rep. 8, it appeared that the message was properly transmitted, but was not given to the company's messenger at the receiving office to be delivered, until three days after its receipt; at the end of that time it was delivered to the proper person. It was held that the company was responsible for the consequences of the negligent delay, although the addressee had called for it on the day it was received, and would have received it if it had been repeated in accordance with the terms of the printed stipulation.

Compare with the above cases, *Clement v. Western Union Tel. Co.*, 137 Mass. 463; 8 Am. & Eng. Corp. Cas. 66, holding that the stipulation as to repeating, exempts the company for liability for negligent delay on the part of its messenger in delivering a message given to him for delivery. *Martin, C. J.*, said: "But the negligence of the messenger boys was plainly contemplated by the parties when they entered into the stipulation, and there are no principles of public policy which would prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount, unless it receives a reasonable compensation for assuming further responsibility." Mr. Thompson calls this an "extraordinary decision," and says of it that "there is no sense whatever in the conclusion or reasoning adopted." *Thomp-*

*son on Electricity*, § 226. See also *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 492.

1. *Western Union Tel. Co. v. Simpson*, 73 Tex. 422. See also *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165 (error in the direction, and a consequent misdelivery).

2. *What Amounts to a Request to Repeat.*—In *Western Union Tel. Co. v. Landis* (Pa. 1888), 12 Atl. Rep. 467; 21 Am. & Eng. Corp. Cas. 206, it appeared that on receipt of the dispatch, the plaintiff, the addressee, went at once to the operator and requested him to ask the sender whether certain words were "five six" or "five sixty." It was held that this amounted to a request by the plaintiff to have the message repeated, and that it was immaterial that the forms established by the company for the repetition of messages were not complied with.

3. *Whether Stipulation Binds Addressee.*—"The receiver can be guided or informed solely by what is delivered to him, and has no opportunity to agree upon any such condition before delivery." *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Tobin v. Western Union Tel. Co.*, 146 Pa. St. 375; 39 Am. & Eng. Corp. Cas. 565; 4 Am. St. Rep. 248.

See also, as impliedly sustaining the same view, *New York, etc., Print. Tel. Co. v. Dryburg*, 35 Pa. St. 303; 78 Am. Dec. 338; *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88. Compare, however, *Western Union Tel. Co. v. James*, 90 Ga. 254.

4. See *infra*, this title, *Evidence of Assent of Sender or Addressee to Printed Stipulations*. In *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358, it was held that express stipulations in the contract of sending, bind the

case where the claim is not presented in writing within a certain length of time after the message is filed with the company for transmission,<sup>1</sup> does not tend to limit the liability of the company for the consequence of its negligence, and is not unreasonable, where the time allowed is not too short to enable the party claiming damages to become aware of the injury and to present his claim properly.<sup>2</sup> The reasons for this rule are obvious,<sup>3</sup> and it has been upheld where the time was limited to sixty days,<sup>4</sup> to thirty days,<sup>5</sup> and to twenty days,<sup>6</sup> after the filing of the message for transmission, though the rule as to the reasonableness of any particular length of time may change with peculiar circumstances.<sup>7</sup> There

receiver as well as the sender. And in Thompson on Electricity, section 237, it is considered that in so far as the receiver's right of action rests in contract, he is bound by the agreement entered into by the sender, as much so as the sender himself. But "if the telegraph company, when it delivers an erroneous message to the person to whom it is addressed by the sender, puts itself in the condition of a mere tort-feasor, one guilty of a misfeasance toward a stranger by which that stranger has incurred a loss, then this conclusion (*i. e.*, that the receiver is not bound) is supportable." Thompson on Electricity, § 237.

1. **Language of Stipulation.**—The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within thirty days after the message is filed with the company for transmission.

2. **Western Union Tel. Co. v. Jones,** 95 Ind. 228; 48 Am. Rep. 713; 8 Am. & Eng. Corp. Cas. 47; Western Union Tel. Co. v. Yopst, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 519; Western Union Tel. Co. v. Dougherty, 54 Ark. 221; Southern Express Co. v. Caldwell, 21 Wall. (U. S.) 264. Similar stipulations by other carriers have been upheld. See CARRIERS OF GOODS, vol. 2, p. 815.

3. See Thompson on Electricity, § 246, quoting from Wolf v. Western Union Tel. Co., 62 Pa. St. 83; 1 Am. Rep. 387; Cole v. Western Union Tel. Co., 33 Minn. 228; 8 Am. & Eng. Corp. Cas. 45.

4. **Within Sixty Days.**—Western Union Tel. Co. v. Way, 83 Ala. 542; Western Union Tel. Co. v. Dougherty, 54 Ark. 221; Hill v. Western Union Tel. Co., 85 Ga. 425; 30 Am. & Eng. Corp. Cas. 590; Western Union Tel. Co. v. James, 90 Ga. 254; Western Union Tel. Co. v. Yopst (Ind. 1887), 11 N. E. Rep. 16; 21 Am. & Eng.

Corp. Cas. 88; 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 519; Western Union Tel. Co. v. Jones, 95 Ind. 228; 8 Am. & Eng. R. Cas. 47; 48 Am. Rep. 713; Young v. Western Union Tel. Co., 65 N. Y. 163; Sherrill v. Western Union Tel. Co., 109 N. Car. 527; Wolf v. Western Union Tel. Co., 62 Pa. St. 83; 1 Am. Rep. 387; Western Union Tel. Co. v. Rains, 63 Tex. 27; Western Union Tel. Co. v. Brown, 84 Tex. 54; Lester v. Western Union Tel. Co., 84 Tex. 313. Compare Western Union Tel. Co. v. McKibben, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 133.

In Lewis v. Great Western R. Co., 5 H. & N. 867, a similar stipulation was upheld, although the period allowed was but seven days. See also Western Union Tel. Co. v. Culberson, 79 Tex. 65.

5. **Within Thirty Days.**—Western Union Tel. Co. v. Dunfield, 11 Colo. 335; 21 Am. & Eng. Corp. Cas. 111; Cole v. Western Union Tel. Co., 33 Minn. 228; 8 Am. & Eng. Corp. Cas. 45; Massengale v. Western Union Tel. Co., 17 Mo. App. 257; Western Union Tel. Co. v. Culberson, 79 Tex. 65; 35 Am. & Eng. Corp. Cas. 45; Western Union Tel. Co. v. Pells (1883), 2 Tex. Law Rev. 246; Beaseley v. Western Union Tel. Co., 39 Fed. Rep. 181. Compare Johnston v. Western Union Tel. Co., 33 Fed. Rep. 362; 21 Am. & Eng. Corp. Cas. 114; Southern Express Co. v. Caperton, 44 Ala. 101; 4 Am. Rep. 118, holding such a stipulation void.

6. **Within Twenty Days.**—Aiken v. Western Union Tel. Co., 5 S. Car. 358; Heimann v. Western Union Tel. Co., 57 Wis. 562.

Mr. Gray considers that a limitation of twenty days is too short. Gray on Telegraphs, § 34.

7. In Massengale v. Western Union Tel. Co., 17 Mo. App. 257, Lewis, P. J., said this in substance.

seems to be no reason why the stipulation should not apply to claims for statutory penalties as well as to other claims, but the authorities are conflicting on this point.<sup>1</sup> And there is authority for the view that such stipulations introduce unreasonable modifications to the general Statute of Limitations and unduly limit the company's liability, and are therefore contrary to public policy and void.<sup>2</sup> Where the stipulation is that the claim must be presented within a certain time after the sending of the message, the limitation does not begin to run until after the message is actually sent, so that if there is a total failure to transmit, the limitation

**1. Stipulation as Applied to Claim for Statutory Penalty.**—In *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 527, the court, in holding that such a stipulation applied to claims for statutory penalties, said: "We conclude that where a contract is essential to the existence of a duty, and it contains a stipulation requiring the plaintiff to give a written notice of a default on the part of the company, the failure to give the notice required by the contract will defeat an action to recover the penalty attached to the violation of the duty created by the contract." *Western Union Tel. Co. v. Jones*, 95 Ind. 228; 8 Am. & Eng. Corp. Cas. 47; 48 Am. Rep. 713; *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 546; *Western Union Tel. Co. v. Meridith*, 95 Ind. 93; 8 Am. & Eng. Corp. Cas. 55.

But an addressee proceeding against the company under the same statute, is held not bound to the stipulation. *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 133. And in order to take advantage of plaintiff's failure to present his claim in an action for the penalty, it must be specially pleaded. *Western Union Tel. Co. v. Scircle*, 103 Ind. 227; 10 Am. & Eng. Corp. Cas. 610.

In *Arkansas and Georgia*, it is held that such a stipulation does not apply to claims for the statutory penalty. *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344; 58 Am. Rep. 756; *Western Union Tel. Co. v. Cooleedge*, 86 Ga. 104. In *Western Union Tel. Co. v. James*, 90 Ga. 254, it is held that while the stipulation does not apply to claims for the statutory penalty, it does apply to all claims for special damages and operates, not only against the sender of a message, but also against the receiver, where message is in reply to a previous message sent by receiver.

## 2. Cases Holding Such Stipulations

**Void.**—In *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362; 21 Am. & Eng. Corp. Cas. 116, it was held that the receiver of a telegram would not be bound by such a stipulation. The court said: "Is a stipulation which has the effect to preclude from the right of action the person to whom a prepaid telegram is directed and to whom it has never been delivered, no matter how gross the negligence of the company may be, a reasonable regulation? In the opinion of this court it is clearly unreasonable, and is contrary to public policy." See this case set out in *Thompson on Electricity*, § 249.

And in *Western Union Tel. Co. v. Longwill* (N. Mex. 1889), 21 Pac. Rep. 339; 25 Am. & Eng. Corp. Cas. 559, the court said: "Instead of being a reasonable regulation, we think the stipulation was an effort on the part of the company to restrict its legal liability to sixty days. It would introduce into the local jurisprudence of every state, territory and county, a species of private statutes of limitation or non-claim. It would avoid the policy of the state in the matter of the time in which actions, both in text and contract, should be brought." See also *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344; 58 Am. Rep. 756; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 133 (addressee suing under section 4177 of Rev. Stat. *Indiana*); *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Southern Express Co. v. Caperton*, 44 Ala. 101; 4 Am. Rep. 118 (limitation unreasonable and void as tending to fraud).

It will be observed, however, that in most of the above cases, the validity of the stipulation was denied on the ground that it could not be made applicable to actions for the statutory penalty or by the addressee. In *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362; 21 Am. & Eng. Corp. Cas.



does not apply.<sup>1</sup> This is not evaded by a provision that the claim must be presented within a certain time after the message is filed for transmission. The stipulation does not bind the plaintiff where without fault on his part, he does not become aware of the wrong until after the expiration of the prescribed period;<sup>2</sup> but it seems that if he is late in discovering the wrong, but still has a reasonable time within which to present his claim before the end of the period of limitation, he is bound by it, although the lateness of his discovery was due to the company's negligence.<sup>3</sup>

The institution of a suit is ordinarily equivalent to a demand, but, in the cases under consideration, if a party commences his action against the company and serves process against it within the prescribed period, he does not thereby sufficiently comply with the stipulation, since a proper presentation is a condition precedent to his right of action;<sup>4</sup> nor can the presentation properly be made after the institution of such a suit, even though it is

116, the stipulation was held void as to the receiver because the stipulated period (thirty days) was too short, and cases might readily occur in which the period would be past before he could become aware of the injury. See Gray on Telegraphs, § 34.

1. *When Limitation Begins to Run.*—The old forms provided for a presentation within "sixty days after sending the message." *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Western Union Tel. Co. v. Trumbull*, 1 Ind. App. 121; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 527. ("The limitation is for the benefit of the company and is of its own creation. It has no right, therefore, to ask that the contract be extended for its benefit beyond the letter of the instrument.") See also *supra*, this title, *Stipulations as to Repeating Messages*, where the rule is laid down that the stipulation as to repeating messages is never upheld where the injury is one which a compliance with the stipulation would not have prevented.

2. *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 192; 46 Am. Rep. 715.

3. A delay in receiving the message, though occasioned by the mistake of the company, will not modify the condition or extend the time, if a reasonable time is left, after knowledge of the mistake, to present the claim. *Heimann v. Western Union Tel. Co.*, 57 Wis. 562; *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 258. It is

therefore error to instruct the jury that the sixty days does not begin to run until the plaintiff has discovered the company's breach of duty. *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608. But where the complaint shows that the message was never delivered, the action having been instituted by the receiver, it is not demurrable merely because it fails to allege that the claim was made within the sixty days. *Sherrill v. Western Union Tel. Co.*, 109 N. Car. 527. Whether any particular time is reasonable is a question for the jury. *Heimann v. Western Union Tel. Co.*, 57 Wis. 562; *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608.

4. This stipulation is a condition precedent to appellee's right to recover any damages. Until he has performed it, he has no cause of action. *Western Union Tel. Co. v. McKinney*, 5 Tex. Law Rev. 173; 8 Am. & Eng. Corp. Cas. 125. And in *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16; 21 Am. & Eng. Corp. Cas. 88, *aff'd* on hearing in 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 526, the same view is taken. The court, by Elliott, C. J., after quoting from the *McKinney* case and from *Cole v. Western Union Tel. Co.*, 33 Minn. 227; 8 Am. & Eng. Corp. Cas. 46, said: "These cases do no more than apply a long settled rule to new instances; for, in the case of insurance companies and common carriers, it has often been held that where the contract requires that a claim shall be presented within a limited time, its

done within the stipulated time.<sup>1</sup> A proper compliance with the stipulation requires that the claim must be presented to an agent of the company authorized to attend to such matters,<sup>2</sup> and one who is an operator merely is not necessarily such an agent. The claim must be presented in writing, though the company may expressly or impliedly waive its right to demand a written notice.<sup>3</sup>

presentation must precede the action." See *FIRE INSURANCE*, vol. 7, p. 1048; Galveston, etc., *R. Co. v. Harmon*, 2 Tex. Law Rev. 216; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387.

The *Alabama* court in *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148, after referring to the *Pennsylvania* case just cited, said: "Our own rulings, on a question not distinguishable from this in principle, have been different;" citing *East Tennessee, etc., R. Co. v. Bayliss*, 74 Ala. 150; 19 Am. & Eng. R. Cas. 480; *South, etc., R. Co. v. Morris*, 65 Ala. 193; *South, etc., R. Co. v. Bees*, 82 Ala. 340.

**1. Claim Must be Presented Before Commencement of Suit.**—"At the time plaintiff instituted this suit, he had not performed the stipulation and, therefore, no cause of action had accrued to him and this suit is not maintainable. We think the institution of this suit, it being based upon a claim in writing for damages, which had been presented to the company, is a sufficient compliance with said stipulation to fix the liability of the company for damages in another suit, or in this suit upon proper amendment and notice thereof to appellant; but that the trial court erred in holding that such claim, made after the institution of the suit (but within the sixty days) was sufficient for the purposes of this suit." *Western Union Tel. Co. v. McKinney*, 5 Tex. Law Rev. 173; 8 Am. & Eng. Corp. Cas. 123.

**2. Claim Must be Presented to Authorized Agent.**—"The agent or manager of the company's office at the station from which the message was sent, is a proper person to whom claims may be presented. *Hill v. Western Union Tel. Co.*, 85 Ga. 425; 30 Am. & Eng. Corp. Cas. 590; 21 Am. St. Rep. 166; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16; 21 Am. & Eng. R. Cas. 88. In *Bennett v. Western Union Tel. Co.* (Supreme Ct.), 2 N. Y. Supp. 365, the plaintiff informed the operator

of a mistake made in sending the message, and was referred by him to the main office, where a clerk told him that the manager was busy, took down his complaint in writing, and handed it to a person in another room, whom he introduced as attorney of the company, which attorney promised to investigate the matter, and afterwards, in reply to plaintiff's inquiry, wrote a letter rejecting the claim, using paper and envelope with printed headings representing him to be the attorney of the company. *Held*, that it sufficiently appeared that the complaint was made to proper authorities.

See also *Young v. Western Union Tel. Co.*, 65 N. Y. 163, where the plaintiff's agent presented an imperfect statement of his claim to an operator, who after examination returned it, stating that he had no authority to attend to it, referring him at the same time to the proper officers. Plaintiff, upon going to their offices and finding them absent, left, and presented no other claim until after the sixty days had passed. It was held that he had not properly complied with the stipulation.

Where the party aggrieved serves upon the agent of the company a written demand for damages, and gives the agent a copy thereof, but keeps the original, on which the agent accepts service in writing, he may prove the contents thereof by parol where the loss of the original is shown. *Western Union Tel. Co. v. Collins*, 45 Kan. 88.

**3. Notice in Writing—Waiver by Company.**—Thus where the plaintiff presented an oral claim within sixty days, whereupon the company entered into a correspondence with him and made an offer in settlement in sixty days, the company's right to insist on a written notice was waived. *Western Union Tel. Co. v. Stratemeier* (Ind. App. 1892), 32 N. E. Rep. 371.

A promise by an agent, to whom oral complaint is made, to look into the matter, is no waiver of the company's right to a written presentation of claims. *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257.

It should set forth clearly the nature and extent of the complainant's demand, and it seems that the recovery will be limited to matters set out in the claim presented.<sup>1</sup>

(4) *Limiting Liability to a Specified Amount—Night Messages.*—In sending night messages, for which reduced rates are charged, the telegraph companies have sometimes put into the contract of sending, a stipulation to the effect that "in consideration of the reduced rate for which this message is sent, the company shall not be liable beyond the amount paid for transmission," or a small multiple of the same. The cases are unanimous in holding that such a stipulation is unreasonable, and, so far as it seeks to limit the liability of the company for the consequences of its own negligence, is contrary to public policy and cannot be enforced.<sup>2</sup>

(5) *Other Stipulations.*—The company may, by special contract, limit its liability for failure or delays due to unavoidable inter-

In *Hill v. Western Union Tel. Co.*, 85 Ga. 425; 30 Am. & Eng. Corp. Cas. 590; 21 Am. St. Rep. 166, the complaint was made orally, but the agent, instead of objecting to the oral complaint, requested time for investigating the merits of the claim, and after investigation, put the company's refusal to pay, not upon the grounds of the insufficiency of the demand, but upon the non-liability of the company. It was held that this constituted a waiver of the right to demand a written notice. *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16; 21 Am. & Eng. Corp. Cas. 88.

**Written Contract as Changed by Oral Agreement.**—An oral agreement with the company's agent, that a message written and paid for as a night message, should be forwarded the next morning instead of at night, changes the contract merely in that particular, and does not affect the printed stipulation in the night message blank that any claim for damages must be presented within thirty days, although on the day messages, the time is sixty days. *Western Union Tel. Co. v. Culberson*, 79 Tex. 65.

**1. Contents of Claim.**—*Western Union Tel. Co. v. Brown*, 84 Tex. 54. In this case it was held that a notice stating the amount of the claim, that it was for damages for the non-delivery of the dispatch, and stating also the loss from the increased price of mules and from expenses incurred, is sufficient to include the loss of profits upon mules sold and contracted for by the complainant.

In *Western Union Tel. Co. v. Morris*, 77 Tex. 173; 30 Am. & Eng. Corp. Cas. 633, the sender presented to the compa-

ny a claim for damages, classifying the damages as "fifty dollars actual damages and five thousand dollars exemplary damages." At the trial, the jury returned a verdict for five hundred dollars based upon the issue of actual damages alone. It was held that the verdict would stand; the plaintiff was not prejudiced by his own classification of the damages he claimed. "The claim presented was for five thousand and fifty dollars in the aggregate, and served in all respects to give the defendant the information stipulated for."

**2. In Sending Night Messages.**—Such a stipulation has been held void where it limits the liability of the company to the amount paid for transmission. *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; 30 Am. & Eng. Corp. Cas. 589; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; *Pinckney v. Western Union Tel. Co.* 19 S. Car. 73; 45 Am. Rep. 765; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 572; 15 Am. St. Rep. 917; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 559; 14 Am. Rep. 775. Compare *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358. See also *Marr v. Western Union Tel. Co.*, 85 Tenn. 529; 16 Am. & Eng. Corp. Cas. 243; *Gray on Telegraphs*, § 50 (where the reason for the doctrine of the text is reviewed).

So is a stipulation limiting a company's liability to ten times the amount

ruption in the working of its lines, as, for example, where peculiar climatic conditions prevent the proper operation of the instruments.<sup>1</sup> But such a stipulation would not embrace cases where the delay is due to the exclusive use of the wire for the time, in sending out train orders.<sup>2</sup> So also, it seems that the company may stipulate against liability for delay for a reasonable time, where its business is much hampered by a strike of the operators.<sup>3</sup> It seems that the company may stipulate that it will not be responsible for errors occurring on connecting lines,<sup>4</sup> or for messages which are written in cipher, or are otherwise obscure.<sup>5</sup>

c. EVIDENCE OF ASSENT OF SENDER OR ADDRESSEE TO PRINTED STIPULATIONS.—Ordinarily a party is not bound by any rule or regulation, by which a carrier seeks to limit his liability, unless the same has been brought to his notice.<sup>6</sup> But in the case

paid for transmission. *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; 21 Am. & Eng. Corp. Cas. 182; 5 Am. St. Rep. 672; *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347. Or to fifty times such amount where the message is repeated. *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; *Brown v. Postal Tel. Cable Co.*, 111 N. Car. 187; 39 Am. & Eng. Corp. Cas. 583. *Compare Bennett v. Western Union Tel. Co.* (Supreme Ct.), 2 N. Y. Supp. 365, where the sender of repeated message was limited to recovery of fifty times the amount paid for sending message. See also *Western Union Tel. Co. v. Young*, 93 Ind. 118 (contract limiting company's liability to twenty-five cents invalid); *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; 54 Am. Rep. 644; *Thompson on Electricity*, § 201. Such a contract is void because its terms are repugnant in assuming to impose an obligation, and by the same act to release from all obligation. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437. That part of the regulation that the company will receive messages to be sent without repetition during the night, for delivery not earlier than the morning of the next day, at reduced rates, is valid. *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211. In *Western Union Tel. Co. v. Neill*, 57 Tex. 289; 44 Am. Rep. 589, a somewhat different conclusion is reached. The court, by Bonner, J., said: "We fail to perceive on principle, why, in such cases, the parties may not, as they did here, agree upon a sum certain in the nature of liquidated damages for an error or delay arising from a cause other than misconduct, fraud or the

want of proper care." *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358 (such a stipulation held valid); *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 157.

1. *May Stipulate Against Liability for Errors Due to Climatic Influences.*—*Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433; 1 Am. Rep. 285; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *Western Union Tel. Co. v. Graham*, 1 Colo. 237; 9 Am. Rep. 136; *Thompson on Electricity*, § 191. See also *Western Union Tel. Co. v. Cohen*, 73 Ga. 522.

2. *Western Union Tel. Co. v. Rosen-triter*, 80 Tex. 406; 35 Am. & Eng. Corp. Cas. 77.

3. *A Strike of Operators.*—At one time while a strike prevailed, the company had all of its blanks stamped, "Accepted subject to delay." The validity of such a stipulation must depend upon whether or not the delay was reasonable. In *Marvin v. Western Union Tel. Co.* (N. Y.), 15 Chic. Leg. N. 416, it was considered that the company had no right to insist upon the sender's assent to such a provision.

4. *Connecting Lines.*—*Western Union Tel. Co. v. Carew*, 15 Mich. 525; *U. S. Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46. *Compare De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547. See *infra*, this title, *Liability Where Message Passes Over Connecting Lines*.

5. *Cannons v. Western Union Tel. Co.*, 100 N. Car. 311; 21 Am. & Eng. Corp. Cas. 121; 6 Am. St. Rep. 590.

6. *The General Rule.*—See *RAILROADS*, vol. 19, p. 916; *CARRIERS OF GOODS*, vol. 2, p. 816; *TICKETS AND*

of telegraph companies, where the message blanks are so arranged that a party in affixing his signature to the message signs a printed contract, it is conclusively presumed that he thereby assents to the terms of such contract, and is bound by them, although he may not have read or noticed them,<sup>1</sup> or even been able to read them.<sup>2</sup> In the absence of fraud or imposition, a party to a contract which has been voluntarily signed and executed by him, with full opportunity for information as to its contents, cannot avoid it on the ground of his own negligence or omission to read it.<sup>3</sup> The use of very small type for printing the stipulations in the blank, where there are letters in large type, directing attention to the stipulations, is not such fraud or imposition as will affect the validity of the implied assent.<sup>4</sup>

In *Illinois*, however, it is held that the question of assent is for the jury to determine from the evidence; that the mere fact that the sender affixes his signature does not of itself make the contract binding upon him, unless it is actually brought to his notice, and he signs with full knowledge of it.<sup>5</sup> But although this view has

*FARES*; *Adams Express Co. v. Haynes*, 42 Ill. 89. Telegraph companies constitute no exception to the general rule. *DeRutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 559; 30 How. Pr. (N. Y.) 433.

1. **Sender Bound by His Signature to Printed Stipulations.**—*Hill v. Western Union Tel. Co.*, 85 Ga. 425; 30 Am. & Eng. Corp. Cas. 590; 21 Am. St. Rep. 166; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Cole v. Western Union Tel. Co.*, 33 Minn. 227; 8 Am. & Eng. Corp. Cas. 45; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; 34 N. Y. Super. Ct. 390; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, *aff'd* 39 Hun (N. Y.) 158; 21 Am. & Eng. Corp. Cas. 107; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526, *aff'd* 45 Barb. (N. Y.) 274; *Pearsall v. Western Union Tel. Co.*, 44 Hun (N. Y.) 532; *aff'd* 124 N. Y. 256; 35 Am. & Eng. Corp. Cas. 31; 21 Am. St. Rep. 662; *Marr v. Western Union Tel. Co.*, 85 Tenn. 530; 16 Am. & Eng. R. Cas. 243; *Dillard v. Louisville, etc., R. Co.*, 2 Lea (Tenn.) 288; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; 8 Am. & Eng. Corp. Cas. 70; *Anderson v. Western Union Tel. Co.*, 83 Tex. 17; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. See also *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433; 1

Am. Rep. 285; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; 71 Am. Dec. 461; *Pinckney v. Western Union Tel. Co.*, 19 S. Car. 73; 45 Am. Rep. 765; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238. Compare *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607.

**Where Operator Writes Out Message.**—In *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; 8 Am. & Eng. Corp. Cas. 70, the sender told the operator that he knew nothing about the business and asked him to write the message for him, which the operator did, and the sender signed his name on the operator's pointing out the place. It was held that the operator was, for that purpose, the sender's agent, and the stipulations were binding upon the sender, notwithstanding his failure to notice them. Compare *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181, where dispatch was copied on a message blank by operator, without his being requested to do so.

2. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. R. Cas. 613; 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; 8 Am. & Eng. Corp. Cas. 70.

3. *Womack v. Western Union Tel. Co.*, 58 Tex. 179; 44 Am. Rep. 614; *Becker v. Western Union Tel. Co.*, 11 Neb. 92; 38 Am. Rep. 356; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526.

4. *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387.

5. **Rule in Illinois.**—*Tyler v. Western*

received countenance in some other jurisdictions, it is clearly opposed to the weight of authority on the subject.<sup>1</sup>

Where the message is not written on the blanks provided by the company, and yet is received for transmission by the company's agent, the sender is not bound by the stipulations printed on the usual message blanks,<sup>2</sup> unless it can be shown that he had

Union Tel. Co., 60 Ill. 421; 14 Am. Rep. 38. The court said: "Whether he (the sender) had knowledge of its terms and assented to its restrictions, is for the jury to determine, as a question of fact upon evidence *aliunde*; and all the circumstances attending the giving of the blank are admissible in evidence to enable the jury to decide that fact." See also *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Illinois Cent. R. Co. v. Frankenburg*, 54 Ill. 88; 5 Am. Rep. 92; *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; 15 Am. St. Rep. 687.

"Slight evidence of acceptance of, or assent to, such regulations, would no doubt suffice, but it is for the jury to determine." *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 45.

1. In *Baldwin v. U. S. Tel. Co.*, 1 Lans. (N. Y.) 125 (*obiter*), and in *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88, it is held that the sender must have actual notice of the stipulations in order to be bound by them. But this, it seems, is not the view of the higher courts of those states. See *Thompson on Electricity*, § 210. And the decided weight of authority, both that of text writers and that of decided cases, is the other way. See *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Gray on Telegraphs*, § 28; *Thompson on Electricity*, § 212.

In *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607, it is held that a telegraph company being authorized by law to make rules for the government of its transactions, any one employing the company will be supposed aware of such regulations, and will be presumed to have engrafted them upon his contract, and no proof of their having been actually brought home to his knowledge will be required.

2. Where Message Blanks Are Not Used.—*Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; 35 Am. & Eng. Corp. Cas. 31; 21 Am. St. Rep. 662.

This rule applies, although a regulation of the company forbids its em-

ployés to transmit messages unless they are written on the printed blanks. *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. In this case, the message was written by the sender on plain paper and after it was handed to him, the operator, without the sender's request or permission, copied it on a regular blank; it was held that the sender's assent to the stipulations was not shown, and he was therefore not bound by them. The same ruling is made in *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429.

In *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; 35 Am. & Eng. Corp. Cas. 31, *aff'd* 44 Hun (N. Y.) 532; 21 Am. St. Rep. 662, the company proved that for a long time it had required messages to be written on a blank which contained a printed stipulation limiting its liability for mistakes. Plaintiff admitted that he was familiar with the appearance of the blanks; had frequently written messages on them; that a parcel of them was always lying on the table in his office; but averred that he had never read the stipulation and had no knowledge of its terms. It was held that, in the absence of a showing that the terms of the stipulation were brought home to the plaintiff, it was not error to exclude the blank from the consideration of the jury. And compare also *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; 21 Am. & Eng. Corp. Cas. 107; *Becker v. Western Union Tel. Co.*, 11 Neb. 93; 38 Am. Rep. 356.

In *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; 30 Am. & Eng. Corp. Cas. 590; 15 Am. St. Rep. 687, it appeared that the defendant, a broker, had contracted with the telegraph company to be furnished with accurate market quotations, and his business being too urgent to admit of written messages, those delivered and received by both parties were verbal; that on account of plaintiff's mistake in sending a message, one of defendant's agents bought, instead of selling, causing defendant serious loss; that a rule, printed at the top of plaintiff's

actual knowledge of the rules of the company in regard to them.<sup>1</sup> But if the message is written on a mutilated blank which contains language sufficient to put the sender upon inquiry as to what the full agreement is, his assent will be presumed, just as in cases where a perfect blank was used.<sup>2</sup> Where the stipulations were printed in conspicuous type and posted in the company's office where the sender wrote his message, they were held to be binding on him, although not incorporated into the printed contract on the blank.<sup>3</sup>

The question whether the addressee or receiver is bound by the stipulations entered into between the company and the sender, depends upon the ground upon which the court bases the right of recovery. Some cases consider that the receiver's right to recover rests entirely upon the contract of sending and upon the principle that where two parties contract for the benefit of the third, such third party may maintain an action for the breach of the agreement in his own right.<sup>4</sup> Where this view is taken, it necessarily follows that the receiver can assert no rights except under the contract as made by the sender; he is therefore bound by the stipulations.<sup>5</sup> But other authorities hold that the receiver's

message blanks, declared that plaintiff would not be liable for mistakes of any unrepeatd messages, and it did not appear that defendant's messages had been repeated. *Held*, that it was for the jury to say, from the evidence, whether plaintiff, by dispensing with the use of its blanks in its transactions with defendant, intended to relieve him from the stipulations printed thereon.

1. *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; 21 Am. & Eng. Corp. Cas. 107.

The fact that the sender was a shareholder in the company does not charge him with notice of the printed stipulations, or of a resolution adopted by the board of directors that it would not thereafter be liable for mistakes in unrepeatd messages, and it is not error to exclude a copy of such resolutions when offered in evidence. *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; 35 Am. & Eng. Corp. Cas. 31, *aff'd* 44 Hun (N. Y.) 532; 21 Am. St. Rep. 662.

**Knowledge of Agent.**—In the case of *Clement v. Western Union Tel. Co.*, 137 Mass. 483; 8 Am. & Eng. Corp. Cas. 66, an agent with knowledge of the regulations of the company concerning repeating messages, sent a dispatch to his principal. In action by the principal for negligent delay in delivery, it was held that he could recover only the

price paid for transmission, as the stipulation as to repeating was binding upon him.

2. **Where Mutilated Blank is Used.**—*Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; 21 Am. & Eng. Corp. Cas. 107. The court, by Earl, J., said: "The plaintiff must be held to have assented to this stipulation. He was familiar with the defendant's blanks, having used them extensively for several years, and he had frequently read the words at the bottom of them: 'Read the notice and agreement at the top.' Therefore, although he may not have known what the precise terms of the stipulations contained in the blank were, yet he knew that some stipulations were therein contained, and he must be held, by the use of the blank and its delivery to the defendant, to have assented to them."

3. *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607.

4. **As to Assent of Receiver or Addressee.**—See *Gray on Telegraphs*, §67; *infra*, this title, *Right of Addressee*.

5. *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433; 1 Am. Rep. 285 (in this case, and in the one immediately preceding, the sender was the addressee's agent).

In a number of cases, the stipulation

action is not on the contract, but for the tort, *i. e.*, for the breach of the company's public duty.<sup>1</sup> Under this view of the rule, the stipulations in the original contract can have no binding effect upon the receiver's action.<sup>2</sup> As a matter of fact, the telegraph companies endeavor to incorporate the stipulations into the message as delivered, but as the receiver does not attach his signature thereto, they are of no effect unless it can be shown that they were brought to his notice and assented to by him.<sup>3</sup>

**3. Negligence.**—Any failure on the part of the company to exercise proper care in the performance of its duties, constitutes negligence,<sup>4</sup> and it seems that the fact that a message was delayed or erroneously transmitted is sufficient evidence of negligence, unless the company is able to show that the error or delay was due to causes beyond its control.<sup>5</sup>

**4. Contributory Negligence.**—In order to warrant a recovery, the plaintiff must be able to show that he himself was not guilty of a want of care, or that his negligence did not contribute to the injury.<sup>6</sup> Thus, the message as offered to the company, must be

as to the presentation of claims has been enforced against the addressee. But it may have been that in those cases the stipulation was regarded as a regulation, which having been duly published, was binding upon all patrons of the company. See *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257; *Western Union Tel. Co. v. Culberson*, 79 Tex. 65.

1. *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109; *infra*, this title, *Character of the Action*; also the section *Right of Addressee*.

2. *Western Union Tel. Co. v. Richmond* (Pa. 1887), 8 Atl. Rep. 171; 16 Am. & Eng. Corp. Cas. 265 (stipulation as to repeating); *de La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383 (stipulation as to repeating).

In *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 137, it is held that the addressee cannot be bound by the stipulation requiring claims for damages to be presented within sixty days, as there is no evidence of his assent, although the message was written out and delivered to him on the regular blanks containing the stipulation. In this case, however, there was a complete failure to deliver, and it does not appear at what time the addressee became aware of the company's breach of duty and of his right of action.

3. See cases in preceding notes.

4. See NEGLIGENCE, vol. 16, p. 389;

*Blyth v. Birmingham Water Works*, 25 L. J. Exch. 213.

5. See *infra*, this title, *Presumption of Negligence—Burden of Proof*. The rule is stated in the case of *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 313; 41 Am. Rep. 500, where it is said by Boynton, C. J.: "If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require in many cases an impossibility not unfrequently resulting in enabling the company to avoid a just liability."

Nor can the company be released from liability for damages resulting from an erroneous transmission, merely by showing that its line was in good order, that approved instruments were used, and that faithful and competent servants were employed, if the particular act complained of shows a negligent performance of the duty to transmit. *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227; 10 Am. & Eng. Corp. Cas. 611.

6. See CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15 *et seq.* Where the company accepts a message for transmission, and undertakes to deliver it



written legibly, and the company cannot be held liable where the mistake in transmission was due to the indistinct writing of the sender.<sup>1</sup> And the address of the person to whom the message is sent must be definitely given; the company cannot be expected or required to make extended searches in large cities in order to find the addressee.<sup>2</sup>

It is the duty of the plaintiff, on discovery that a mistake has occurred, to use all reasonable diligence to render the injury to himself as light as possible.<sup>3</sup> What this duty requires in particular cases must of course depend upon the peculiar circumstances involved; the criterion is always what a reasonably prudent business man, of ordinary sagacity, would have done under similar circumstances, and it is usually for the jury to say whether the injured party has so acted.<sup>4</sup>

about 9 o'clock at night, the fact that the sender of the telegram might have filed it earlier in the evening, so that it could have reached plaintiff, to whom it was addressed, in time to prevent the injury complained of, does not make plaintiff guilty of any contributory negligence. *Western Union Tel. Co. v. Bruner* (Tex. 1892), 19 S. W. Rep. 149.

**1. Message Must Be Written Out Clearly.**—In *Koons v. Western Union Tel. Co.*, 102 Pa. St. 164, the sender, H., intending to order by telegraph the sale of "two thousand" cases, wrote what more nearly resembled "ten thousand" and sent the message to the telegraph office by a small boy. The operator transmitted the dispatch "ten thousand," and, in accordance with the regulations of the company, added in parenthesis the figures "10,000" which were not in the written message. In an action by the addressee against the company for damages sustained by reason of the sale of ten thousand instead of two thousand cases, it was held that the cause of the loss was the negligence of the sender, and there could be no recovery. See also *Western Union Tel. Co. v. Liddell*, 68 Miss. 1.

**2. Definite Address Must Be Given.**—*Western Union Tel. Co. v. McDaniel*, 103 Ind. 294. In this case the only address given was "Mrs. LaFontaine, Kankakee," although the operator asked to have it made more definite. K. proving to be a city of more than twelve thousand inhabitants, the company was not held liable for failing to find Mrs. L. Compare *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

In *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183; 21 Am. & Eng. Corp. Cas. 158, the message was ad-

dressed to "291 Rampart St." without designating north or south, and after inquiry, the messenger delivered it at 291 North Rampart, where nobody would receive it; it appeared afterwards that the addressee lived at South Rampart. Had the address been definite, the message would have been properly delivered. It was held that such contributory negligence would bar recovery.

**3. Duty of Plaintiff to Make Injury as Light as Possible.**—The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract, the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him. *Hamilton v. McPherson*, 28 N. Y. 76; 84 Am. Dec. 331. See also *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; 5 Am. & Eng. Corp. Cas. 205; 51 Am. Rep. 435; 89 Ala. 191; *Western Union Tel. Co. v. Reid*, 83 Ga. 401; *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420.

**4. See NEGLIGENCE**, vol. 16, pp. 402-3; **CONTRIBUTORY NEGLIGENCE**, vol. 4, p. 22.

The plaintiff sent a telegram directing certain building plans to be sent to him at C., in order that he might conclude contracts for the material to be used in the building. In an action by him against the company for a delay in delivering the message, it was held error to refuse to instruct the jury that it was plaintiff's duty to use reasonable efforts to avoid or lessen his damage,

If the message is intelligible and not doubtful in its terms, the addressee cannot be considered negligent in acting in accordance with its requirements, although he may have reason to suspect that a mistake has been made.<sup>1</sup> But he assumes all responsibility if he guesses at the intended meaning and acts upon it, and it turns out that his interpretation was wrong.<sup>2</sup>

and if a reasonably prudent business man would have sent another telegram for the plans, and if such telegram had been sent, the plans would have reached plaintiff in time to have consummated his contract, then plaintiff is only entitled to compensation for the value of his time and expense during the extra time he would have been kept at C. on account of the delay. *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 823.

In *Western Union Tel. Co. v. Wisdom*, 85 Tex. 261, it appeared that A engaged B to telegraph in case A's child should become dangerously ill. A dispatch sent in due time was not delivered. In the action, the telegraph company requested an instruction, that if B could have so notified A that he might have reached his child before it died, there could be no recovery. It was held that the request for this instruction was properly refused.

In another case, through the negligence of the company in delaying a message sent to the plaintiff, other creditors attached the property of his debtor, thereby postponing his claim to theirs. The property when sold by the sheriff brought less than the amount of these prior claims. It was held that the fact that the estimated value of the real estate sold by the sheriff was greater than the amount realized at the sale, and was sufficient to include plaintiff's claim, did not impose upon the plaintiff the duty of buying it and discharging the prior liens. *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; 10 Am. St. Rep. 790. See also *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *Western Union Tel. Co. v. Stevens* (Tex. 1891), 16 S. W. Rep. 1095; *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122; *Thompson on Electricity*, §§ 411, 414; *Smith v. Independent Line of Telegraph* (N. Y. 1864), reported in *Scott & Jar. on Tel.*, § 412, note.

A message from plaintiff to his agent instructing the latter to buy shares, was made to read "buy five hundred" instead of "five Hudson," as the plaintiff intended. The agent purchased according to the message received by

him, and notified his principal, who immediately took steps to remedy the error as far as possible, without notifying the telegraph company. It was held that plaintiff had discharged his duty, and was not bound to notify defendant of the error; the damage had been done before he knew of it, and his right of action vested immediately. *Rittenhouse v. Independent Line of Tel.*, 1 Daly (N. Y.) 474; 44 N. Y. 263; 4 Am. Rep. 673.

1. *Tyler v. Western Union Tel. Co.*, 60 Ill. 433; 14 Am. Rep. 38; *Gray on Telegraphs*, § 75.

Thus where a message requesting plaintiff's presence, is received, which purports to come from *South Carolina* instead of from Staten Island, and plaintiff, though in expectation of a message from the latter place, without making inquiry of any of defendant's agents, goes to *South Carolina*, he is not guilty of contributory negligence. *Tobin v. Western Union Tel. Co.*, 146 Pa. St. 375; 39 Am. & Eng. Corp. Cas. 565; 4 Am. St. Rep. 248.

In *Texas*, however, it is held that a party who acts upon information conveyed by a telegram which has been erroneously transmitted, cannot recover of the company for losses sustained by reason of the erroneous message, if before acting, he had reason to doubt its accuracy, and failed to have it verified by repetition. And this, notwithstanding the declarations made to him by the operator that the message was correct. *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589.

2. *Gray on Telegraphs*, § 76; *Western Union Tel. Co. v. Neill*, 57 Tex. 292; 44 Am. Rep. 589; *De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547.

Thus in *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633, a message from plaintiff to his agent, in reply to a previous one asking instructions as to the sale of certain bonds, concluded "H says hold undoubted;" the company negligently transmitted it so as to make it read "H says hold undoubted." The plaintiff's agent, interpreting this as an order to sell, sold the bonds at a loss, without

Where the sender requests the operator to write out or to correct the message for him, the operator acts, not as agent of the company, but as that of the sender, and if a mistake is occasioned through his having written it erroneously, the company is not chargeable with damages for the consequences.<sup>1</sup>

**5. Liability Where Company Acts Under Contract to Furnish Market Reports and Other News.**—It is no part of the duty of a telegraph company to collect and transmit news of any kind unless it contracts to do so.<sup>2</sup> But it may enter into contracts to furnish news reports and may make the collection and transmission of market reports, stock quotations, and other news, a special department of its business.<sup>3</sup> In such cases it becomes liable for all damages occasioned to its patrons through its furnishing incorrect information, and this whether the error occurred in the process of transmission or existed in the information as originally received by it. The company in such cases assumes duties beyond those incumbent upon it as a mere carrier of reports, and cannot escape liability by showing a mere correct transmission.<sup>4</sup>

In some instances telegraph companies are organized for the express purpose of distributing news reports; such companies are

making any inquiry or having the message verified. It was held that the damages occasioned by the improper sale were the result of the negligence of plaintiff's agent as he should have made some inquiry; recovery was therefore denied.

Although the stipulations in the contract of sending, which insist that the company will not be liable for unreported messages, are invalid and not binding (see *supra*, this title, *Stipulations as to Repeating Messages*), yet where the plaintiff, the addressee, has reasonable ground to suspect a probable error, it is his duty to have the message repeated in order to avoid possible injury, and he cannot recover for damages occasioned from his acting on the doubtful message. *Western Union Tel. Co. v. Neill*, 57 Tex. 292; 44 Am. Rep. 589.

**1. Message Written for Sender by Operator.**—*Western Union Tel. Co. v. Foster*, 64 Tex. 220; 53 Am. Rep. 754; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; 8 Am. & Eng. Corp. Cas. 70.

**2. Bradley v. Western Union Tel. Co.** (Ohio, 1883), 27 Alb. L. J. 363; *Gray on Telegraphs*, § 31.

**3. See** *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; 15 Am. St. Rep. 687.

**Construction of Contract.**—In *Good-*

*sell v. Western Union Tel. Co.*, 130 N. Y. 430, *aff'g* 9 N. Y. Supp. 425, it appeared that a telegraph company contracted to deliver certain news reports of an average number of words per day, one-third to be transmitted in the daytime and two-thirds at night, to all the places named in a certain schedule, for a gross sum per month, the other party to have the right to substitute other places for those named; and, if the reports were transmitted to "any greater number of places" than were enumerated in such schedule, then an additional payment should be made. The schedule contained 38 different places. It was held that the company was bound, without additional payments, to transmit the day reports to 38 places and the night reports to 38 places, although the latter places were different from the former.

**4. Obligation to Transmit Correct Information.**—*Gray on Telegraphs*, § 31; *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; 20 Am. Rep. 605; *Bank of New Orleans v. Western Union Tel. Co.*, 27 La. Ann. 49. In this last case, the company's defense was that the error in the reports was caused by the working of the gold stock indicator in their office in New York from which they received their information. It was held that this did not release them from

possessed of the same general powers and are subject to the same obligations as ordinary telegraph companies. Thus they may provide reasonable regulations as to the use of their instruments ("tickers") by subscribers, and require that they shall not allow non-subscribers to have copies of the reports furnished to them.<sup>1</sup> But they cannot make unjust discriminations; they are of a public character and must serve all alike, and may be enjoined from refusing to continue serving a subscriber who has complied with all their reasonable regulations.<sup>2</sup> They have a right, however, to refuse to furnish reports to a gambling place, even though they have contracted to do so, as they can be under no obligation to forward an illegal undertaking.<sup>3</sup>

**6. Immoral Messages—Gambling Transactions.**—A telegraph company is not bound to receive or transmit messages which are immoral or otherwise improper to be sent. Thus, it cannot be made liable for a failure to transmit a message containing inde-

liability, since they had contracted to deliver to plaintiffs correct information which they should have obtained, without relying wholly on the indicator.

**1. "Tickers"—Stock Indicators—Reasonable Regulation.**—In *Shepard v. Gold, etc.*, Tel. Co., 38 Hun (N. Y.) 338, the subscriber's contract with the company provided that "these reports are furnished to subscribers for their own private use in their own business exclusively. It is stipulated that subscribers will not sell or give up copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule, subscriptions by one party for the benefit of himself and others at their joint expense will not be received." It was held that this stipulation was a reasonable one and did not conflict with any duty the company owed to the public. And where the subscriber violated the stipulation by furnishing copies to another firm, although he was a member of such firm, the company was justified in removing its machine from his office.

**2. Must Serve all Impartially.**—*Friedman v. Gold, etc.*, Tel. Co., 32 Hun (N. Y.) 4; *Smith v. Gold, etc.*, Tel. Co., 42 Hun (N. Y.) 454; *Metropolitan, etc., Exchange v. Mutual Union Tel. Co.*, 11 Biss. (U. S.) 531; *Bradley v. Western Union Tel. Co.* (Ohio, 1883), 27 Alb. L. J. 363; *Gray on Telegraphs*, p. 35, note.

The company cannot stipulate that they shall have the right to discontinue the service to any subscriber without notice, whenever in their judgment he

has violated the contract; such a provision is unreasonable in making the company the sole judge in their own cause. *Smith v. Gold Stock, etc.*, Tel. Co., 42 Hun (N. Y.) 454.

**3. Not Obligated to Serve Gambling Institutions.**—*Smith v. Western Union Tel. Co.*, 84 Ky. 664; 16 Am. & Eng. Corp. Cas. 231. In this case, the court, by Bennett, J., said: "These reports were the essence, the very sinew, of appellant's gambling business, and without the prompt supply of which, his business was a failure. Can the appellee be compelled to continue the supply? We think not. Not upon the ground that the appellee is the innocent victim of an illegal enterprise; not that it has been entrapped into aiding a gambling business, for it says that it was willing to furnish the reports as long as the terms of the contract suited it; but upon the ground that appellant was engaged in a gambling enterprise, which is contrary to law, good morals and public policy. It is for the sake of the law and the best interests of society that we relieve the appellee from continuing to furnish to appellant the reports. The appellant is engaged in running a bucket shop."

Complainants being in the business of gambling, equity will not compel a company to furnish them with a "ticker," giving quotations of prices ruling in the Chicago Board of Trade, and this although they are members of that board. *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825. See also *infra*, this title, *Immoral Messages—Gambling Transactions*.

cent language or intended to forward a libidinous purpose.<sup>1</sup> But it cannot refuse to send a message merely on the ground that the language is equivocal and the operator suspects that it is intended for improper purposes.<sup>2</sup>

The principal question involved in this connection is the right of a sender or other party aggrieved to recover damages where the company is guilty of negligence in transmitting a message, whereby the message is lost or delayed or becomes changed in its terms so as to mislead the receiver, when such message relates to a gambling transaction. Undoubtedly the company rests under no obligation whatever to undertake to transmit such messages, and it may refuse to receive them.<sup>3</sup> Thus, where the company chooses to discontinue furnishing to a "bucket shop" the stock reports and quotations, the courts will not enjoin such discontinuance, for the reason that they decline to extend their

**1. Indecent Telegraph or Telephone Messages.**—Gray on Telegraphs, § 15; Pugh v. City, etc., Teleph. Co. (Ohio, 1883), 27 Alb. L. J. 163; Rev. Stat. Louisiana, § 3761. Compare Bryant v. Western Union Tel. Co., 17 Fed. Rep. 825.

A telephone company may provide that no indecent or profane language shall be used over its line, and may refuse to serve a subscriber who uses such language in speaking through its line. Pugh v. City, etc., Teleph. Co. (Ohio, 1883), 27 Alb. L. J. 163. In this case the subscriber, being annoyed because unable to get the number he wished to call up, said: "If you don't get the party I want, you can shut up your damned old telephone." One judge dissented from a decision in favor of the telephone company on the ground that "damn" was not profane or obscene. See FRANCHISES, vol. 8, p. 613.

**2. In Western Union Tel. Co. v. Ferguson,** 57 Ind. 495, this message was offered for transmission to a neighboring town: "Send me four girls on first train to tend fair." The company refused to receive it on the ground that it was indecent, as the "four girls," it had reason to believe, referred to prostitutes. The plaintiff's action was sustained, evidence to prove that the message was, in fact, immoral in its purposes, being held inadmissible. The court, by Hawk, J., said: "We know of no provision of law which would authorize the appellant or any of its agents to inquire into or impugn the motives of anyone who might desire to transmit a message, couched in decent language, over the appellant's telegraph lines. If the mes-

sage offered is expressed in decent language, on payment or tender of the usual charge, the duty of the telegraph company is fixed by law and it has no discretion. If, however, the message is expressed in indecent, obscene or filthy language, then, in our opinion, the telegraph company will be excused from the transmission of any such message." Mr. Gray very justly dissents in a measure, from this view, on the ground that if the company's agent is aware of the real character of the message, it is immaterial that he did not derive his knowledge from the message itself. He holds that evidence of the real character of the message should have been admitted. In Gray v. Western Union Tel. Co., 87 Ga. 350; 35 Am. & Eng. Corp. Cas. 50, the court, by Bleckley, C. J., speaking of this case, said: "It seems to us that this decision is correct. . . .

When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company dealing with it, either civilly or criminally, for transmitting the dispatch, and hence it would be the duty of the company, in deciding whether to transmit or not, to give the benefit of the doubt to the sender."

**3. Messages Relating to Gambling Transactions.**—"Of course a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril. If it is mistaken, or has misjudged the tenor or purpose of the message, it will be held responsible to the injured party for any damage sustained." Smith v. Western Union Tel. Co., 84 Ky. 664; 16 Am. & Eng. Corp. Cas. 231; Gray on Telegraphs, § 15.

aid to promote any such illegal device.<sup>1</sup> And in extension of this principle, the better rule seems to be, that where the message relates to a gambling or similar illegal transaction, neither the sender nor receiver can maintain an action for damages on the ground that the company refused to transmit the message.<sup>2</sup> If, while attempting to transmit such a message, the company failed to exercise proper care, whereby an erroneous message was sent, the sender may recover the price paid for transmission,<sup>3</sup> but neither he nor the receiver can invoke the illegal contract or the gain or loss resulting from it to measure the damages sustained by him in consequence of an erroneous transmission.<sup>4</sup>

1. *Smith v. Western Union Tel. Co.*, 84 Ky. 664; 16 Am. & Eng. Corp. Cas. 231; *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825.

2. The principle is the same here as in the case of the "bucket shops;" the courts will not compel the telegraph company to assist in the promotion of a transaction so opposed to public policy. See *Cothran v. Western Union Tel. Co.*, 83 Ga. 25; 25 Am. & Eng. Corp. Cas. 533; *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825.

3. *Cothran v. Western Union Tel. Co.*, 83 Ga. 25; 25 Am. & Eng. Corp. Cas. 533; *Gray v. Western Union Tel. Co.*, 87 Ga. 350; 35 Am. & Eng. Corp. Cas. 47. According to these cases, the contract of transmission is valid, having been voluntarily entered into by the company; but the court will not allow as damages for the breach of such contract, any injury sustained in relation to the illegal gambling contract which was the subject of the message.

4. In *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480, this message was offered for transmission: "W. & Co.: Cover two hundred September, one hundred August, B." The company improperly transmitted the message so that as delivered to the addressee it read: "Cover two hundred September, two hundred August." The meaning of the dispatch was an order by the sender to his New York broker to sell two hundred bales of cotton to be delivered in September, and one hundred to be delivered in August. In August, cotton had advanced so that the sender, in complying with his contract, incurred a loss of one hundred and fifty dollars more than he would have suffered had only one hundred bales been sold, as his message ordered. He brought an action against the company to recover this amount, together with twenty-five dollars paid his broker

for buying the extra one hundred bales. The recovery was allowed, the court holding that although speculation in cotton futures was illegal, still the sender, having sustained damage from the erroneous transmission, in that he was compelled to pay the expenses incurred by his agent, who had acted on the erroneous message, he was entitled to recover of the company the amount of his actual damage which resulted as a proximate consequence of the company's negligence.

But in a later case in the same jurisdiction, a different view is taken, and the foregoing case to some extent overruled. See *Cothran v. Western Union Tel. Co.*, 83 Ga. 25; 25 Am. & Eng. Corp. Cas. 533. The dispatch in this latter case, from which the company negligently omitted a word in transmission, was concededly, one relating to dealings in "futures." The holding is stated in the opinion of the court, by Bleckley, C. J.: "The plaintiffs claimed their full damages, and sought to measure the same by the market changes; thus resorting to the fluctuations in 'futures' in order to arrive at the amount of their recovery. We think this standard cannot be invoked, for the reason that contracts relating to 'futures' are illegal and we cannot see how an illegal contract can be called in to measure the damages sustained by reason of the breach of a legal contract. It is true that, according to *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480, a recovery in this case might be had. But that decision was made at a time when contracts between brokers and their principals were considered obligatory, notwithstanding the vitiating element of speculation in 'futures'; but since the case of *National Bank v. Cunningham*, 75 Ga. 366, the principle of the former case has stood virtually overruled."

It seems, however, that where the action against the company is to recover the statutory penalty, the company cannot defend on the ground that the message, which it was negligent in transmitting, related to a gambling transaction.<sup>1</sup> As to what are illegal or gambling transactions, within the meaning of the rules just stated, reference must be had to a previous article. The cases decided have generally been in connection with the buying and selling of "futures," or with the gambling device known commonly as a "bucket shop."<sup>2</sup>

**7. Sunday Messages.**—(See also SUNDAY, vol. 24, p. 528 *et seq.*).—The telegraph company has a right to make reasonable regulations as to office hours and this embraces the right to close its offices on Sunday, except where the character of the locality of the office would necessitate a different rule.<sup>3</sup> The agent or operator, however, may undertake to transmit a message at any hour on Sunday, but in assuming such an undertaking he does so conditionally, and the company does not become liable for his failure to transmit promptly, when it appears that transmission was impossible, owing to the fact that the office at the point of destination was closed. The agent is not obliged to know the office hours at other stations,<sup>4</sup> and in accepting a message for transmission, there is always an implied condition that the office

The "future" contract being illegal and void, the sender of the message who is a party to it is not bound to fulfil it, and if he does so voluntarily and thereby suffers injury, he cannot set up such injury as damage resulting from the company's negligence in transmitting the telegram. *Melchert v. American Union Tel. Co.*, 11 Fed. Rep. 194.

**1. In Actions for Statutory Penalty.**—Under the *Georgia* statute which required that telegraph companies should receive all dispatches, either from other lines or from individuals, and "shall transmit the same with impartiality and good faith, and with due diligence under penalty of," etc., the court holds that the telegraph company is denied any power of selection or discrimination. "A dispatch cannot be rejected on account of its subject-matter, unless by sending it, the company would or might subject itself or its servants either to indictment or civil action. This is a rational test and one that may fairly be presumed to coincide with legislative intention. . . . Now, in this state, it is neither a crime nor a tort to speculate in futures. It is gross immorality, and conflicts with public policy; but it is not indictable nor actionable." The court then goes on to say that the company may refuse to send an indecent message because it is within the excep-

tion mentioned. Further on it is said: "Doubtless it is true that a telegraph company is not bound, even when it contracts to do so, to furnish 'bucket shops' with reports of the market prices of stock and provisions, nor to allow 'tickers' for the purpose to remain in the offices of these immoral establishments. But were the supplying of market reports and 'tickers' to all applicants, 'with impartiality and good faith' enjoined by statute, a different question might arise." *Gray v. Western Union Tel. Co.*, 87 Ga. 350; 35 Am. & Eng. Corp. Cas. 47; *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

**2. What Are "Gambling Transactions."**—See GAMBLING CONTRACTS, vol. 8, p. 992 *et seq.*; ILLEGAL CONTRACTS, vol. 9, p. 879 *et seq.* See also cases cited in previous notes of this section. *Sawyer v. Taggart*, 14 Bush (Ky.) 727; *Pickering v. Chase*, 79 Ill. 328; *Barnard v. Backhaus*, 52 Wis. 593; *Melchert v. American Union Tel. Co.*, 11 Fed. Rep. 194.

**3.** See *supra*, this title, *Regulations as to Office Hours*; *Brown v. Western Union Tel. Co.* (Utah, 1889), 21 Pac. Rep. 988.

**4.** *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119; 8 Am. & Eng. Corp. Cas. 107; *supra*, this title, *Regulations as to Office Hours*.

at the receiving station is open.<sup>1</sup> Ordinarily, contracts entered into on Sunday or to be performed on that day are void;<sup>2</sup> therefore a contract of sending, made with the telegraph company on Sunday, is void and no action can be based upon it.<sup>3</sup> But there is always an exception in favor of messages which are a matter of necessity or charity, and if the party complaining can show that his message is of this character, he may recover for a negligent failure or delay in sending it, though the contract was made on Sunday.<sup>4</sup> The difficulty is to determine when the message is of such a character. If it is to relieve the sick or suffering, to prevent great or irreparable injury to life or property, or if it is intended to secure the presence of relatives at the funeral of their kinsman, or is intended for any similar purpose, it may be regarded as one of necessity or charity. But each case must be governed by its own peculiar facts.<sup>5</sup>

1. *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191 (penalty held not to be incurred although operator falsely informed sender as to his ability to get the message through); *Western Union Tel. Co. v. Harding*, 103 Ind. 505; 10 Am. & Eng. Corp. Cas. 617.

2. See *SUNDAY*, vol. 24, p. 528, where the subject of Sunday contracts is examined at length; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 230; *Woodman v. Hubbard*, 25 N. H. 67; 7 Am. Dec. 310; *Brimhall v. Van Campen*, 8 Minn. 1; 82 Am. Dec. 118.

3. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; 41 Am. Rep. 558; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 519. See also *Thompson on Electricity*, § 166 *et seq.*

4. It has never been questioned that where matters of necessity or charity are concerned, the law makes no distinction between Sunday and the other days of the week; they are all regarded alike both as regards the validity of contracts and the right to engage in work or labor. *SUNDAY*, vol. 24, p. 528; *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; *Edgerton v. State*, 67 Ind. 588; 33 Am. Rep. 110; *Pate v. Wright*, 30 Ind. 476; 95 Am. Dec. 705.

5. In this connection, consult the article on *SUNDAY*, vol. 24, p. 528, where numerous instances of what have been held works or contracts of necessity are set out. In *McGatrick v. Wason*, 4 Ohio St. 566, the court observes: "Nor will it do to limit the word 'necessity' to those cases of danger to life, health or property which are beyond human foresight or control. On the contrary, the

necessity may grow out of, or indeed be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the rule." *Flagg v. Millbury*, 4 Cush. (Mass.) 243; *Doyle v. Lynn, etc., R. Co.*, 118 Mass. 195; 19 Am. Rep. 431.

**Telegrams of Necessity.**—A message addressed to a physician, notifying him of the illness of the sender's daughter, and requesting him to come at once, sufficiently shows the necessity of its being sent at once. A contract for its transmission is valid, though made on Sunday. *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46; *Brown v. Western Union Tel. Co.* (Utah, 1889), 21 Pac. Rep. 988.

A message to a person notifying him of the death of his father, and requesting his attendance at the funeral, involves such a moral necessity, that a contract for its transmission may be valid, though made on Sunday. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32.

A husband absent from home, sent to his wife a message by telegraph, explaining his protracted absence, and announcing the time of his return. It was held that the sending of such a message involved a moral necessity, and the contract was therefore valid; nor was such contract rendered illegal by the fact that the sender might as well have sent it on the preceding Saturday, but failed to do so through inadvertence. *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599.

So also a message reading "Bettie and baby dead. Come to C. to-night with my help. Tell her mother," sent by a person whose wife and child had just



The principle is well settled that where a passenger is injured through the negligence of a common carrier, the fact that the injury was done on Sunday or that the contract of carriage was made on Sunday is no defense to an action for damages sustained from the injury.<sup>1</sup> From analogy to this principle it would seem that, in those jurisdictions where the addressee's right of action is regarded as resting in tort and not as arising out of the contract of sending, the fact that the message was sent on Sunday would be no defense. The company may refuse to accept on Sunday any message not of necessity or charity; but having accepted it for transmission, it cannot escape liability for the injury to the addressee by setting up the invalidity of the contract.<sup>2</sup> And where a message offered for transmission on Sunday is retained by the company until the following Monday, such retention constitutes a ratification of the contract of sending, and renders the

died, asking his father to come to his assistance, is one of necessity, and shows such necessity on its face, and the telegraph company must respond in damages for a failure to send it, although the contract of sending was made on Sunday. *Gulf, etc., R. Co. v. Levy*, 59 Tex. 543; 12 Am. & Eng. R. Cas. 96; 46 Am. Rep. 278.

But a message: "Come up in the morning, bring all," does not indicate any matter of necessity, and having reference to nothing more than a social visit, a contract for its transmission is void if made on Sunday. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; 41 Am. Rep. 558 (action by sender to recover statutory penalty).

In *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16; 21 Am. & Eng. Corp. Cas. 89; 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 520, it appeared that the sender, the plaintiff in the case, was a stenographer, who had been engaged to make a report of a certain trial and to furnish notes of the evidence for a bill of exceptions. The time for filing such bill was limited, and plaintiff, after working assiduously, finished the report on the 18th, two days before the expiration of the time limited. It was necessary that the attorney managing the case should at once be informed, so that he might secure the signature of the judge before the term expired. He therefore sent to the attorney this message, "Bring forty dollars if you want record," offering it for transmission on Sunday. The court allowed plaintiff to recover, holding that the message related to a matter of necessity, and there being a complete failure to send,

the company could not urge that the message did not exhibit on its face the necessity.

1. See SUNDAY, vol. 24, p. 528, and numerous cases cited.

2. See *infra*, this title, *Character of the Action*.

It may admit of question whether the sender's right of action should not be governed by the same principle. The contract made with a telegraph company is not unlike that made with a carrier of passengers; it creates a duty on the part of such carrier, a failure to properly discharge which, is a tort. The doctrine is stated by Stayton, A. J., in *Gulf, etc., R. Co. v. Levy*, 59 Tex. 548; 12 Am. & Eng. R. Cas. 96; 46 Am. Rep. 278: "Telegraph companies exercise a public employment, which imposes upon them duties to the public, which give to every person the right to have their services in the transmission of proper messages, upon payment of the requisite consideration; and this public duty creates an obligation honestly and faithfully to perform that duty whenever it is fixed in a given case. The purpose of a contract, express or implied, in reference to anything falling within the line of that duty, is to make it obligatory in the given case, rather than to create the duty or to fix the measure of damages in the case of non-performance. Such duties do not stand solely upon special contract, as do duties which arise between individuals, who owe no duty to each other nor to the public in reference to the subject matter of the contract." See *Cooley on Torts*, p. 91; *Courtenay v. Earle*, 10 C. B. 83; 70 E. C. L. 83; *New Orleans*,

company liable for a complete failure to send.<sup>1</sup> In order to make it the duty of the company to send the message on Sunday, it should bear on its face evidence that it relates to a matter of necessity or charity, or the company should be otherwise informed of the fact.<sup>2</sup>

**8. Interstate Messages.**—The fact that the initial and terminal points of a message sent by telegraph are not in the same state, is not material in an action against the company to recover damages for a breach of its common-law duty to use proper care to secure a correct and prompt transmission and delivery, since such fact can have no effect upon the right of recovery of either the sender or receiver.<sup>3</sup> The cases are numerous in which the sender has been allowed to recover damages, although the message was sent to another state and the breach of duty occurred in such state.<sup>4</sup> The same is true of actions by the person to whom a message has been addressed.<sup>5</sup> And it seems that the fact that a state statute exists, declaratory of the common-law duty of the company, and providing further that the company shall not by contract limit its liability for the consequences of its negligence, does not create a different case or necessitate a different rule of law.<sup>6</sup>

But a state cannot extend its penal laws beyond its own boundaries, and an action cannot therefore be maintained to recover the statutory penalty where the breach of duty relied on as the basis of the action occurred in another state.<sup>7</sup> This, how-

etc., *R. Co. v. Hurst*, 36 Miss. 665; 74 Am. Dec. 785; *Houston, etc., R. Co. v. Stirley*, 54 Tex. 148; *Graham v. Roder*, 5 Tex. 149; *NEGLIGENCE*, vol. 16, p. 424. But this reasoning cannot be made to apply to an action for the statutory penalty. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; 41 Am. Rep. 560.

1. *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16; 21 Am. & Eng. Corp. Cas. 88.

2. *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16; 21 Am. & Eng. Corp. Cas. 88; 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 519. See also other cases cited in this section. But a mere retention of the price of transmission does not amount to a ratification of the contract. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; 41 Am. Rep. 560.

3. *Kemp v. Western Union Tel. Co.*, 28 Neb. 661; 30 Am. & Eng. Corp. Cas. 611; *citing Oppenheimer v. Western Union Tel. Co.* (U. S. Cir. Ct., Neb. 1890); 2 Thompson on Neg., 838.

4. See *Western Union Tel. Co. v.*

*Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 183; 46 Am. Rep. 715; *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; 5 Am. & Eng. Corp. Cas. 203; 51 Am. Rep. 435; *Western Union Tel. Co. v. Richman* (Pa. 1887), 8 Atl. Rep. 171; 16 Am. & Eng. Corp. Cas. 263; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 15; 4 Am. St. Rep. 126. In none of these cases nor in any others was any question made on the ground that the message was between points in different states.

5. *Young v. Western Union Tel. Co.*, 107 N. Car. 370; 35 Am. & Eng. Corp. Cas. 60; 22 Am. St. Rep. 883; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864. *Compare Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; 46 Am. Rep. 175.

6. *Kemp v. Western Union Tel. Co.*, 28 Neb. 661; 30 Am. & Eng. Corp. Cas. 607; *citing Oppenheimer v. Western Union Tel. Co.* (U. S. Cir. Ct., Neb. 1890).

7. *Alexander v. Western Union Tel. Co.*, 66 Miss. 161; 14 Am. St. Rep. 556.

ever, does not prevent the maintenance of an action for the penalty where the company's breach of duty occurred within the state, although it was in relation to an interstate message.<sup>1</sup>

Where the initial and terminal points are in the same state, but in the course of transmission the message is sent to a point without the state and thence to its destination, it does not thereby come within the term interstate transportation and become subject to the rules governing interstate messages.<sup>2</sup>

**9. Forged or Fraudulent Messages.**—Where a telegraph company, by its agent, receives and transmits a forged and fraudulent message, it is responsible to the addressee for damages sustained by him in consequence of the fraud, if it can be made to appear that the company's agent, by the exercise of ordinary care, might

The legislature of *Indiana* passed a statute declaring the duties of telegraph companies as to the transmission and delivery of dispatches, and provided a penalty for every failure to perform such duties. The state courts held that the penalty might be recovered where the message was sent to another state, and although the breach of duty occurred in such other state. *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; 8 Am. & Eng. Corp. Cas. 56; 48 Am. Rep. 692; *supra*, this title, *State Regulation and Control*, where this latter case is set out. But the Supreme Court of the *United States* reversed these decisions on the ground that such a penal statute could not be extended to cases where the breach of duty occurred without the state; that the *Indiana* statute could not control the conduct of the company in *Iowa*. The later *Indiana* statute (Rev. Stat. *Indiana*, 1881, § 4176), is held not to apply to messages sent from another state to a person in *Indiana*. *Rogers v. Western Union Tel. Co.*, 122 Ind. 395; 17 Am. St. Rep. 373; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; 46 Am. Rep. 175. In this last case the court said: "Unless we adopt the view that the statute only applies to contracts made in this state, we shall be involved in endless difficulty. Any other rule would make the telegraph company amenable to different punishments for the same wrong, for it is quite clear that if the wrong is punishable by the laws of the place where contract is made, it would be no answer to a prosecution there to plead a judgment rendered in another forum under a different law."

The *Mississippi* statute (Rev. Stat. 1889, § 2725), making it the duty of every telegraph company to provide sufficient facilities for the dispatch of the business of the public, to receive dispatches from and for other telegraph lines and from or for any individual, and, on payment or tender of their usual charges for transmitting dispatches, to transmit the same promptly and with impartiality, under a penalty of \$200 for every neglect or refusal so to do, does not render a telegraph company liable for negligent failure to deliver a message to a person in another state, but only for failure to receive and transmit it. *Connell v. Western Union Tel. Co.*, 108 Mo. 459; 39 Am. & Eng. Corp. Cas. 594.

1. Thus where the company fails to deliver a telegram, the penalty may be recovered, although the message was sent from a point without the state. *Western Union Tel. Co. v. James*, 90 Ga. 254. So where there is a refusal or failure to transmit, the sender may enforce the penalty, although the point of destination of the message is in another state. *Connell v. Western Union Tel. Co.*, 108 Mo. 459; 39 Am. & Eng. Corp. Cas. 594.

2. **What Is an Interstate Message.**—The point has never been directly decided, but it seems that the rule of the text follows by analogy from that laid down in *Campbell v. Chicago*, etc., R. Co. (*Iowa*, 1892), 53 N. W. Rep. 351, where it is held that "the continuous transportation of freight from one point in the state to another point in the same state, does not come within interstate transportation merely because it passes through part of another state on its route." See also *INTERSTATE COMMERCE*, vol. 11, p. 559.

have detected and prevented such fraud.<sup>1</sup> And if the circumstances attending the request to transmit the message are such as would give the agent reasonable cause to suspect the fraud, his negligence in failing to prevent it will be conclusively presumed.<sup>2</sup> It was held in one case that where an impostor requests money to be sent by telegraph, the company is not liable for a *bona fide* payment to him, it appearing that there was nothing connected with the transaction to create suspicion.<sup>3</sup>

The liability of the company for damages caused by the sending of forged messages extends to cases where the operator himself is the author of the forged dispatch.<sup>4</sup> It extends also to cases where the authorized agent of the company employs, with-

1. *Strause v. Western Union Tel. Co.*, 8 Biss. (U. S.) 104; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140; *Thompson on Electricity*, § 146. Compare *Dickson v. Renter's Tel. Co.*, 2 C. P. Div. 62; *aff'd* 3 C. P. Div. 1.

The negligence must be shown to be proximate cause of the injury. Thus, in *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; 19 Am. Rep. 154, it appeared that B. sent a message by telegraph to the plaintiff, asking for five hundred dollars. By mistake the message was transmitted as asking for five thousand dollars. The money was sent and B., overcome by cupidity, absconded with it. It was held that the company was not liable, since the injury did not result as a proximate consequence of its negligence. See *NEGLIGENCE*, vol. 16, p. 436.

2. *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140. In this case it appeared that the plaintiff, B. & Co., were bankers, doing business at P. in *Pennsylvania*. On August 12th they received this telegram: "From Erie, Pa. Dated Aug. 12th. Forwarded from Titusville, 12 M. Received Aug. 12th. To P. & Co., P., Pa.:—Keystone Bank will pay the checks of T. F. McC., to the amount of twenty thousand dollars (\$20,000). Keystone Bank."

The plaintiffs observed that name of the officer of the bank had been omitted, and a second message was then received with the addition of the words "J. J. Town, cashier of Keystone Bank." Near the close of the day, McC. presented himself at the plaintiff's banking house and drew ten thousand dollars on the faith of the telegram, leaving an equal sum to his credit. It appeared that the telegram was fraudulent; that McC. himself had presented the tele-

gram at Titusville for transmission; that the operator knew McC. by that name; and that he showed no authority from the cashier when he offered the message for transmission. It was held that the company was liable to the plaintiffs for the loss sustained by them, since the operator had been guilty of negligence in not detecting so palpable a fraud.

3. *Western Union Tel. Co. v. Meyer*, 61 Ala. 158; 32 Am. Rep. 1. In this case an impostor in Cincinnati sent a dispatch in B's name to C at Selina, requesting C to send a telegraphic money order to him (B). C complied and sent the money order, taking from the company this receipt: "Received from C forty dollars to be paid to B at Cincinnati." On the same day the company handed over the money to the impostor who personated B, without having him identified. In an action by C, it was held that the company could not be held liable, as there was nothing connected with the transaction to excite suspicion.

4. In *McCord v. Western Union Tel. Co.*, 39 Minn. 181; 25 Am. & Eng. Corp. Cas. 578; 12 Am. St. Rep. 636, the local agent of the telegraph company, who was also the local agent for an express company, sent a dispatch to merchants in a neighboring city requesting them to forward money to their correspondent at the former place to be used in buying grain; he forged the name of the agent employed by the addressees to purchase wheat for them. The dispatch was duly received, and the money in good faith forwarded by express; but the local agent intercepted the package and converted the money. It was held that the telegraph company must answer to the addressees for the loss, the proximate cause thereof hav-

out authority, a sub-agent to receive and transmit messages, and such sub-agent forges and sends a message whereby he obtains money.<sup>1</sup> Where the dispatch is concerning the payment of a forged draft, the fact that the plaintiff, the addressee, has a remedy *ex contractu* against a solvent indorser is no bar to his action *ex delicto* against the telegraph company; nor is it necessary in such a case to sue the indorser first.<sup>2</sup>

**10. Libelous Messages.**—To transmit over its lines to an addressee, a message libelous on its face, is a publication of a libel for which the company can be held responsible,<sup>3</sup> since in such a case not only the addressee, but also all of the company's agents through whose hands the dispatch must pass, are made acquainted with its contents.<sup>4</sup>

**11. Liability Where Message Passes Over Connecting Lines.**—Following the principle of law governing the liability of common carriers of goods,<sup>5</sup> the rule is adopted that a telegraph company which has received a message for transmission beyond its own lines, is not, in the absence of special agreement, liable for losses

ing been the willful wrong of the company's agent. The court, by Vanderbilt, J., said: "If the corporation fails in the performance of its duty (as to sending messages) through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character. Such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation. *Booth v. Farmers', etc., Bank*, 50 N. Y. 400." *McCord v. Western Union Tel. Co.*, 39 Minn. 181; 25 Am. & Eng. Corp. Cas. 582; 12 Am. St. Rep. 636.

**1. Forgery by Sub-agent.**—In *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280, the sub-agent sent a false message purporting to come from the cashier of a bank, directing another bank to pay a fictitious person a sum of money; he then personated the fictitious person and obtained the money. No negligence on the part of the bank was shown. It was held that the company was responsible to the bank for the amount thus obtained. The court reasoned that, although a principal is not bound by a contract made in his name by a sub-agent appointed by his agent without authority, yet he is responsible for the negligence and torts of such sub-agent, if the agent who appointed

him was at the time acting in the business of his principal and the sub-agent was transacting such business.

**2.** In laying down the rule stated in the text, Gresham, J., said, by way of illustration: "If a railroad train is wrecked by the carelessness of a drunken engineer, the injured passengers have two remedies, one against the engineer for the tort, and the other against the company on the contract. In an action by the passenger in such a case against the engineer, the latter would not be allowed to plead against all but nominal damages, that the passenger had a remedy against the solvent carrier." *Strause v. Western Union Tel. Co.*, 8 Biss. (U. S.) 104.

**3.** *Archambault v. Great N. W. Tel. Co.* (Quebec Ct. of App. 1888), 14 Quebec L. Rep. 8; 11 Montreal Leg. News 368. In this case the dispatch was sent to the associated press; the case was aggravated by the fact that the company refused to disclose the name of the sender of the message.

**4.** *Whitfield v. South Eastern R. Co.*, 1 El. B. & El. 115; 96 E. C. L. 113; *Williamson v. Freer*, L. R. 9 C. P. 393; *LIBEL AND SLANDER*, vol. 13, p. 370 *et seq.*

**5.** See *CARRIERS OF GOODS*, vol. 2, pp. 856, 859; *RAILROADS*, vol. 19, p. 919; *TICKETS AND FARES*; *Reed v. U. S. Express Co.*, 48 N. Y. 462; 8 Am. Rep. 561; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318.

caused by the negligence of a connecting carrier; its undertaking is only to transmit the message promptly and correctly over its own line to the connecting line.<sup>1</sup> The fact that the original company usually receives in advance the whole price for transmission does not alter the rule.<sup>2</sup> To insure protection from such liability, it is generally stipulated in the contract of sending that the company will not be liable for errors or delays occurring beyond its lines, but that it acts merely as the agent of the sender to forward the message over the lines of other companies.<sup>3</sup> Such a stipulation is reasonable and valid, since it merely secures to the company that immunity which the law itself extends.<sup>4</sup> In several of the states, however, the English rule as to the liability of connecting carriers is recognized, and it seems that the courts of these states will be inclined to apply the same rule to telegraph companies.<sup>5</sup> Any one of the connecting lines may be held liable where it can be shown that its negligence was the proximate cause of the injury resulting from error or delay.<sup>6</sup> And it has been held that

1. *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *reversing* 1 Lans. (N. Y.) 125; 54 Barb. (N. Y.) 505; 6 Abb. Pr. (N. Y.) 405; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256; *Smith v. Western Union Tel. Co.*, 84 Tex. 359; 39 Am. & Eng. Corp. Cas. 539; *Gray on Telegraphs*, § 58; *Scott & Jar. on Tel.*, § 278; *Thompson on Electricity*, § 262. *Compare De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547 (this is practically overruled by the *Baldwin* case); *Thurn v. Alta Tel. Co.*, 15 Cal. 472; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530.

2. *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *reversing* 54 Barb. (N. Y.) 505; *Gray on Telegraphs*, § 56. *Contra*, *Western Union Tel. Co. v. Shumate* (Tex. Civ. App. 1893), 21 S. W. Rep. 109.

3. The exact language of the stipulation now used is this: "And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination."

4. *Western Union Tel. Co. v. Carew*, 15 Mich. 525; note by A. C. Freeman, Esq., in 71 Am. Dec. 471; *McCarn v. International, etc., R. Co.*, 84 Tex. 352.

Although such a stipulation may not state where the company's lines end, the sender of the message is nevertheless put upon inquiry and cannot claim

damages for errors occurring on another line, on the ground that he was ignorant of the fact that defendant company's line did not extend to the point of destination of his message. *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

As to other particular regulations concerning connecting lines, see *supra*, this title, *Stipulations in Contract of Sending*.

5. See *CARRIERS OF GOODS*, vol. 2, pp. 859-861; *RAILROADS*, vol. 19, p. 920, note 2; *Atchison, etc., R. Co. v. Roach*, 35 Kan. 740; 27 Am. & Eng. R. Cas. 257; 57 Am. Rep. 199; *Lawson's Contr. of Carr.*, § 238 *et seq.*

6. *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81; 4 Am. Rep. 587; *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.) 181; *Smith v. Western Union Tel. Co.*, 84 Tex. 359; 39 Am. & Eng. Corp. Cas. 589; *Lin v. Terre Haute, etc., R. Co.*, 10 Mo. App. 125; *Hutchinson on Carr.*, § 104.

Where two of several connecting lines are both negligent, that one will be held responsible whose negligence was the proximate cause of the loss complained of. Thus, in the case of *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630, the defendant company received from the sender a message to be sent to a point on a connecting line. In the course of transmission over defendant's line, the address became changed from "Sam. T." to "Wm. T." The agent of the connecting line at the point of destination believed the

in a suit against the last company, the burden of proof lies upon such company to show that the error did not occur on its line, since it lies peculiarly within its power to make such proof by showing that the message delivered by it to the addressee was the same as that received by it from the connecting line.<sup>1</sup>

The fact that one company receives messages to be sent over its own line and that of another company, is of itself no evidence of a partnership arrangement between the two companies, whereby each company becomes liable for the negligence or defaults of the other.<sup>2</sup> A company may, of course, enter into a special agreement with the sender or receiver by which it undertakes to insure the correctness of all messages delivered by it; and where such an agreement exists, the negligence of a connecting line constitutes no defense.<sup>3</sup> The connecting lines are all bound by the terms of the original contract of sending, where the parties to it have not exceeded their powers; and it would seem that all stipulations in the original contract limiting the liability of the first company would inure to the benefit of all the other lines; though there may be cases in which the language of the stipulation would not warrant such a construction, as, for example, where the limitation was expressly confined to the first company.<sup>4</sup> The duty to receive for transmission all messages properly tendered, is imposed

telegram to be intended for "Sam. T." and on being informed (erroneously) that he was in another town, mailed it to him at such town. The transmission by defendant having been prompt, and its error having been cured, it was held not liable for the delay in delivery, since its negligence in changing the address was not the proximate cause of the complainant's injury.

1. *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Lin v. Terre Haute, etc., R. Co.*, 10 Mo. App. 125; *Wolff v. Central R. Co.*, 68 Ga. 653; 6 Am. & Eng. R. Cas. 441; 45 Am. Rep. 501.

Where the evidence is conflicting as to whether defendant delivered the message to a connecting line, or itself operated the entire line to the point of destination of the message, a verdict for plaintiff will not be disturbed. *Western Union Tel. Co. v. Jones*, 81 Tex. 271.

2. *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *reversing* 1 Lans. (N. Y.) 125; 54 Barb. (N. Y.) 505; 6 Abb. Pr. N. S. (N. Y.) 405.

3. Thus, where a company undertakes to furnish market reports from a point beyond its own line, it will be presumed, in the absence of evidence to the contrary, that the report was correctly delivered to it at the place where its

own line commences. The burden is upon it to show that a mistake in the report occurred from causes which would relieve it from liability. *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; 20 Am. Rep. 605.

4. In *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157, the second company undertook to take advantage of the stipulation made with the sender by the original company that the latter would not be liable for unrepeatd messages. The court held, however, that the stipulation inured only to the benefit of the original company. The holding was based on the ground that the language of the stipulation confined its operation to the original company.

It seems that the contract of sending made with the original company within its authority is binding on the connecting lines; and exceptions in an agreement between the two companies unknown to the sender are not available as against him. *Baldwin v. U. S. Tel. Co.*, 6 Abb. Pr. N. S. (N. Y. Supreme Ct.) 405.

It is a recognized rule that a contract limiting the liability of the first carrier inures to the benefit of the connecting carriers. *CARRIERS OF GOODS*, vol. 2, p. 871.

on telegraph companies by the common law, and extends to messages tendered by a connecting line; in some jurisdictions this duty is specifically declared by statute, though these statutes are usually merely affirmative of the law already existing.<sup>1</sup> But this duty does not extend to cases where the message is directed to a point beyond the company's line, unless the company undertakes as a part of its business the transmission of such messages; in accepting such a message the company is entitled therefore to affix reasonable conditions and limitations to its liability.<sup>2</sup> An action for delay in delivery can of course be maintained only against the last line.<sup>3</sup>

**IX. ACTIONS FOR DAMAGES RESULTING FROM NEGLIGENT TRANSMISSION OR DELAY**—1. **Parties to the Action**—*a.* **RIGHT OF SENDER TO SUE.**—Where the sender can show that through the negligence of the company in transmitting or delivering a message he has suffered a legal injury, there can be no question as to his right to sue for damages, and this whether the right of action be regarded as resting in contract, or in tort for the breach of public duty.<sup>4</sup> The only difficulty arising in this connection is as to who is to be deemed the sender; he is not always the party who signs the message or delivers it to the company.<sup>5</sup> Such a party may act as agent in so doing, and where this is true, his principal is to be regarded as being the real sender.<sup>6</sup>

*b.* **RIGHT OF ADDRESSEE.**—In *England*, the rule has always been that the right of action against a telegraph company for negligently transmitting or delaying a message is founded upon the contract of sending, and that therefore the addressee, not being a party to the contract, cannot maintain the action; that

1. U. S. Tel. Co. v. Western Union Tel. Co., 56 Barb. (N. Y.) 46; Gray on Telegraphs, § 55 *et seq.*

Under a statute requiring connecting telegraph companies to receive and forward messages, transmitted for the purpose upon each other's lines, a company receiving a message to be forwarded, in part, over such a connecting line, is to be regarded as authorized to make the contract respecting its transmission for such other line; and the receipt by the former company, of an entire price for the message, is a sufficient consideration for the express or implied obligation resulting against such connecting company. Baldwin v. U. S. Tel. Co., 6 Abb. Pr. (N. Y. Supreme Ct.) 405.

2. **Duty to Receive Dispatches for Points Not on Its Line.**—Gray on Telegraphs, § 55; Western Union Tel. Co. v. Way, 83 Ala. 542; Pitlock v. Wells, 109 Mass. 452; U. S. Tel. Co. v. Western Union Tel. Co., 56 Barb. (N. Y.)

46 (duty to receive dispatches from connecting lines prescribed by statute). In the case of Western Union Tel. Co. v. Stratemeier (Ind. App. 1892), 32 N. E. Rep. 871, plaintiff asked the agent whether it had a line and receiving station at a certain point, and upon being informed that it had, he delivered to the agent a message directed to such point, relying entirely on the operator's representations. In an action for failure to deliver such message, it was held that the company was estopped to deny that it had no line or receiving station at the point named.

3. Western Union Tel. Co. v. Phillips, 2 Tex. Civ. App. 608.

4. Gray on Telegraphs, § 64; Playford v. United Kingdom, etc., Tel. Co., L. R., 4 Q. B. 706; 10 B. & S. 759.

5. Western Union Tel. Co. v. Brown, 108 Ind. 538; 14 Am. & Eng. Corp. Cas. 139; Western Union Tel. Co. v. Kinney, 106 Ind. 468.

6. De Rutte v. New York, etc., Tel.



the right belongs to the sender alone.<sup>1</sup> It is intimated, however, that in case of fraud on the part of the company the receiver might sue.<sup>2</sup> So also he has a right of action where the sender was in fact his agent in sending the message.<sup>3</sup> But this view has never been adopted in this country, and the receiver or addressee has always been allowed to maintain his action when he could prove actual damage.<sup>4</sup> The courts have stated various grounds for this doctrine. It is considered by some that while the addressee is not an actual party to the contract of sending, yet his case comes within the rule that where two parties contract for the benefit of a third, such third party may sue for damages resulting from a breach of the contract. The addressee is the beneficiary of the contract of sending and is entitled to sue in his own right for damages when, by the negligence of the company, he is deprived of the benefit he would otherwise have derived.<sup>5</sup>

Co., 1 Daly (N. Y.) 547; 30 How. Pr. (N. Y.) 403; Milliken v. Western Union Tel. Co., 110 N. Y. 403.

1. **Rule in England.**—Playford v. United Kingdom, etc., Tel. Co., 10 B. & S. 759; L. R., 4 Q. B. 706; Dickson v. Renter's Tel. Co., 2 C. P. Div. 62; 19 Moak's Rep. 313; *aff'd* 3 C. P. Div. 1. In this last case the plaintiffs carried on business as merchants at Valparaiso, and were a branch house of a firm at Liverpool. A telegraph company, through the negligence of their agent, misdelivered a telegraphic message to the plaintiffs. The message purported to be from the plaintiffs' Liverpool house, and to be a large order for barley; but in fact it was not from the Liverpool house, nor intended for the plaintiffs. The plaintiffs executed the supposed order, and, having suffered a heavy loss in consequence, claimed damages against the telegraph company. *Held*, that they were not entitled to maintain their action, as there was no contract between them and the company.

2. Dickson v. Renter's Tel. Co., 2 C. P. Div. 62; 19 Moak's Rep. 313; *aff'd* 3 C. P. Div. 1.

3. Playford v. United Kingdom, etc., Tel. Co., 10 B. & S. 759; L. R., 4 Q. B. 706.

4. **American Rule.**—Western Union Tel. Co. v. Dubois, 128 Ill. 248; 15 Am. St. Rep. 109; West v. Western Union Tel. Co., 39 Kan. 93; 21 Am. & Eng. Corp. Cas. 185; 7 Am. St. Rep. 530; May v. Western Union Tel. Co., 112 Mass. 90; De La Grange v. Southwestern Tel. Co., 25 La. Ann. 383; Western Union Tel. Co. v. Allen, 66 Miss. 549; 25 Am. & Eng. Corp. Cas. 535; West-

ern Union Tel. Co. v. Longwill (N. Mex. 1889), 25 Am. & Eng. Corp. Cas. 559; De Rutte v. New York, etc., Tel. Co., 1 Daly (N. Y.) 547; 30 How. Pr. (N. Y.) 403; Wolfskehl v. Western Union Tel. Co., 46 Hun (N. Y.) 542 (word negligently omitted from the message); Milliken v. Western Union Tel. Co., 110 N. Y. 403; Young v. Western Union Tel. Co., 107 N. Car. 370; 35 Am. & Eng. Corp. Cas. 60; 22 Am. St. Rep. 887, New York, etc., Print. Tel. Co. v. Dryburg, 35 Pa. St. 298; 78 Am. Dec. 338; Aiken v. Western Union Tel. Co., 5 S. Car. 358; Wadsworth v. Western Union Tel. Co., 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864; Western Union Tel. Co. v. Beringer, 84 Tex. 38; Western Union Tel. Co. v. Jones, 81 Tex. 271; Martin v. Western Union Tel. Co., 1 Tex. Civ. App. 143; Abraham v. Western Union Tel. Co., 11 Sawy. (U. S.) 28; 3 Suth. on Dam. 314; Shear. & Red. on Neg. (4th ed.), § 560.

The rule in the Canadian courts is the same, and the receiver is allowed to recover. Watson v. Montreal Tel. Co., 5 Mont. Leg. News 87; Bell v. Dominion Tel. Co., 3 Mont. Leg. News 406; 25 L. C. J. 248. *Compare* Feaver v. Montreal Tel. Co., 23 U. C. C. P. 150; Delaporte v. Madden, 17 L. Can. Jur. 29.

5. **Addressee Regarded as Beneficiary in Contract of Sending.**—Aiken v. Western Union Tel. Co., 5 S. Car. 371; Western Union Tel. Co. v. Hope, 11 Ill. App. 291; Western Union Tel. Co. v. Jones, 81 Tex. 271. *Compare* Gray on Telegraphs, § 67; Western Union Tel. Co. v. Dubois, 128 Ill. 248; 15 Am. St. Rep. 109, both of which authorities

This view is particularly applicable and is correct where the sender acted as the agent of the addressee in making the contract of sending,<sup>1</sup> though in such a case there is nothing to prevent the agent from suing in behalf of his principal.<sup>2</sup> Other authorities base the addressee's right to recover upon the ground that the company, being in the exercise of a public employment, has assumed the duty correctly to transmit and promptly to deliver messages intrusted to it, and is therefore liable to any party to whom this duty is owing, for damages resulting as a proximate consequence of its negligence. And this seems to be the more correct view.<sup>3</sup>

combat the propriety of this ground, as well as its correctness.

"A person for whose benefit a promise to another upon a sufficient consideration is made, may maintain an action on the contract in his own name against the promisor." *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541; *Hendrick v. Lindsay*, 93 U. S. 143; *PARTIES TO ACTIONS*, vol. 17, p. 528. Compare *Gray on Telegraphs*, § 67; *Tweedle v. Atkinson*, 1 B. & S. 393; *Exchange Bank v. Rice*, 107 Mass. 41; 9 Am. Rep. 1.

In *West v. Western Union Tel. Co.*, 39 Kan. 93; 21 Am. & Eng. Corp. Cas. 185; 7 Am. St. Rep. 530, a son, for the benefit of his father, left with the company a message addressed to his father, with instructions to forward it immediately, at the same time paying the fee. Subsequently, the father returned to the son the amount paid, and fully ratified his act. It was held that the contract was made for the benefit of the father, and that he was entitled to sue for damages for the failure to deliver.

**1. Where Sender Is Addressee's Agent.**—In *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, it was held that a principal may avail himself of the obligation of the contract made by his agent with the company, to transmit a message addressed to himself, and may recover damages sustained by him because of an incorrect transmission or a delayed delivery. The court, by Reyer, C. J., said: "The rule that a principal is entitled to maintain an action upon a contract made by his agent with a third person, although the agency is not disclosed at the time of making the contract, has many illustrations in the reported cases, and is elementary law. *Coleman v. First Nat. Bank*, 53 N. Y. 388; *Briggs v. Partridge*, 64 N. Y. 357; 21 Am. Rep. 617; *Ford v. Williams*, 21 How. (U. S.) 288; *Dykens v. Town-*

*send*, 24 N. Y. 57. This principle has been frequently applied in actions against telegraph companies, and is now the settled law of this country in respect to such corporations. *De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547; 30 How. Pr. (N. Y.) 403." See also *Kennon v. Western Union Tel. Co.*, 92 Ala. 399. Compare *Gray on Telegraphs*, § 69.

**2. U. S. Tel. Co. v. Gildersleeve**, 29 Md. 332; 96 Am. Dec. 519; *Thompson on Electricity*, § 434; *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; 5 Am. & Eng. Corp. Cas. 203; 51 Am. Rep. 435 (message signed by agent, who brought the action in his own name for use of his principal).

**3. Ground that Company Owes a Public Duty.**—In *Illinois*, it is held distinctly that the addressee's only remedy is in tort for a breach of the company's public duty; the addressee is considered to sustain no contractual relation with the company. *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109 (message negligently altered in course of transmission).

In 3 *Suth. on Dam.* 314, after stating the English rule, the author observes: "In this country a different doctrine prevails. The company's employment is of a public character and it owes the duty of care and good faith to both the sender and receiver." *Western Union Tel. Co. v. Longwill* (N. Mex. 1889), 25 Am. & Eng. Corp. Cas. 559 (in this case the message was addressed to a physician, who lost a fee by the company's failure to deliver it); *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Abraham v. Western Union Tel. Co.*, 11 Sawy. (U. S.) 28.

Mr. Bigelow suggests as a satisfactory ground for the American rule, the

The company is also regarded as sustaining to the addressee the relation of agent, and as being therefore liable to its principal for the consequences of its negligence.<sup>1</sup> In still other cases, the right of the addressee to sue is based upon the statutory provision declaring the duties and obligations of telegraph companies.<sup>2</sup> The question as to who paid the price of transmission is considered immaterial; the fact that the message was paid for in advance by the sender is not regarded as affecting the addressee's right of recovery.<sup>3</sup> In one jurisdiction it has been considered that the telegraph company, in delivering to the addressee a message which through its negligence has become changed, is liable on the ground that the delivery of a false message is a misrepresentation, for the consequences of which the company must be held responsible.<sup>4</sup> But in order for the addressee to sustain the action he must be able to prove that he himself sustained some injury through the negligence of the company. Therefore, where a message from a dealer to his broker is erroneously transmitted, by reason of which the broker makes losing contracts for his principal, the broker cannot maintain an action for damages,

fact that telegraphic communication is usually resorted to only in matters of importance, from which the company ought to infer the necessity of correct and prompt transmission, and that "a mistake in its transmission will be likely to produce damage to the receiver by causing him to do what he would otherwise not do. Knowing, then, the probable evil consequences of transmitting an erroneous message, they owe a duty to the receiver of refraining from such act; and if (by negligence) they violate this duty, they must, on plain legal principles, be liable for the damage produced." Bigelow on Torts, 602. Practically the same view is taken in *Young v. Western Union Tel. Co.*, 107 N. Car. 370; 35 Am. & Eng. Corp. Cas. 62; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 30 Am. & Eng. Corp. Cas. 594; 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 183; 46 Am. Rep. 715; *Western Union Tel. Co. v. Allen*, 66 Miss. 549; 25 Am. & Eng. Corp. Cas. 535, though in this last case it is intimated that no satisfactory reason can be given.

**1. Company as Agent of Addressee.**—"It seems reasonable that for all purposes of liability, the telegraph company shall be regarded as much the agent of him who receives, as of him who sends the message. In point of fact, the fee is often paid on delivery; and I am inclined to think that the company ought

to be regarded as the common agent of the parties at either end of the wire." *New York, etc., Print Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Pa. St. 338.

**2. Wadsworth v. Western Union Tel. Co.**, 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864.

**3. Immaterial as to Who Paid Fee.**—*Wolfskehl v. Western Union Tel. Co.*, 46 Hun (N. Y.) 542 (prepaid message); *Western Union Tel. Co. v. Allen*, 66 Miss. 549; 25 Am. & Eng. Corp. Cas. 535; *Western Union Tel. Co. v. Feebles*, 75 Tex. 537; *Western Union Tel. Co. v. Beringer*, 84 Tex. 38 (addressee allowed to recover, although fee was paid by sender and afterwards returned by the company); *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358. See also cases cited in preceding notes.

**4. Altered Message a Misrepresentation.**—*May v. Western Union Tel. Co.*, 112 Mass. 90; *Gray on Telegraphs*, § 73. A physician, who negligently administers a wrong medicine, is responsible to his patient for the injury resulting therefrom, if he takes it in the belief that he is taking the right medicine. *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 298; *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; *Ayers v. Russell* (Supreme Ct.) 3 N. Y. Supp. 338. And it has been suggested that by analogy, a telegraph company must answer to an addressee for delivering to him a message, which, through its own negligence, has become false. *Allen's Tel.*

because, as he is not responsible on the contracts, he cannot claim to have suffered any damage.<sup>1</sup>

c. RIGHT OF THIRD PARTY.—The right to recover damages does not extend to every one who has an interest in the correct and prompt transmission of the message and who sustains an injury from the company's failure properly to discharge its duty. The plaintiff must show that the company owed a duty to him in the particular instance involved. Therefore a stranger, of whose connection with or interest in the message the company is ignorant, and who is only remotely connected with the transaction, cannot maintain an action for damages by merely showing that in consequence of the incorrect transmission he sustained injury.<sup>2</sup> Where, however, he can show that either the sender or the addressee or both, acted merely as his agents, he is entitled to maintain the action in his own name.<sup>3</sup> Where the message is

Cas. 455; Gray on Telegraphs, § 73, note.

1. Addressee Must Prove Damage to Himself.—*Rose v. U. S. Tel. Co.*, 6 Robt. (N. Y.) 305; 3 Abb. Pr. N. S. (N. Y.) 408; 34 How. Pr. (N. Y.) 308. The broker had received by telegraph an order from his principal to sell five thousand barrels of petroleum to be delivered at a future day; the order was executed without plaintiff's disclosing his principal. It appeared that the order as sent by the principal was for only five hundred barrels, the message having become changed in the process of transmission. The broker was not allowed to maintain the action for damages against the telegraph company because the contracts made were not his and he was not liable upon them; he could not, therefore, be said to have suffered any damage.

2. Thus, in *Elliott v. Western Union Tel. Co.*, 75 Tex. 18; 30 Am. & Eng. Corp. Cas. 613, it appeared that the saw in plaintiffs' mill having broken, plaintiffs engaged S., of the firm of G. & S., to order a new one from St. Louis by telegraph. S. wrote a dispatch in the name of his firm to a St. Louis concern to send a saw to the plaintiffs, and handed the dispatch to a salesman of the St. Louis concern, who, however, wrote another dispatch ordering the saw to be sent to S.'s concern; but neither dispatch was delivered. It was held that plaintiffs had no right of action against the telegraph company.

In *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183; 21 Am. & Eng. Corp. Cas. 158, the plaintiff ordered goods of a country merchant who, act-

ing as a merchant and not as agent, though at the plaintiff's request, telegraphed for the goods. The message was never delivered to the addressee, and in consequence, the plaintiff failed to get the goods, thereby sustaining injury. It was held that there was no privity of contract between him and the company to authorize a recovery by him.

3. Where Sender or Addressee is Agent of Third Party.—Thus, when two attorneys in different cities are acting in a suit on behalf of the same party, the client can maintain an action in his own name for any damage sustained by him through the negligence of the company in transmitting a message sent by one attorney to the other; and this, although the company was not aware that the message was sent on his behalf. *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; 21 Am. & Eng. Corp. Cas. 182; 5 Am. St. Rep. 672. See *Gage v. Stimson*, 26 Minn. 64; *Story on Agency*, § 418. The fact that the company had no knowledge that plaintiff was in fact the principal, is immaterial, except that the company might set up in defense any matter which occurred prior to the disclosure of the principal, that would constitute a defense if the suit were brought by, and in the name of, the agent. *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; 21 Am. & Eng. Corp. Cas. 182; 5 Am. St. Rep. 672. For a similar case, see *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446. Compare *Rose v. U. S. Tel. Co.*, 6 Robt. (N. Y.) 305; 3 Abb. Pr. N. S. (N. Y.) 408; 34 How. Pr. (N. Y.) 308.

sent on behalf of a wife, the husband is the proper person to sue, whether or not he was a party to the contract of sending.<sup>1</sup>

*d. UNDER SPECIAL STATUTES.*—The *Mississippi* statute, imposing a penalty upon telegraph companies for every failure to properly discharge its duty as to transmitting and delivering messages, provides that the penalty may be recovered by the "party aggrieved;" this is considered to embrace either the sender or receiver.<sup>2</sup> A similar rule prevails in *Tennessee*<sup>3</sup> and *Missouri*.<sup>4</sup> But under the *Indiana* statute, providing for a penalty, it is considered that only the sender has a right of action,<sup>5</sup> though under

In *Sherrill v. Western Union Tel. Co.*, 109 N. Car. 527, it was held that a right of action was shown by a complaint which alleged that the dispatch was sent by plaintiff's sister, who had charge of his house, and that the price was paid out of the plaintiff's money, the dispatch being directed to plaintiff's father, where plaintiff was, and it being alleged further that the dispatch was sent for plaintiff's use and benefit.

See the rule of the text upheld in a peculiar state of facts in *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519.

**1. Husband and Wife.**—See generally *HUSBAND AND WIFE*, vol. 9, p. 828; *NEGLIGENCE*, vol. 16, p. 469. The husband of the wife for whose benefit the message was sent, and who was injured by the delay, may sue irrespective of the questions of agency and of payment of the fee. The fact that the company had no notice that she was plaintiff's wife, or that the contract was made for her, is immaterial. *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 30 Am. & Eng. Corp. Cas. 594; 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Fugles*, 75 Tex. 537; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772 (plaintiff not entitled in such case to damages for injury to his own feelings). See also *Young v. Western Union Tel. Co.*, 107 N. Car. 370; 35 Am. & Eng. Corp. Cas. 60; 22 Am. St. Rep. 883.

**Parent and Child.**—*Western Union Tel. Co. v. Hoffman*, 80 Tex. 420; 35 Am. & Eng. Corp. Cas. 733, was an action by a father and his son against the telegraph company for failure to deliver a message sent to a physician. The son, a boy of fifteen years, had broken his arm and on the same day his mother, in his father's absence, telegraphed for the physician. Through the conceded negligence of the company the message was not delivered for nine days, but it appeared that the par-

ents made no further effort to secure a physician until it was too late to save the boy's arm. It was held that the father's contributory negligence in not sending for another physician would bar recovery on his own account, but that a judgment in favor of the son was proper, as the negligence of the father could not be imputed to him. See also *Williams v. Texas, etc., R. Co.*, 60 Tex. 205; 15 Am. & Eng. R. Cas. 403; *Galveston, etc., R. Co. v. Moore*, 59 Tex. 64; 10 Am. & Eng. R. Cas. 745; 46 Am. Rep. 265; *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645; *Beach on Contrib. Neg.*, § 43; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 82.

**2. "Party Aggrieved"**—*Mississippi Statute.*—*Western Union Tel. Co. v. Allen*, 66 Miss. 549; 25 Am. & Eng. Corp. Cas. 535 (in this case the addressee was allowed to recover the statutory penalty, although he had sustained no pecuniary injury, and the charges had been paid by the sender).

**3. In Tennessee.**—The code (1884), section 1542, provides that upon a failure by the company to perform the duties prescribed, it shall be liable in damages to the "party aggrieved"; this includes the receiver. *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864.

**4. In Missouri.**—*Markel v. Western Union Tel. Co.*, 19 Mo. App. 80. The statute provided for the recovery of special damages. *Rev. Stat. of Missouri* (1879), § 887.

**5. In Indiana,** under *Rev. Stat.*, § 4176, the right of action for the penalty was limited to the sender. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; 8 Am. & Eng. Corp. Cas. 56; 48 Am. Rep. 692; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223. And one who directs his clerk to forward to him in his absence, an expected message from

another statute, authorizing the recovery of special damages, the addressee is allowed to sue.<sup>1</sup>

Under the *New York* statute, prescribing the duties of telegraph companies, a company may maintain an action against a connecting telegraph line which refuses to receive for transmission a message sent over the line of the company tendering it,<sup>2</sup> although in such case the original sender of the message might properly have maintained the action.<sup>3</sup>

**2. Matters of Pleading, Practice, and Evidence**—(See also SERVICE OF PROCESS, vol. 22, p. 107 *et seq.*)—*a. CHARACTER OF THE ACTION.*—The action is properly one *ex contractu*, and based on the contract of sending, though it differs in some degree from ordinary actions for breach of contract, owing to the public character of the defendant company.<sup>4</sup> There is authority, however, for the view that where the addressee is complainant, the action must be in tort, since there is no contractual relation existing between him and the defendant company.<sup>5</sup> It has also been held that there is a distinction between an action brought for the loss sustained by the addressee in acting upon a message which the company altered in the course of transmission, and an action for a failure to transmit or deliver; in the first of these cases the

a third person, is not a "sender" within the meaning of the statute. *Western Union Tel. Co. v. Kinney*, 106 Ind. 468. Nor is one a sender who merely shows that he delivered to the company for transmission a message signed by another, but paid for by himself. *Western Union Tel. Co. v. Brown*, 108 Ind. 538; 14 Am. & Eng. Corp. Cas. 139. Compare *Western Union Tel. Co. v. Buskirk*, 107 Ind. 549.

The latter statute of 1885, giving a right of action for the penalty to the "party aggrieved," is also considered to limit the right to the sender. This construction is placed upon the ground that the statute, being penal, is to be construed strictly. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; 21 Am. & Eng. Corp. Cas. 72.

**1. Special Damages in Indiana.**—*Western Union Tel. Co. v. McKibben*, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 133; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1.

**2. U. S. Tel. Co. v. Western Union Tel. Co.**, 56 Barb. (N. Y.) 46.

**3. See supra**, this title, *Liability Where Message Passes Over Connecting Lines*; *Thompson on Electricity* 261, note; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446.

*Quere*, as to right of the original sender to sue in such a case. *Thurn v. Alta Tel. Co.*, 15 Cal. 472.

**4.** There are few, if any, cases directly adjudicating this question. But it is a universally accepted rule that in actions against telegraph companies, only such damages are recoverable as were in contemplation of the parties at the time of making the contract. See *infra*, this title, *Measure of Damages*. But the rule of damages in actions *ex delicto* is more extensive than this. See *DAMAGES*, vol. 5, p. 13; *NEGLIGENCE*, vol. 16, p. 476. The courts seem therefore to have virtually held such actions to be *ex contractu*. The case is somewhat analogous to that of actions against carriers of passengers; in such cases the action is in tort for a breach of the public duty created by the contract of carriage. See *CARRIERS OF PASSENGERS*, vol. 2, p. 742; *NEGLIGENCE*, vol. 16, pp. 419, 424-5; *TICKETS AND FARES*.

**5.** In *Western Union Tel. Co. v. DuBois*, 128 Ill. 248; 15 Am. St. Rep. 109, an action by an addressee, the court held that his remedy was in tort only. The same view has been taken in *Western Union Tel. Co. v. Richman* (Pa. 1887), 8 Atl. Rep. 172; 16 Am. & Eng. Corp. Cas. 265; *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88.

On the other hand, in an action by an addressee for the loss on certain goods caused by their being shipped to the wrong place, owing to an erroneous telegram, the *Louisiana* court has held

action sounds in tort, and is different from that where the sender sustains injury from a non-delivery.<sup>1</sup>

b. PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF—(See also BURDEN OF PROOF, vol. 2, p. 649; OPEN AND CLOSE, vol. 17, p. 195).—In ordinary actions for damages resulting from negligent personal injury there is properly no presumption of negligence against either party; the mere fact that the injury has occurred creates no such presumption, except where, from the peculiar circumstances involved, the familiar maxim of *res ipsa loquitur* is applicable.<sup>2</sup> But in actions against telegraph companies for negligently transmitting or delivering a dispatch, it is universally held that proof of an improper transmission or of a delay in delivery raises a presumption of negligence against the company and casts upon it the burden of proof to show that the incorrectness or delay was due to other causes.<sup>3</sup> In one instance, however, it has been held that such proof alone will not authorize the recovery of more than the price paid for transmission,

that the action being *ex contractu*, the limitation of one year against action *ex delicto* had no application. *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

1. *Western Union Tel. Co. v. Richmond* (Pa. 1887), 8 Atl. Rep. 172; 16 Am. & Eng. Corp. Cas. 265. But this distinction has been made in very few, if in any, cases besides the one cited. Nor does it seem to be well founded. In support of its view the court cited *New York, etc., Tel. Print. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338.

2. See NEGLIGENCE, vol. 16, p. 448, where the subject is discussed; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 91 *et seq.*

3. **Mistake or Delay Creates Presumption of Negligence.**—*Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102 (message transmitted but not delivered, though addressee called for it); *Western Union Tel. Co. v. Short*, 53 Ark. 434 (failure to transmit correctly); *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Western Union Tel. Co. v. Ward*, 23 Ind. 377; 85 Am. Dec. 462; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; 20 Am. Rep. 605; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190; 21 Am. & Eng. Corp. Cas. 182; 5 Am. St. Rep. 672 (delivery of message three days after its receipt at the office of destination, unexplained, is proof of negligence); *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795;

*De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 21 Am. & Eng. Corp. Cas. 145; 1 Am. St. Rep. 353 (error in transmission—omission of important word in message); *Western Union Tel. Co. v. Goodbar* (Miss. 1890), 7 So. Rep. 219; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263; 4 Am. Rep. 673; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; 35 Am. & Eng. Corp. Cas. 31; 21 Am. St. Rep. 662, *aff'g* 44 Hun (N. Y.) 532; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 303; 41 Am. Rep. 500 (erroneous transmission); *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751; *Wharton on Negligence*, § 756; *Gray on Telegraphs*, §§ 26, 53, 54, 77; 3 *Suth. on Dam.* 295; *Thompson on Electricity*, §§ 273-282; *CARRIERS OF GOODS*, vol. 2, p. 905.

*Compare Breese v. U. S. Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526 (erroneous transmission; the holding of this case is criticised in the *Pearsall* case as being mere *obiter*); *U. S., etc., Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Thompson v. Western Union Tel. Co.*, 106 N. Car. 549; 30 Am. & Eng. Corp. Cas. 634 (plaintiff cannot recover price of transmission merely upon proof of non-delivery of the message).

This presumption was considered to be rebutted in *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211, where a night message which was, according to the usual agreement, to be transmitted the next morning, was burned with the telegraph office

where the contract of sending contained special limitations of the company's liability. The effect of these special limitations is said to be to shift the burden of proof of negligence upon the complainant.<sup>1</sup>

c. PLEADING—(1) *In Actions for Damages.*—There is nothing peculiar in the pleadings in actions against telegraph companies for damages, and all that can be said here is to apply recognized rules to this particular class of cases.<sup>2</sup> The declaration or complaint must of course allege the facts necessary to sustain the action; thus it must aver that the message was delivered to the company for transmission, that the usual charges were paid or tendered (though this latter averment is not indispensable);<sup>3</sup> and that the failure of the message to reach its destination promptly or correctly was caused by the negligence of the company in

during the night without any negligence on the part of the company.

In *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, the defendant company contended that it was not the first carrier, and that the plaintiff failed to prove that the error in transmission occurred on its line, and showed an express provision in its printed blanks that it would not be liable for errors occurring on connecting lines. It was held that whether defendant was the first carrier or not, it was peculiarly within its power, and it was its duty to prove that the error did not occur on its line. Being engaged in the transmission of messages over the country, it was easily able to show that the message delivered by it to the plaintiff was the same as that received by it from the connecting line.

The plaintiff makes out a *prima facie* case by proof of the undertaking, error or delay, and damage, and throws the burden of proof upon the company to show that the error was caused by some agency for which it was not responsible. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437. "It was not necessary that plaintiff should show affirmatively that the failure to deliver happened through any omission of duty by the company or its officers, or from some defect in the instrumentalities employed by the company. The failure to deliver being shown, the legal presumption is that it was caused by one or the other of these causes, or of all combined." *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 216.

1. *Womack v. Western Union Tel. Co.*, 58 Tex. 180; 44 Am. Rep. 614. In this case the court upheld the validity

of a stipulation which relieved the company from liability for unrepeatd messages, except where there was fraud, misconduct or want of due care on the part of the company or its agents; and the message being an unrepeatd one, the court held that the plaintiff must affirmatively prove such misconduct, fraud or want of due care. It is not intimated, however, in what possible way such misconduct, etc., whereby the message became changed in the process of transmission, is to be proved. *Aiken v. Western Union Tel. Co.*, 69 Iowa 31; 58 Am. Rep. 210; 13 Am. & Eng. Corp. Cas. 585, is a similar case; the same conclusions were reached. See also *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433; 1 Am. Rep. 285. See also *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558. It is difficult to comprehend the exact meaning in these cases. They hold that where such stipulations exist, the company is not liable unless gross negligence can be proved. But there is no method of proof except from the fact and the character of the error. And in numerous cases "gross" negligence was considered to have been established upon a mere showing of the difference between the message as offered for transmission and as delivered to the addressee.

2. See DECLARATION, vol. 5, p. 349 *et seq.*; PLEADING, vol. 18, p. 467 *et seq.*; *Ferguson v. Anglo-American Tel. Co.*, 15 Pa. St. 211; *Kennon v. Western Union Tel. Co.*, 92 Ala. 399.

3. The complaint need not allege that the message as offered to the company was in writing, although there is a val-



transmitting it.<sup>1</sup> It is not necessarily demurrable because it claims special damages as well as the statutory penalty, although the case was one in which the penalty was not recoverable.<sup>2</sup> The amount and character of the damages claimed should be set out,<sup>3</sup> though it is held that under a claim of general damages, the plaintiff may recover for mental suffering.<sup>4</sup> It must also allege such damages as are recoverable, and if on its face only remote or consequential damages appear to be claimed, it is demurrable.<sup>5</sup>

Where the complaint, after setting out the words of the message, has a copy of it attached and asks that such copy be made a part of the complaint, the entire copy, including the printed contract, becomes a part of it.<sup>6</sup>

(2) *In Actions for Statutory Penalty*—(See also PENALTIES, vol. 18, p. 269).—The rules of pleading are usually enforced with more strictness in actions of this character than in ordinary actions for damages. The complaint must allege all the facts necessary to bring the case within the letter of the statute as well as its spirit.<sup>7</sup> It must therefore allege that the usual charges were paid or tendered,<sup>8</sup> and that the defendant company is one included within the terms of the statute.<sup>9</sup> It need not, however, set out a copy

id regulation by the company that all messages must be in writing. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32.

1. *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

2. *Alexander v. Western Union Tel. Co.*, 67 Miss. 386. In this case the penalty was not recoverable, because the negligent act was committed in a foreign state.

3. *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195 (must allege whether actual or exemplary damages are demanded).

A complaint alleging an error in the transmission of a telegram whereby the plaintiff was prevented from buying certain goods, and asking a certain sum as special damages without alleging any facts going to show such damage, will not sustain a judgment for more than nominal damages. *Acheson v. Western Union Tel. Co.*, 96 Cal. 235.

4. *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805.

5. *Western Union Tel. Co. v. Smith*, 76 Tex. 253; *Erie Tel., etc., Co. v. Grimes*, 82 Tex. 39; *infra*, this title, *Measure of Damages*. Compare *Alexander v. Western Union Tel. Co.*, 67 Miss. 386.

6. *Sherrill v. Western Union Tel. Co.*, 109 N. Car. 527.

A complaint may be good on general demurrer, though it might have been considered insufficient in certain par-

ticulars if they had been specially excepted to. For example, see *Loper v. Western Union Tel. Co.*, 70 Tex. 689; 21 Am. & Eng. Corp. Cas. 191; 16 Am. St. Rep. 864.

7. *Western Union Tel. Co. v. Kinney*, 106 Ind. 468; *Greenberg v. Western Union Tel. Co.*, 89 Ga. 754 (complaint set aside).

8. *Necessity of Alleging Payment of Charges*.—In proceedings under a penal statute, the party plaintiff must bring his case within the letter of the statute, and therefore he must aver and prove that he paid or tendered the usual charges. *Western Union Tel. Co. v. Mossler*, 95 Ind. 32; *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

But when the action is not under penal statute, but under the common-law right of recovery of damages, it is not necessary to allege in the complaint the payment or tender of charges. If complaint shows that plaintiff engaged the defendant and that the defendant undertook to transmit the message, the mutual obligation of the parties is sufficiently shown. *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, *reversing* 52 N. Y. Super. Ct. 232; 53 N. Y. Super. Ct. 111.

9. *Under Indiana Statute*.—The complaint is required to allege that the defendant was, in the words of the statute, "engaged in telegraphing for the pub-

of the message,<sup>1</sup> nor is it necessary that it should negative matters of defense,<sup>2</sup> nor does the requirement that the allegations must not vary from the proof avoid the complaint, where the inconsistency is merely an immaterial difference in dates.<sup>3</sup>

*d. EVIDENCE.*—It is not proper to admit evidence to show that the defendant company is a wealthy corporation; such evidence is admissible only where there has been a willful injury, and exemplary damages are claimed;<sup>4</sup> nor is evidence of the embarrassed financial condition of the sender of the message admissible, as bearing on the question of damages for the loss of a valuable bargain in consequence of the company's negligence.<sup>5</sup> So where the message was to a physician requesting his professional attendance, evidence on behalf of the company that the doctor's charges had not been paid and that he did not usually make such visits without prepayment, is inadmissible.<sup>6</sup> Evidence cannot be ad-

lic;” and an allegation that defendant was “engaged in the business of transmitting telegraphic dispatches for hire,” is insufficient. *Western Union Tel. Co. v. Axtell*, 69 Ind. 199. See also, as to sufficiency of such allegations, *Western Union Tel. Co. v. Roberts*, 87 Ind. 377; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; 44 Am. Rep. 776.

Under the statute of 1885, the courts seem to have insisted less than previously upon exactness. Thus it is held that a complaint which states that a message was not transmitted until more than 27 hours after it was received, and that the company did not transmit it with impartiality and in good faith without delay, and in the order of time in which it was received, sufficiently shows a violation of the statute, though it does not refer to the statute, or state that the message was offered and accepted upon the usual terms. *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46.

Where the message appears to have been sent on Sunday, the complaint is bad unless it shows that the sending of such message was a matter of necessity or charity. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 519. As to sufficiency of such a complaint, see *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46.

1. *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; 8 Am. & Eng. Corp. Cas. 54.

2. **Allegations as to Residence of Addressee within Delivery Limits.**—Thus, where the statute required messages to be delivered in cases where the addressee lived within one mile of the receiving station or in the same city with

it, the complaint need not aver that the addressee lived within delivery distance, since whether he did or not was a matter of defense. *Western Union Tel. Co. v. Buskirk*, 107 Ind. 549; *Western Union Tel. Co. v. Gougar*, 84 Ind. 176 (Rev. Stat. 1876, p. 868 construed); *Western Union Tel. Co. v. Lindley*, 62 Ind. 371. See also *SUNDAY*, vol. 24, p. 528. Under the statute of 1885, however, a different rule is set up, and the complaint must allege that the addressee resided within delivery distance of the receiving office. *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

In *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148, the rule is stated to be that in an action for failure to deliver a message within a reasonable time, where the defense is that the person to whom it was addressed lived outside of the free delivery limits, and that plaintiff (the sender) failed to comply with the regulation of the company requiring a deposit to pay for delivery in such case, the burden is on plaintiff to prove that such person lived within the limits.

3. Thus, where the complaint alleged that the message was sent in March, the plaintiff might still show it to have been sent in January. *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42.

4. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148.

5. *Western Union Tel. Co. v. Way*, 83 Ala. 542.

6. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148.

mitted to show that, because of the alleged negligence, a deduction had been made from the pay of the operator by one of his superior officers.<sup>1</sup> Statements or declarations of the company's agent who received the message, are inadmissible, except where they can be shown to be a part of the *res gestæ*.<sup>2</sup> But the complainant may introduce evidence that other messages, sent on the same day as his, were transmitted correctly and delivered promptly;<sup>3</sup> and where the action was for mental suffering caused by the plaintiff's being kept away from the bedside of his dying mother, the court allowed evidence to be introduced to show that plaintiff was his mother's favorite child.<sup>4</sup> Where his good faith in making certain purchases in pursuance of the erroneous telegram is in question, the plaintiff may show his understanding of the message and that he acted on the basis of such understanding.<sup>5</sup> And in general all evidence pertinent to the substantial issues involved, and tending to throw light on the whole transaction, is admissible.<sup>6</sup>

1. Grinnell v. Western Union Tel. Co., 113 Mass. 299; 18 Am. Rep. 485.

2. **Declarations and Admissions of Operators.**—Thus, where the operator made a mistake in transcribing a message received at his office and delivered the next day, his admission of the error, made several days afterwards, is not evidence against the company, being no part of the *res gestæ*. Aiken v. Western Union Tel. Co., 5 S. Car. 358. Such statements are not competent as against the company to prove the negligence of the company, when they are not made in the performance of any duty relating to the transmission of the message. Western Union Tel. Co. v. Way, 83 Ala. 542. Where the action is for a failure to deliver a message summoning a physician to attend at a child-birth, correspondence by wire between the operators sending and receiving the message, not communicated to plaintiff or his wife, is not admissible to show that the physician had gone into the country so that the message could not be delivered to him. Western Union Tel. Co. v. Cooper, 71 Tex. 507; 10 Am. St. Rep. 772.

In an action for mental suffering, declarations of the company's agents, made to the sender of the message, that it had been delivered at the other end of the line, are properly admitted in evidence. Western Union Tel. Co. v. Lydon, 82 Tex. 364. In an action for delay in delivering a message, evidence of declarations made by the company's messenger as to his inability to find the plaintiff, are admissible against the

company. Western Union Tel. Co. v. Bennett, 1 Tex. Civ. App. 558.

3. Western Union Tel. Co. v. Lydon, 82 Tex. 364. Here the plaintiff was allowed to show that he sent another message to the same place, but to a different person, and that it was delivered and a reply received within a specified time. But see as to the admission of such evidence generally, NEGLIGENCE, vol. 16, pp. 457-8.

4. Western Union Tel. Co. v. Lydon, 82 Tex. 364.

5. Aiken v. Western Union Tel. Co., 69 Iowa 31; 13 Am. & Eng. Corp. Cas. 585; 58 Am. Rep. 210.

6. Generally where the company seeks to excuse non-delivery on the ground that the receiver was an obscure person whom the messenger could not find, specimens of printed cards and letter-heads which he had used in his business as grocer are pertinent to the issue and admissible, especially after he had testified without objection that he so used them. Gulf, etc., R. Co. v. Wilson, 69 Tex. 739; 21 Am. & Eng. Corp. Cas. 80.

Defendant sent a dispatch by plaintiff's telegraph line for purchase of stock, which did not reach New York, its destination; at the same time he mailed a letter. At the trial, a letter from the parties in New York was admitted, and defendant testified as to the reasons why the New York parties did not buy directly on receipt of letter. Held, that the letter and the statements by the parties in New York were inadmissible. U. S. Tel. Co. v. Wenger, 55 Pa. St.

*2.* INSTRUCTIONS.—(See INSTRUCTIONS, vol. II, p. 236; NEGLIGENCE, vol. 16, pp. 463–68; QUESTIONS OF LAW AND FACT, vol. 19, p. 598).—In addition to these references see note 1 for instances of instructions in particular cases.

*3. Measure of Damages*—*a.* GENERAL RULE.—The rule as to the measure of damages in the class of cases under consideration was first clearly laid down in the well-known case of *Hadley v. Baxendale*; <sup>2</sup> the rule as there stated has been so often quoted as to have become a proverb in law, and it is universally recognized and accepted as a fundamental principle in the law of damages for negligent breach of contract. The exact statement of the rule is that “when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may

262; 93 Am. Dec. 751. See also *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; 15 Am. St. Rep. 687.

The meaning of a dispatch sent from a live stock broker to a shipper, couched in such terms as to be readily understood by the shipper, but which is ambiguous or unintelligible to persons not engaged in the stock business as shippers, may be explained by the testimony of the broker who sent it. *Western Union Tel. Co. v. Collins*, 45 Kan. 88.

Where the company failed to deliver a message summoning a physician to assist at a confinement, proof was admissible that the child was still-born, if such fact tended to show that the mother's labor was thereby prolonged, and her suffering so increased. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772.

In *Erie Tel., etc., Co. v. Grimes*, 82 Tex. 39, the plaintiff G., on returning home after an absence of several days, found awaiting him a message dated two days previous, announcing that an important surgical operation was about to be performed on his mother, and asking him to come. He telegraphed immediately to know whether it was too late for him to come, but his message was never transmitted. He waited a few hours for a reply and then left home, not returning for several days. The question was raised on the trial as to his wish to see his mother. He testified that, not having received a dispatch, he supposed that the operation had not been performed. It was held that his supposition as to the matter was a fact to be considered by the jury.

*1. In Particular Cases.*—On the ques-

tion of negligence, a charge that “the question of diligence is one to be determined by the jury from all the facts and circumstances, and if you believe from the evidence that defendant used such care and diligence as a prudent man, under like circumstances, would use in his own behalf to deliver the message, and failed through no fault of defendant company or its agents or employes, then you will find for defendant,” is sufficient. *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739; 21 Am. & Eng. Corp. Cas. 80.

Where the action was for delay in delivering a message, whereby a son was prevented from reaching the bedside of his dying mother, the court properly refused to charge the jury that plaintiff could not recover if he failed to take certain trains by which he would have reached the bedside of his mother before her death, it being the province of the jury to say whether or not plaintiff's delay was accounted for or excused. *Western Union Tel. Co. v. Lydon*, 82 Tex. 364. In this same case it appeared that the plaintiff had replied to the message announcing his mother's illness at a time when it would be several hours before any train would leave his place, hoping to receive an answer in the meanwhile. The court properly refused to instruct the jury that he should have acted on the first dispatch instead of trusting to receive another.

The subject of instructions in particular cases is considered at some length in *Erie Tel., etc., Co. v. Grimes*, 82 Tex. 39; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772. *2.* 9 Exch. 341.

fairly and reasonably be considered, either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."<sup>1</sup> The effect and operation of this rule is to exclude the consideration of remote and speculative damages; the rule itself is a definite statement of what damages the breach of contract is the proximate cause.<sup>2</sup> The law regards only such damages as are the proximate consequence of the injury complained of; the accepted maxim, *causa proxima non remota spectatur*, excludes the recovery of all damages of which the alleged wrong was not the proximate cause.<sup>3</sup> The subject of proximate and remote cause, as connected with cases involving a recovery for negligent injury,

1. *Hadley v. Baxendale*, 9 Exch. 341. Alderson, B., delivering the opinion in this case, went on to say: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them." See all this language quoted in *Mackey v. Western Union Tel. Co.*, 16 Nev. 226; *Gray on Telegraphs*, § 80; *Thompson on Electricity*, § 311. The facts in the *Hadley v. Baxendale* case were that the plaintiff broke a shaft in his mill, and in order to get it replaced, left the broken shaft with defendant, a carrier, to be taken to the manufacturer as a model, at the same time informing the carrier's clerk that he desired the shaft to be sent forward immediately, as his mill must remain idle until a new shaft could come. The carrier delayed forwarding the broken shaft and the new one was

consequently delayed. In an action against the carrier for this negligent delay, the plaintiff sought to recover as damages, the loss of the profits caused by his mill being kept idle. The court held, however, that since the carrier had not been informed that the want of the shaft and that alone would keep the mill idle, the plaintiff could not recover of him for such loss of profits; the loss could not have been in contemplation at the time the contract of carriage was made.

The courts adopt this rule universally, although it has been laid down in some cases that an action by the addressee is not *ex contractu*, but *ex delicto*. See *supra*, this title, *Character of the Action*. And see DAMAGES, vol. 5, p. 13.

2. *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 15; 4 Am. St. Rep. 126.

3. *Other Statements of the Rule.*—In *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157, the court, by Bigelow, C. J., laid down a similar rule as follows: "A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform, and to the compensation paid and received therefor. The practical rule, founded on a wise policy, and at the same time consistent with good sense and sound

has been considered at length in a previous article;<sup>1</sup> it must be observed, however, that where the action is for a breach of contract, the damages are restricted to a more narrow limit than in actions in tort.<sup>2</sup> But, aside from what has been said, general statements of the law regulating the measure of damages are of little value; the difficulty in most cases is not to determine the correctness of any rule of law, but to ascertain whether such rule applies to the particular case under consideration and to determine the effect of its application. For this reason the remainder of this section may best be devoted chiefly to illustrative decided cases, in which an application of the foregoing recognized principles has been made to peculiar states of facts.<sup>3</sup>

*b.* WHAT ARE REMOTE OR SPECULATIVE DAMAGES.—Remote or speculative damages are those which do not result directly or necessarily from the wrong complained of, and which depend for their existence upon the operation of an additional cause;

equity, is that a party can be held liable for a breach of a contract only for such damages as are the natural or necessary, and the immediate and direct results of the breach—such as might properly be deemed to have been in contemplation of the parties when the contract was entered into—and that all remote, speculative, and uncertain results, as well as possible profits and advantages and other like consequences which might have arisen from the fulfillment of the contract, must be excluded as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach. *Fox v. Harding*, 7 Cush. (Mass.) 516; *Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.) 381." In the case quoted from, it appeared that the company failed to deliver a message containing an agreement to accept an offer to sell goods at a certain price, in consequence of which the bargain was lost. The court held that the measure of damages was the additional sum which the plaintiff would have been compelled to pay at the same place to obtain the same quantity of similar goods, but that "any profit which the plaintiffs might have realized by the sale of the goods which were the subject of the message was not an element of damage and nothing could be recovered on that account."

In *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446, the court, by Earl, J., said: "The damages must flow directly and naturally from the breach of contract and they must be certain, both in their nature and in

respect to the cause from which they proceed. Under this rule, speculative, contingent, remote damages which cannot be directly traced to the breach complained of, are excluded. . . . It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be fairly supposed to have contemplated when they made the contract. A more precise statement of the rule is that a party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the fact." See these statements of the rule quoted, or similar language employed in *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 565; 27 Am. Rep. 285; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 25 Am. & Eng. Corp. Cas. 542; 10 Am. St. Rep. 699 (not necessary that the exact pecuniary loss should have been foreseen as a consequence of negligent transmission).

1. See *NEGLIGENCE*, vol. 16, pp. 428-446.

2. See *DAMAGES*, vol. 5, p. 13; *NEGLIGENCE*, vol. 16, p. 476.

3. In *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44, Justice Miller observes that "If we could deduce from them (the cases) the best possible

which are uncertain or contingent;<sup>1</sup> and which no man of ordinary care and forethought would have contemplated as a probable result of a breach at the time the contract was made.<sup>2</sup> Thus, the probability that if the message had been properly transmitted a certain trotting horse would have won a race and his owner secured a large purse, or that a painting or other article to be exhibited would have won a premium, is not a proper element of damage, being too remote and entirely speculative.<sup>3</sup> So the loss of a valuable note, which the plaintiff alleged his father would have given him had he been able to see him at his death, is too remote to be considered in a claim for damages for a failure by the company to deliver a message announcing the father's extreme illness.<sup>4</sup> The reported cases afford numerous other instances of similar claims.<sup>5</sup>

In the category of remote damages are to be included all those damages which result from the operation of an intervening effi-

expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it and often with the nicest discriminations."

1. "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Selden, J., in *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718.

2. *Chicago v. Starr*, 42 Ill. 174; 89 Am. Dec. 422; *Shear. & Red. on Neg.*, § 739; *Pollock on Torts*, 36, 37; *Negligence*, vol. 16, p. 437.

3. *Western Union Tel. Co. v. Crall*, 39 Kan. 580; 5 Am. St. Rep. 795. See note immediately succeeding.

4. *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; 30 Am. & Eng. Corp. Cas. 627. The court said: "Perhaps his father would have given him the note. It would not, however, have been a natural consequence of his going to see him. He might, and he might not, have done so. No such loss could have been contemplated by the parties to the sending of the message, had their minds at the time been drawn to the contingency of its not being delivered. . . . As well might one claim from a railroad company the amount of a stake in a race upon the ground that

if the train had not been negligently delayed, his horse would have arrived in time and won the race." A man was found in *Kansas*, however, who earnestly insisted that he should be allowed to recover the stake money which he alleged his steed would have won had he not been kept away from the race by the negligence of the telegraph company. See *Western Union Tel. Co. v. Crall*, 39 Kan. 580; 5 Am. St. Rep. 795.

5. *Illustrative Cases—Remote Damages.*—Plaintiff S: signed and delivered to the company a message: "R. Meet me in C. Saturday night." It was not delivered to R. and plaintiff brought an action against the company, alleging that by its negligence he was put to expense in hiring a conveyance to go from C. to R.'s home and back again; that by loss of time he failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired. *Held*, that the petition was bad on demurrer, the damages being too remote, conjectural and not in contemplation of the parties when the contract was made. *Western Union Tel. Co. v. Smith*, 76 Tex. 253.

Damages for bruises received in consequence of being obliged to take a rough vehicle, instead of the family carriage which he had telegraphed for, are too remote for a claim against the telegraph company for failure to transmit a message ordering the carriage. *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195.

In *Bodkin v. Western Union Tel. Co.*, 31 Fed. Rep. 134; 21 Am. & Eng. Corp.

cient cause. Even though the company's negligence may have some causal connection with the damage complained of and may have exerted a material influence in producing the final result, still the company cannot be held liable as being, through its negligence, a proximate cause, where a subsequent intervening cause took advantage of such negligence and brought about the ultimate result which is the subject of complaint.<sup>1</sup> If the company's default is made mischievous to the party complaining, only by the operation of some other intervening cause, then the maxim *causa*

Cas. 202, owing to a delay of thirty hours in the delivery of a telegram, the plaintiff was unable to take a barge up the river, upon which to load a large lot of staves, and the staves were swept away by a flood. The message read, "Barge at Mobile Bridge. Get them above as soon as possible." It was held that the loss of the staves was too remote; an efficient cause (the flood) having intervened between the company's negligence and the loss complained of.

**Message Asking Information—Loss on Sale of Property.**—In *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165, the plaintiff telegraphed to his agent, "Telegraph me at Rochester what that well is doing;" the message was undelivered and did not reach the agent for several days. The agent on receiving it replied by wire, "Well flowing eighty barrels; can sell your interest for \$5,000. Telegraph refusal," etc. In the meantime, however, plaintiff, having received no answer after waiting some days, sold his interest for \$3,800. He sued to recover of the company the difference in the price received and that which he would have secured had there been no delay in delivering the first message, and introduced some evidence to show that the operator had knowledge of the circumstances connected with the message. The court held that there could be no recovery; the damages were regarded as "quite too remote, and depending upon too many contingencies. Had the message been received (promptly) the agent might or might not have answered it; and what the answer would have been cannot certainly be known. The answer might or might not have been received by the plaintiffs at Rochester, and if received, it is conjectural what might have been the action of the plaintiffs thereon."

**Proximate Consequences.**—On the other hand, where a wife, about to be confined, sends a message summoning

her husband, and through a negligent delay in delivery of it he did not arrive, and in consequence she suffered more physical pain, anxiety of mind and alarm on account of her condition, and sustained permanent injury for want of her husband's presence, such damages are not remote, but are a proximate consequence of the company's negligence, the message having shown on its face the necessity of its immediate transmission and delivery. *Thompson v. Western Union Tel. Co.*, 106 N. Car. 549; 30 Am. & Eng. Corp. Cas. 644. See also *Loper v. Western Union Tel. Co.*, 70 Tex. 689; 21 Am. & Eng. Corp. Cas. 191; 6 Am. St. Rep. 864.

In *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; 15 Am. St. Rep. 835, plaintiff, having bought a flock of sheep, sent a dispatch to his servant to "Bring Shep," this being the name of his dog; but the message as delivered directed the servant to "bring sheep." It was held in an action against the company that there was notice of the object of the dispatch, and attendant details.

See also a prior hearing of the same case in 63 Tex. 668; 8 Am. & Eng. Corp. Cas. 70.

**1. Effect of Intervening Efficient Cause.**—See *NEGLIGENCE*, vol. 16, pp. 444-5; *Scheffer v. Washington, etc., R. Co.*, 105 U. S. 252; 8 Am. & Eng. R. Cas. 59; *Crain v. Petrie*, 6 Hill (N. Y.) 522; 41 Am. Dec. 765. In this last case the doctrine was stated by the court that "to maintain an action for special damages, they must appear to be the legal and natural consequences arising from the tort and not from the wrongful act of a third person induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of."

The case of *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; 19 Am. Rep. 154, is an application of the rule of the text. B. delivered to the tele-



*proxima* prevents the liability of the company; since its default becomes a remote and not a proximate cause of the injury.<sup>1</sup>

c. EFFECT OF SPECIAL CIRCUMSTANCES.—(See also DAMAGES, vol. 5, pp. 14, 15).—Special circumstances involved in the case cannot be considered in estimating the damages, unless it can be made to appear that the company was informed as to them at the time the contract of sending was made.<sup>2</sup> But it is immaterial how this information is conveyed to the company; it may appear on the face of the message, or may be communicated by the sender or his agent at the time of offering the dispatch for trans-

graph company a message addressed to one L., asking him for a remittance of five hundred dollars. Through the negligence of the company's agent, the message was made to ask for five thousand dollars. The latter amount was sent to B., who, upon receiving it, absconded with it. It was held that L. could not hold the company responsible for the loss. The embezzlement by B. was not a proximate consequence of the erroneous transmission, but was produced by an intervening cause, *i. e.*, B.'s dishonesty.

First National Bank *v.* Western Union Tel. Co., 30 Ohio St. 555; 27 Am. Rep. 485, was a similar case. The plaintiff, a bank at B., sent a letter to its agent in New York, asking as to the financial standing of certain parties who had presented drafts, and concluding, "If everything is all right, you need not dispatch. If not right, answer by Saturday evening (13th)." On Monday at 4:55 p. m. the agent delivered to the telegraph company in reply to the letter a message reading: "Parties will accept if bill of lading accompanies draft. Parties stand fair." This message was never transmitted. Before three o'clock on the same day the bank, having received no reply, cashed the drafts to L., which amount was eventually lost, since L.'s drafts proved worthless. The bank brought an action against the telegraph company, alleging that if the company had promptly delivered the dispatch, the money paid to L. could have been recovered from him, and that as a consequence of the company's negligence, the bank was defrauded of the amount paid on the drafts. The court held that only nominal damages were recoverable; that had it not been for the intervening cause, the dishonesty of L., the company's negligence would not have produced the result complained of. "The loss was occasioned

by two causes—the shortcoming of the telegraph company in not delivering the message, and the still shorter-coming of L. in appropriating to himself what belonged to somebody else." L. had testified that he would have returned the money if the request had been made on the said Monday; but this was a mere contingency, as there was no proof of his solvency or honesty.

See also *supra*, this title, *Forged or Fraudulent Messages*.

1. This is Mr. Parson's statement of the rule. 2 Pars. on Contracts, p. 257 *et seq.*

2. Western Union Tel. Co. *v.* Lively (Tex. 1891), 15 S. W. Rep. 197; Western Union Tel. Co. *v.* Way, 83 Ala. 542; Horne *v.* Midland R. Co., 7 C. P. 583; Wood's Mayne on Dam., § 34.

"But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." Hadley *v.* Baxendale, 9 Exch. 341. See also DAMAGES, vol. 5, pp. 14, 15.

**Message Announcing Date of Trial of a Case.**—Thus in Western Union Tel. Co. *v.* Short, 53 Ark. 434, a message was sent to plaintiff informing him that his case was set for Aug. 17th. The company negligently changed it to read Aug. 7th, thereby causing plaintiff to make an unnecessary journey to the place where trial was expected. It was held that the defendant company was liable for plaintiff's reasonable expenses in going to and from the trial, and the value of his time; but that, there being no evidence that the company had notice of special circumstances connected with the sending of the message, it was

mission; it is only requisite that the company shall have been informed of such circumstances at the time it contracted with the sender.<sup>1</sup> Special circumstances, however, even when communicated to the company, cannot control the measure of damages, where the damage complained of is essentially remote or speculative in its character, as, for example, where the sender loses the opportunity to conduct a profitable speculation or to secure contingent profits.<sup>2</sup>

d. WHERE MESSAGE IS IN CIPHER OR IS OTHERWISE UNINTELLIGIBLE—(1) *The General Doctrine*.—The rule already set out as to the measure of damages, confines the plaintiff's recovery in actions against the company for negligence, to such damages as may fairly be supposed to have been in contemplation of the parties at the time of making the contract.<sup>3</sup> This being true, it follows as a logical and necessary sequence that where the message as delivered for transmission is unintelligible, except to the sender or the addressee, and the company has no information otherwise as to its character and purport, nor of its importance and urgency, the party injured can recover of the company nothing more than nominal damages or at most the price paid for transmission.<sup>4</sup> And this is the rule which has been

not liable for loss to plaintiff resulting from the necessity of shutting down his mill, idleness of his teams, etc., during his absence.

In *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *aff'd* 67 N. Y. 590, a similar message was lost in transmission, and, in consequence, the plaintiff and his counsel went to the place of trial and found that his case would come up later. He was allowed to recover the expenses of himself and counsel in making this unnecessary trip, and also the fee paid to his counsel for going the second time and attending to the case then.

1. See DAMAGES, vol. 5, pp. 15, 16; *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. Ct. 487; *infra*, this title, *Where Message is in Cipher or is Otherwise Unintelligible*. Compare *Western Union Tel. Co. v. Landis* (Pa. 1888), 12 Atl. Rep. 467; 21 Am. & Eng. Corp. Cas. 206.

There can be no question that operators or agents who receive dispatches for transmission, are agents of the company to receive information of such special circumstances. From the nature of the case, in no other practicable way could the company have knowledge of the circumstances involved. *Thompson on Electricity*, §§ 315, 316; *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57.

2. *Western Union Tel. Co. v. Hall*, 124 U. S. 444; 21 Am. & Eng. Corp. Cas. 211.

3. See *supra*, this title, *Measure of Damages—a. General Rule*.

4. In *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452, the message was in cipher, and the company was not informed as to its importance. The court, in holding that only nominal damages were recoverable for a failure to deliver it promptly, said, by Dixon, C. J.: "It cannot be said or assumed that any amount of damages or any pecuniary loss or injury will naturally ensue or be suffered, according to the usual course of things, from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect of which, pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling and unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation, at the time of making the

adopted by the English and American courts almost without exception.<sup>1</sup> The rule is analagous to, and derives support from, the principle in the law of common carriers which exempts the carrier from responsibility where the owner of goods shipped over its road conceals their nature and value.<sup>2</sup>

contract, that any particular damage or injury would be the probable result of a breach of the contract on his part." "For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case and of this advantage it would be very unjust to deprive them." *Hadley v. Baxendale*, 9 Exch. 341.

1. **English and American Rule.**—*Sanders v. Stuart*, 1 C. P. Div. 326; 17 Moak's Rep. 286; 35 L. T. N. S. 370; 24 W. R. 949; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575; 30 Am. & Eng. Corp. Cas. 605; 19 Am. St. Rep. 55; *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232; 96 Am. Dec. 519; *Beaupré v. Pacific, etc.*, Tel. Co., 21 Minn. 155; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. Ct. 487; 7 Abb. N. Cas. (N. Y.) 151; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300; 21 Am. & Eng. Corp. Cas. 124; 6 Am. St. Rep. 590; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301; 41 Am. Rep. 500; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 25 Am. & Eng. Corp. Cas. 544; 10 Am. St. Rep. 699 (doctrine recognized, though not applied); *Daniel v. Western Union Tel. Co.*, 61 Tex. 452; 8 Am. & Eng. Corp. Cas. 117; 48 Am. Rep. 305; *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37; *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131; *Gray on Telegraphs*, § 80; *Thompson on Electricity*, § 358. See also *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 27; 56 Am. Rep. 119 (question mentioned in one of the several opinions delivered, but what was said was *obiter dicta*); *Western*

*Union Tel. Co. v. Hall*, 124 U. S. 444; 21 Am. & Eng. Corp. Cas. 211.

In *Sanders v. Stuart*, 1 C. P. Div. 326; 17 Moak's Rep. 286, a collector of telegraph messages, who, for reward, undertook to receive messages for transmission, and to transmit them by telegraph to places abroad, received such a message written in a cipher (which he had no means of understanding or reading), and negligently transmitted it wrongly, so that the sender of the message lost a profitable contract. It was held that only nominal damages could be recovered by him in an action against such collector. See also *Horne v. Midland R. Co.*, 7 C. P. 583.

**Effect of Stipulation against Liability for Errors or Delay in Cipher Messages.**—The telegraph blanks contain a stipulation to the effect that the company will not be liable for errors in cipher or obscure messages. Such a stipulation is reasonable and will be upheld. *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300; 21 Am. & Eng. Corp. Cas. 121; 6 Am. St. Rep. 590. But as a rule, the courts have not regarded this stipulation, and have decided the cases on other grounds, though in their decisions it is practically upheld. See *Gray on Telegraphs*, § 92, n; *Thompson on Electricity*, § 370.

2. **Analogy to Rule in Case of Common Carriers.**—See *CARRIERS OF GOODS*, vol. 2, p. 796; *Angell on Carriers*, § 264; *Redman on Carriers* (2d ed.), p. 52.

In *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452, where a case involving a cipher message was under consideration, the court, after intimating that where the sender used no means to conceal the character of his message, he would not be bound to disclose the meaning except upon inquiry by the company, said: "But in regard to these messages in cipher, the signification and purport of which are wholly unknown to the operators, the question would still arise whether they should not be looked upon as a means of artifice adopted by the sender to conceal the nature and importance of the communication and thus have brought such messages within the operation of

In several of the states, however, a different view has been taken. In *Virginia, Georgia, Florida, and Alabama*, the courts have laid down the doctrine that the measure of damages recoverable by the plaintiff is not to be affected by the character of the message and the knowledge of the company as to its urgency or importance;<sup>1</sup> that while the company might with some reason refuse to accept a cipher dispatch for transmission without having its meaning explained, yet, after having accepted it and undertaken to transmit and deliver such dispatch, it cannot escape responsibility for its negligence by setting up its ignorance as to

another principle which exempts the common carrier from responsibility. Angell on Carriers, §§ 258, 263. The principle which relieves the common carrier on the ground of concealment by the owner of the goods, in respect to the nature, amount and value of them, seems to be that which is most nearly suited to the case or transaction in hand; and as it is the one which has been thus far acted upon and applied by other courts, we feel no hesitation in adopting it." See also *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300; 21 Am. & Eng. Corp. Cas. 128; 6 Am. St. Rep. 590. Compare *Western Union Tel. Co. v. Hyer*, 22 Fla. 367; 16 Am. & Eng. Corp. Cas. 233; 1 Am. St. Rep. 223.

**1. Authorities Supporting a Contrary Doctrine.**—*Daughtery v. American Union Tel. Co.*, 75 Ala. 168; 5 Am. & Eng. Corp. Cas. 203; 51 Am. Rep. 435; *American Union Tel. Co. v. Daughtery*, 89 Ala. 106; *Western Union Tel. Co. v. Way*, 83 Ala. 542 (Somerville, J., dissenting); *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 16 Am. & Eng. Corp. Cas. 233; 1 Am. St. Rep. 222; *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 183; 46 Am. Rep. 715; *Scott & Jar. on Telegraphs*, § 6. See also *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 8 Am. & Eng. Corp. Cas. 27; 56 Am. Rep. 119.

"It can safely be said that the larger part of all messages sent are of a commercial or business nature which suggests value. The requirements of friendship or pleasure can await other means of less celerity and less expense. If this be true, why should the law assume that as a rule all messages sent (by telegraph) are unimportant and that an

important one is an exception, of which the operator is to be informed. . . .

The common carrier charges different rates of freight for different articles, according to their bulk and value and their respective risks of transportation, and provides different methods of transportation for each. It is not shown here that the defendant company had any scale of prices which were higher or lower, as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that if its importance had been disclosed to the operator, he was required by the rules of the company to send the message out of the order in which it came to the office with reference to other messages awaiting transmission; that he was to use any extra degree of skill, and a different method or agency for sending it from the time or the skill used, the agencies employed, or the compensation demanded for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation?" *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 16 Am. & Eng. Corp. Cas. 236; 1 Am. St. Rep. 225. In this case, the message was in cipher and in response to a previous cipher dispatch; it was transmitted, but never delivered, and in consequence, the plaintiffs had an idle chartered vessel on their hands. The court held that actual damages could be recovered. Rayney, J., dissenting, considered that the recovery should have been of nominal damages only. See also *Bowen v. Lake Erie Tel. Co. (Ohio, 1853)*, 1 Am. L. Reg. 685; *Gray on Telegraphs*, § 87.

the contents or importance of the telegram.<sup>1</sup> The perplexing question in this connection is as to whether the company was actually informed or had any means of knowing the importance and urgency of the dispatch. Such information may be derived from the message itself, or from external evidence, or from both of these sources.<sup>2</sup>

(2) *Where the Message Itself Contains the Only Evidence of Its Importance.*—In such cases, if the message is in cipher, there can be no question as to the application of the rule, and the plaintiff can recover no more than nominal damages, together with the price paid for transmission.<sup>3</sup> But where ordinary language is employed, the meaning and purport of which may or may not be understood without the aid of other information, it is a question for the jury to determine in each particular case whether or not it was sufficient to indicate to the company's agent the importance of the message; no absolute rule can be stated.<sup>4</sup> By some authorities, it is considered that the message is sufficiently plain

1. *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 5 Am. & Eng. Corp. Cas. 182; 46 Am. Rep. 715; *Daugherty v. American Union Tel. Co.*, 75 Ala. 168; 5 Am. & Eng. Corp. Cas. 211; 51 Am. Rep. 435. In the first of these cases, there was a complete failure to transmit, although the message was accepted for transmission; the case was affected by the fact that a statute of *Virginia* prescribed specifically the duties incumbent upon telegraph companies in transmitting messages.

2. Messages may be divided into several classes, according to the degree of intelligibility which they bear on their faces, and according to the amount and extent of the external evidence given by the sender when the message was offered for transmission. These can best be considered under the two headings following. See Gray on Telegraphs, §§ 83-93.

3. *Daniel v. Western Union Tel. Co.*, 61 Tex. 452; 8 Am. & Eng. Corp. Cas. 118; 48 Am. Rep. 305; *Western Union Tel. Co. v. McKinney*, 5 Tex. Law. Rev. 173; 8 Am. & Eng. Corp. Cas. 123. In *Mackey v. Western Union Tel. Co.*, 16 Nev. 227, the message was in cipher, though the agent admitted he thought it related to stocks, since a large proportion of the messages sent from his office to San Francisco were of that character; he admitted also that plaintiff inquired whether it would reach S. in time for the two o'clock meeting of the board of brokers. But it was considered that the agent was

not informed of the importance of the message.

4. *Whether or Not Message Is Intelligible.*—In *Pepper v. Western Union Tel. Co.*, 87 Tenn. 557; 25 Am. & Eng. Corp. Cas. 544; 10 Am. St. Rep. 699, the telegram sent to produce dealers, read: "Car cribs six sixty, c. a. f., prompt." The word "cribs" meant in the meat trade clear ribs and "c. a. f." meant cost and freight. These terms, it appeared, were well understood in the trade and by the defendant company. It was held that the importance of the message was sufficiently disclosed and that the company was liable for the damages caused from its substituting the words "six thirty" for "six sixty." See also *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126; *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143.

In *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 303; 41 Am. Rep. 500, the plaintiff delivered this message to the company: "Will you give one fifty for twenty-five hundred at London? Answer at once as I have only till night." It related to the sale of seed. As delivered to the addressee it read "one five," instead of "one fifty." It was held that the importance of the message was sufficiently disclosed; "the company were apprised of the fact that a pecuniary loss might result from an incorrect transmission. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and

if its language is such as to put the company upon inquiry.<sup>1</sup> Certainly the message is not required to show on its face all the minute details of the transaction of which it is a part.<sup>2</sup> Thus a message announcing the serious illness of a named person and requesting the immediate presence of the addressee, cannot be considered obscure because it does not reveal the relationship of the parties concerned.<sup>3</sup>

(3) *Where the Company Has External Evidence of the Importance of the Message.*—It is not essential that the message itself shall disclose its importance and the necessity for prompt and

deliver the message in the language in which it was received." *Compare* King-horne v. Montreal Tel. Co., 18 U. C. Q. B. 60; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530.

In *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751, the message was: "Buy fifty (50) North Western, fifty (50) Prairie du Chien, limit forty-five (45)." There was a delay in delivery, causing a loss to the sender on account of the advance in price of the stocks ordered to be purchased. The court held that the sender might recover such loss; "the dispatch was such as to disclose the nature of the business to which it related, and that a loss might be very likely to occur if there was a want of promptitude in transmitting the order." So in *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; 74 Ill. 168; 24 Am. Rep. 279, the message read: "Sell one hundred Western Union;" by the company's negligence it was made to read: "Sell one thousand," etc. It was intended as an order to sell one thousand shares of stock in the Western Union. The agent, obeying the order as delivered to him, sold one thousand, and to fill the order was obliged to buy nine hundred shares more than was intended. The court held that the plaintiff could recover the difference between the price for which the nine hundred extra shares were sold and that which he was compelled to pay for those purchased. *Compare* *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519 ("sell fifty gold" considered unintelligible).

In *Marr v. Western Union Tel. Co.*, 85 Tenn. 530; 16 Am. & Eng. Corp. Cas. 243, a dispatch: "Buy one hundred shares Memphis and Charleston" was made to read: "Buy one thousand," etc. It was held that the language was clear and the company was liable for the loss occasioned. Also, in *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45

Am. Rep. 480, a telegram "Cover two hundred September, one hundred August," was so changed as to read "two hundred August." The terms were well understood in the cotton trade, and the court held that it was not such an obscure message as to authorize the recovery of nothing more than nominal damages. *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732. See also *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; 3 Suth. on Dam. 301; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; 10 Am. St. Rep. 790 ("You had better come and attend to your claim at once," sent by a bank holding notes for collection for plaintiff against a failing debtor; held sufficiently clear).

1. *Thompson on Electricity*, § 365, citing *Lodge v. Simonton*, 2 Pen. & W. (Pa.) 439; 23 Am. Dec. 36, 47, note. A message, "G. is dead. Answer," sufficiently suggests its importance and puts the company on inquiry; and notice of the relationship of the deceased to addressee is unnecessary. *Western Union Tel. Co. v. Carter* (Tex. 1892), 20 S. W. Rep. 834.

2. *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 25 Am. & Eng. Corp. Cas. 542; 10 Am. St. Rep. 699.

3. *Messages Announcing Death or Illness.*—*Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; 35 Am. & Eng. Corp. Cas. 77; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 30 Am. & Eng. Corp. Cas. 594; 16 Am. St. Rep. 920. *Compare* *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37.

In *Western Union Tel. Co. v. Brosche*, 72 Tex. 654; 13 Am. St. Rep. 843, a message was sent announcing to a relative the bringing of a corpse. There was evidence tending to show that the telegraph operator knew that

correct transmission; if the company is informed of these facts by any other means, it becomes charged with notice of the loss that is likely to follow from a negligent transmission or delivery, and is responsible for such loss if it occurs.<sup>1</sup> Whether the circumstances in any particular case warrant a finding that the company was so informed, must be determined by the jury from the evidence, unless the case is so plain as to justify the court in holding as matter of law that the information was sufficient.<sup>2</sup>

unless the message was sent promptly it would be too late. The court charged that the plaintiff could recover only for the direct and natural result of the failure to send the message. It was held that an instruction to the effect that plaintiff could not recover for a failure to accomplish anything not shown on the face of the message, unless defendant had knowledge of plaintiff's purpose, was properly refused.

1. *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *Rittenhouse v. Independent, etc., Tel. Co.*, 44 N. Y. 263; 4 Am. Rep. 673; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; 15 Am. St. Rep. 835; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575; 30 Am. & Eng. Corp. Cas. 600; 19 Am. St. Rep. 55. Thus an instruction that "if the agent knew of the importance of the prompt delivery of the message or could have discovered it from the terms of the telegram or from other telegrams in relation to the same matter," the defendant company would be chargeable with such knowledge, is a correct statement of the law. *Erie Tel., etc., Co. v. Grimes*, 82 Tex. 39. Compare *Pope v. Western Union Tel. Co.*, 14 Ill. App. 531; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165, reversing 54 Barb. (N. Y.) 505; 1 Lans. (N. Y.) 125. See *Thompson on Electricity*, § 364.

2. See generally NEGLIGENCE, vol. 16, p. 463; QUESTIONS OF LAW AND FACT, vol. 19, pp. 646, 656. In *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300; 21 Am. & Eng. Corp. Cas. 124; 6 Am. St. Rep. 590, a telegram was sent reading "if market is firm and advancing Narrator," followed by another several hours later containing the single word "Narrator." They were sent by a cotton merchant to his broker, and on delivering the first one he told the operator he wished it to be delivered "before the cotton market opens." The delivery of the first message was delayed so that it did not reach the ad-

ressee until after the second one. In an action for the loss sustained it was held that the company could not be charged with notice of the importance of the message and that nominal damages only were recoverable, it appearing that the delay was short and that no gross negligence was shown.

In *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452, the message ordering the purchase of certain stock was wholly in cipher, but the plaintiff testified that the operator to whom he handed it and the other persons engaged in the office at the time, knew "that it pertained to stock," because they knew that to be his business, and also testified that he informed the office boy that it required attention and promptness in the sending, and left under the belief that his request would be complied with. Held, that the facts, however they might tend to show negligence in the operator or other employé, did not show such a communication of the meaning and character of the message that the operator could reasonably be supposed to have contemplated a rise in the value of the stock named, by which the plaintiff would become a loser, as one of the probable or possible results of a failure to promptly transmit the message.

So in *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530, it was held that the message, "Get ten thousand dollars of the Mail Company," was too obscure to charge the telegraph company with more than special damages. Since it did not indicate that the money was needed to save a valuable contract for stock, damages caused by loss of the contract were not recoverable. Measure of damages in such a case would be merely the lawful interest on the money which should have been obtained. On the other hand, it is said that the negligent transmission of a message, "Buy in addition to 1,000 August, 1,000 cheapest month,"

*e.* LOSS OF EXPECTED PROFITS IN TRANSACTIONS OF SALE.<sup>1</sup>—Where the negligence of the company in transmitting or delivering a message prevents a sale by the plaintiff, which would otherwise have been consummated, the measure of damages in an action against the company is the difference between the market value of the goods or other property to be sold, and the price which the plaintiff would have secured had the sale taken place,<sup>2</sup> together with expenses necessarily incurred;<sup>3</sup> in other words, the plaintiff may recover the profits he would have reaped from the bargain had it been perfected.<sup>4</sup> So where the plaintiff directs his agent to sell certain property and the message is delayed and the price of such property falls meanwhile, the company is responsible for the difference between the price actually secured and that which would have been secured had there been no delay in delivering the message.<sup>5</sup> The company is also liable for the decrease in

and "Put stop order on 5,000 Dec. at 17 cents," will authorize the recovery of substantial damages where it appears in evidence that from previous messages relating to similar transactions by the same party, the company might, with reasonable diligence, have understood the message. *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575; 30 Am. & Eng. Corp. Cas. 600; 19 Am. St. Rep. 55.

**Property in Telegraph Ciphers.**—See in this connection, *Reuter's Tel. Co. v. Byron*, 43 L. J. Ch. 661, where a "telegram company" in London made an arrangement with defendants, two individuals in *Australia*, for the transmission of messages in which certain words were used as a short expression of the names and addresses of the principal customers; and defendants were described as agents of the "telegram" company. Afterwards, the parties quarreled, and one of the defendants came to *England* to carry on an independent telegram business with his partner in *Australia*, and sent circulars to the customers of the telegram company, mentioning that he had their ciphers. In a suit to restrain him from using the ciphers, it was held that there was nothing confidential in the ciphers and that he was entitled to use them.

1. As to the general right to recover loss of profits, see *Masterston v. Brooklyn*, 7 Hill (N. Y.) 61; 42 Am. Dec. 38; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *Wilson v. Lancaster, etc., R. Co.*, 9 C. B. N. S. 632; 99 E. C. L. 632.

2. Consummation of Sale Prevented—Plaintiff Being Vendor.—*Western Union Tel. Co. v. James*, 90 Ga. 254; *Western Union Tel. Co. v. Lindley*, 89 Ga. 484; *Western Union Tel. Co. v. Brown*, 84 Tex. 54. Compare *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60 (quantity of goods to be sold uncertain—no recovery).

In *Manville v. Western Union Tel. Co.*, 37 Iowa 214; 18 Am. Rep. 8, the message to plaintiff, "Ship your hogs at once," was delayed four days; in consequence, plaintiff had to keep his hogs four days longer than he would have done, thus incurring expense for feeding, etc., and had to sell at a decreased price. It was held that he might recover the difference, at the place of delivery, between the market value of the hogs on the day when they would have been delivered, had the message been delivered promptly, and the market value on the day when plaintiff was able to deliver them after the receipt of the message. The reason and importance of the message were "evident on its face. It clearly imported that to meet a good market the hogs must be shipped at once, and that by delay a good market would be lost."

3. *Western Union Tel. Co. v. Collins*, 45 Kan. 88; *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; 9 Am. Rep. 136; *Lane v. Montreal Tel. Co.*, 7 U. C. C. P. 23.

4. See cases cited in preceding and subsequent notes of this section.

5. *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; 5 Am. & Eng.



price obtained at a sale, occasioned by the erroneous transmission of a message announcing prices.<sup>1</sup> For similar reasons, where the company fails to deliver a message ordering the purchase of certain goods, it is responsible to the plaintiff for the increase in price which he is compelled to pay for such goods;<sup>2</sup> but not for profits

Corp. Cas. 203; 51 Am. Rep. 435; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; 21 Am. & Eng. Corp. Cas. 72; *Western Union Tel. Co. v. Stevens* (Tex. 1891), 16 S. W. Rep. 1095. *Compare Cahn v. Western Union Tel. Co.*, 48 Fed. Rep. 810; 39 Am. & Eng. Corp. Cas. 552, *aff'd* 46 Fed. Rep. 40.

Where plaintiff had contracted to sell certain live stock, and, owing to his failure to receive a message promptly, the other party to the contract had rescinded it, it was held that the measure of damages was not the difference between the contract price and the price at which the stock could have been sold if the message had been delivered promptly, but such difference less the expense of transportation. *Western Union Tel. Co. v. Brown*, 84 Tex. 54.

1. **Message Announcing Prices.**—*Pep- per v. Western Union Tel. Co.*, 87 Tenn. 554; 25 Am. & Eng. Corp. Cas. 542; 10 Am. St. Rep. 699; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109.

A telegraph company failing to deliver a message to a shipper of live stock as to the state of the market, the result being that the shipper sends his stock to another market and gets less than he might have got had he received the message, is liable for the difference between the market price at the two places with the difference in freight added. *Western Union Tel. Co. v. Collins*, 45 Kan. 88; *Garrett v. Western Union Tel. Co.*, 83 Iowa 257; *Western Union Tel. Co. v. Stevens* (Tex. 1891), 16 S. W. Rep. 1095; *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; 20 Am. Rep. 605.

In *Western Union Tel. Co. v. Landis* (Pa. 1888), 12 Atl. Rep. 467; 21 Am. & Eng. Corp. Cas. 206, plaintiff's agent wired him that he (the agent) had two car-loads of sheep at five dollars and sixty cents per hundred; the company erroneously transmitted it so as to read five dollars and "six" cents. Plaintiff sold the sheep before arrival, at six dollars per hundred. It was held that plaintiff might recover the difference between the amount for which the sheep were sold

and their actual value, although the price obtained was greater than the cost. The message, having enough on its face to show that it related to the price of goods shipped to the addressee, was sufficiently plain to put the company on its guard against errors in transmission.

A wrote to B, asking what price the latter would pay for turkeys, and received in reply a telegram, "thirty-three cents for good, young turkeys," but the message as written by B was "twenty-two cents," etc. A shipped turkeys to B, but B refused to pay more than twenty-two cents for them. A having paid twenty-five cents a pound for them and incurred an expense amounting to one cent per pound, it was held that he was entitled to recover of the company an amount equal to four cents per pound for all the turkeys shipped to B. *Western Union Tel. Co. v. Richman* (Pa. 1887), 8 Atl. Rep. 171; 16 Am. & Eng. Corp. Cas. 263.

But where the party sending the message was under no obligation to keep the plaintiff informed of prices, and it appears that plaintiff did not rely on him for such information, plaintiff cannot recover for the decrease in price obtained for his cotton in consequence of the erroneous transmission of a message announcing prices. *Frazer v. Western Union Tel. Co.*, 84 Ala. 497.

Consult, in this connection, *infra*, this title, *Contracts by Telegraph—Telegraph Company Ordinarily Agent of Sender*; *Pegram v. Western Union Tel. Co.*, 100 N. Car. 28; 21 Am. & Eng. Corp. Cas. 150; 6 Am. St. Rep. 557.

2. **Message Offering to Purchase—Plaintiff a Purchaser.**—The measure of damages is the difference between the price offered and that which plaintiff was obliged to pay at the same place in order, by due diligence, after knowing of the company's failure, to purchase a like quality and quantity of goods. *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751; *Turner v. Hawkeye Tel. Co.*, 41

which he might have made or expected from a resale.<sup>1</sup> The same is true where there has been a mere delay in delivery.<sup>2</sup> And where there is an erroneous transmission of such a message, the measure of damages recoverable is the increase in the loss sustained by the plaintiff above that which he would have sustained had the error not occurred.<sup>3</sup> The plaintiff must be able,

Iowa 458; 20 Am. Rep. 605; *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; 9 Am. Rep. 136 (may recover money paid for transmission, any advance in freight, and any expense incurred, but not contingent or anticipated profits); *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347.

Thus in *Alexander v. Western Union Tel. Co.*, 67 Miss. 386, through the negligence of the company in failing to deliver a message, the plaintiff, A, lost the opportunity to buy for three thousand dollars, land worth five thousand, and which he had instructed his agent to purchase for him. The court held that he could recover the difference, such damages not being remote or conjectural. It appeared also in this case, that another person had also sent a message instructing the same agent to buy the same property for him. If both messages had been transmitted without delay, the latter message would have reached the agent first and A would have lost the opportunity to secure the property. It was held that this afforded no defense to the company.

Where the telegram which the company fails to send contains an acceptance of an offer to buy from plaintiff certain cotton, and also to purchase for his account certain contracts for future delivery, losses which would have been sustained on the latter purchases must be deducted from the amount of the damage from the loss of the contract to sell; nor can plaintiff extend from month to month on a falling market his contract of sale, and recover the loss from the company; he must make an effort to sell. *Western Union Tel. Co. v. Way*, 83 Ala. 542.

In *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122, an order sent by telegraph from plaintiff to his factors to purchase five thousand bales of cotton was made, through an erroneous transmission, to read "twenty-five thousand bales." Immediately on dis-

covering the mistake, the telegraph company notified the factors. It was held that it was the duty of the plaintiffs, on ascertaining the mistake, to notify the company that it would be held responsible.

**1. Expected Profits from a Resale Not Recoverable.**—Such profits are entirely too contingent and conjectural to come within the recognition of the law. *Western Union Tel. Co. v. Graham*, 1 Colo. 230; 9 Am. Rep. 136; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Western Union Tel. Co. v. Hall*, 124 U. S. 444; 21 Am. & Eng. Corp. Cas. 211; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157.

**2. Where There is a Delay Merely.**—The measure of damages for a failure to properly deliver a message containing on its face an instruction to buy certain stock, which in consequence was not bought until twenty-four hours later, is the difference between the market value of the stock when the message should have been received and that when it was actually received. *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; 35 Am. & Eng. Corp. Cas. 31; 21 Am. St. Rep. 662, *aff'g* 44 Hun (N. Y.) 532.

**3. Western Union Tel. Co. v. Blanchard**, 68 Ga. 299; 45 Am. Rep. 480; U. S. Tel. Co. v. Wenger, 55 Pa. St. 262; 93 Am. Dec. 751.

In *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263; 4 Am. Rep. 673, the plaintiff sent a message instructing his broker to "buy five Hudson," which the company erroneously transmitted so as to read "buy five hundred." Learning of the error, the plaintiff immediately telegraphed to his broker, but owing to the delay, plaintiff lost, by the advance in the price of the stock ordered, thirteen hundred dollars. It was held that he was entitled to recover this sum. Likewise in the case of *Marr v. Western Union Tel. Co.*, 85 Tenn. 529; 16 Am. & Eng. Corp. Cas. 243, the plaintiff ordered by wire the purchase of one thousand shares of stock, but the message as transmitted

however, to show an actual loss; the courts will not presume that a loss has occurred merely from the fact of the negligence of the company.<sup>1</sup>

Other instances of liability for mistake or delay in transmitting messages concerning contemplated sales are found in the reported cases. Thus, where the company erroneously transmits an order for goods so that more goods are sent than the original order called for, it is responsible to the party suffering a loss thereby,<sup>2</sup> though in such cases the injured party is bound to use reasonable diligence in order to render the injury as light as possible.<sup>3</sup> So where the negligence of the company in transmitting such an order causes the goods to be sent to the wrong place, it is liable to the party injured, and the measure of damages is the difference be-

called for only one hundred shares. He knew of the error the day after the one hundred shares had been purchased, but did not renew his order until several days afterwards, the stock having meanwhile advanced in price. It was held that he could recover for the advance in the price of nine hundred shares up to the time he became aware of the mistake, but not for the advance occurring after that. See also *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; 20 Am. Rep. 605.

1. **Plaintiff Must Prove Loss.**—*Pennington v. Western Union Tel. Co.*, 67 Iowa 631; 8 Am. & Eng. Corp. Cas. 115; 56 Am. Rep. 367.

The sender cannot recover of the company for the alleged loss of a bargain caused by its negligence in failing to transmit a message ordering goods, if there is no evidence that the goods could or would have been shipped if the message had been promptly sent. *Meggett v. Western Union Tel. Co.*, 69 Miss. 198. See also *Levy v. Western Union Tel. Co.*, 35 Mo. App. 170.

2. **Where Negligent Transmission Causes Excess of Goods to be Sent to Purchaser.**—The measure of plaintiff's recovery in such a case is the difference between the market values of the excess at the place of shipment and that at the place to which they were sent, together with the expense of transportation. *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446. See also *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

In *Bowen v. Lake Erie Tel. Co.* (Ohio, 1853), 1 Am. L. Reg. 685, the original message ordered one shawl, but as delivered it ordered one hundred. They were shipped back to their starting point, the vendee refusing to receive

them. The measure of damages recoverable by the shipper was held to be the freight on the shawls both ways, together with the depreciation in price during their absence.

In a similar case, the message ordered "one hand bouquet," and the company made it read "one hundred bouquets," mistaking the word "hand" for "hund." The bouquets were accordingly prepared, but were refused. The florist who had the perishable property on his hands was allowed to recover the expense of making up the bouquets as well as the price paid for the flowers of which they were composed. *New York, etc., Print. Tel. Co. v. Dryburgh*, 35 Pa. St. 298; 78 Am. Dec. 338.

In the case of *Elsey v. Postal Tel. Co.* (C. Pl.), 3 N. Y. Supp. 117, a party, wishing to order oysters from "P. Ellsworth," and being unable to recall the name exactly, sent a message addressed to "P. Elsey." The message, when received at the office of its destination, read "H. Elsey." The operator, finding no H. Elsey in the city directory, delivered the message to John Elsey, who forwarded the oysters. The sender, however, refused to receive them on the ground that his order was not intended for John Elsey, and the oysters, being spoiled, were lost. It was held that the telegraph company was liable for the value of the oysters and the cost of transportation.

3. See *supra*, this title, *Contributory Negligence*; *Western Union Tel. Co. v. Way*, 83 Ala. 542.

But in such cases, the party is not bound to transport the goods to a more favorable place of sale. *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446.

tween the price which would have been obtained, had the goods gone to the proper place, and the market value or best price which the party could obtain at the place to which they were actually sent.<sup>1</sup> But there can be no recovery for a loss of profits which were purely speculative and contingent, particularly where the transaction bears a taint of gambling. The bargain prevented must have been free from such a taint,<sup>2</sup> and the profits anticipated therefrom must have been certain and not conjectural.<sup>3</sup> Nor can there be a recovery of any damages which fail to come within the rule that they must be such as were in contemplation of the parties at the time the contract of sending was made.<sup>4</sup>

*f.* **LOSS OF EXPECTED EMPLOYMENT OR OF PROFESSIONAL FEES.**—Where the negligence of the telegraph company in failing to promptly deliver a message, causes the complainant to lose a situation or employment, he is entitled to recover of the

1. **Goods Sent to Wrong Place.**—*Western Union Tel. Co. v. Reid*, 83 Ga. 401; *Western Union Tel. Co. v. Stevens* (Tex. 1891), 16 S. W. Rep. 1095.

2. **Bargain Prevented Must not Have Been Immoral or Purely Speculative.**—See *supra*, this title, *Immoral Messages—Gambling Transactions*; *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300; 21 Am. & Eng. Corp. Cas. 124; 6 Am. St. Rep. 590; *Kiley v. Western Union Tel. Co.*, 39 Hun (N. Y.) 158; *Reliance Lumber Co. v. Western Union Tel. Co.*, 57 Tex. 395; 44 Am. Rep. 620.

Thus when the message ordered the sale of two hundred shares of the stock of a certain company, and the telegraph company failed to deliver it to the vendors for several days after it should have been delivered, and the plaintiff did not in fact own any stock in said company, and no transaction was made, he is not entitled to recover the difference between the market value of said stock on the day when the telegram should have been delivered and the day when it was actually delivered. *Cahn v. Western Union Tel. Co.*, 46 Fed. Rep. 40; *aff'd* 48 Fed. Rep. 810; 39 Am. & Eng. Corp. Cas. 522.

3. **Loss of Opportunity to make a Lucrative Speculation.**—In *Western Union Tel. Co. v. Hall*, 124 U. S. 444; 21 Am. & Eng. Corp. Cas. 211, it appeared that the plaintiff sent a message by the telegraph company to an agent instructing him to buy on his (plaintiff's) behalf ten thousand barrels of petroleum. Petroleum was selling on the exchange at \$1.17 per barrel at the time when the addressee ought to have received the message, and the evidence showed that

the agent would have bought at that figure. But the telegram having been delayed through the negligence of the defendant company and the price having advanced to \$1.35 per barrel at the time of receipt of the message, the agent did not buy. The plaintiff brought action to recover the difference in the prices of the oil, claiming that but for the defendant's negligence he would have made that sum. The court held that he could not recover anything more than the price of transmission. The damages were purely speculative; had the oil been purchased in time plaintiff might possibly have resold next day at the same price or might have held it until the price had decreased. The court recognized that the case is different where the message is erroneously transmitted, and the plaintiff, acting on the faith of it, incurs expense and trouble. See also *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 8 Am. & Eng. Corp. Cas. 15; 4 Am. St. Rep. 126.

4. **Damages Must Have Been in Contemplation of Parties.**—In *Beaupré v. Pacific, etc., Tel. Co.*, 21 Minn. 155, the plaintiffs, merchants in S, wrote to R, a wholesale dealer in pork, asking whether he had a certain kind of pork, and the price of it. R replied by wire, acknowledging the receipt of letter and saying he had a certain grade of pork. On receiving this dispatch, the plaintiffs, on July 15th, delivered to the defendant company at S, about six o'clock p. m., the following message addressed to R, with a request to forward it without delay: "Dispatch received. Will take two hundred extra mess, price named." The transmission of the message was delayed, and the price

company the actual damage sustained by him in consequence of the loss. The exact amount of the recovery will of course depend upon the circumstances involved, the character of the employment, etc.<sup>1</sup> The recovery will be limited to such damages as have accrued before the institution of the action.<sup>2</sup> The same right of recovery exists where a contractor loses, through the negligence of the company, the opportunity to secure a valuable contract.<sup>3</sup> And where a professional man, through the negligence of the company, loses a fee, which he would otherwise have secured, by being deprived of the opportunity of attending a patient or client in a professional capacity, he may recover the actual damages sustained.<sup>4</sup> But the general rule already stated applies here as well as in other cases,

of pork advanced; plaintiffs bought at an advanced price. It was held that they could not recover for such loss.

1. **Loss of Situation.**—In *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57, through the negligence of the company, the plaintiff failed to obtain a salaried position. It was held that he could recover the difference between the amount of such salary and the amount actually earned by him. Owing to the company's failure to deliver a message, the plaintiff claimed that he was thrown out of employment in which he could have made two dollars per day. The court properly granted an instruction that plaintiff's damages would be two dollars per day from date of sending the message to the institution of the suit, excluding Sundays, and deducting such amount as he had earned or might have earned by reasonable diligence in seeking other work. *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 133. (The action was under the statute providing for the recovery of special damages, Rev. Stat. *Indiana*, § 4177.)

See similar cases in *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661; 30 Am. & Eng. Corp. Cas. 607; *Wolfskehl v. Western Union Tel. Co.*, 46 Hun (N. Y.) 542. Compare *Merrill v. Western Union Tel. Co.*, 78 Me. 97 (nominal damages only allowed where plaintiff lost opportunity to work by the day for an uncertain period).

2. *Uline v. New York Cent., etc.*, R. Co., 101 N. Y. 98; 23 Am. & Eng. R. Cas. 3; 54 Am. Rep. 661; *DAMAGES*, vol. 5, p. 17; *STREET RAILWAYS*, vol. 23, p. 940. See also *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; 21 Am. & Eng. Corp. Cas. 133.

3. Plaintiffs were threshers and their agent at V. wired them, "Have 30,000 bushels for you, if you can come at once." Plaintiffs answered, "Will ship machinery at once." This latter message was not delivered and the parties for whom the threshing was to be done, not knowing that the offer was accepted, employed other contractors. It was held that the company was liable, although there was no delay in getting the machinery to V.; that complainant, being able to show the amount of grain to be threshed and the rate of toll per bushel contracted for, the damages claimed could not be considered contingent, uncertain, or speculative. *Western Union Tel. Co. v. Bowen*, 84 Tex. 476.

The company's agent by whom the first message in the above case was received and to whom the second was delivered for transmission, testified that she knew at the time that plaintiffs owned and operated a threshing machine. The company were therefore precluded from complaining that the damages resulting from the loss of the contracts were not in contemplation of the parties when the contract of sending was made. *Western Union Tel. Co. v. Bowen*, 84 Tex. 476.

4. **Loss of Fees.**—In *Western Union Tel. Co. v. Longwill* (N. Mex. 1889), 21 Pac. Rep. 339; 25 Am. & Eng. Corp. Cas. 565, the plaintiff, a physician, was telegraphed for to attend to a gunshot wound; the message was delivered too late to enable him to respond to the call. There was evidence to show that a reasonable fee for the operation to be performed was five hundred dollars; the parties sending were shown to be solvent. It was held that the case came within the rule of *Griffin v. Col-*

and if it appears that the company had no information, from the face of the message or otherwise, of the consequences which would follow an incorrect transmission or a delayed delivery, only nominal damages are recoverable.<sup>1</sup>

**g. LOSSES WHICH MIGHT HAVE BEEN PREVENTED BUT FOR THE NEGLIGENCE OF THE COMPANY.**—The rule of damages includes not only "gains prevented," but also "losses sustained." Wherever a party sustains a loss which he could and would have prevented but for the negligence of the company, he is entitled to hold the company responsible for it.<sup>2</sup> But in all such cases he must be able to show that the loss would have been prevented;<sup>3</sup> therefore, where the action is for a failure to deliver a message summoning a physician to see plaintiff's wife, the plaintiff cannot recover for a loss of his wife's services, there being no evidence to show that the arrival of the physician would have saved her life.<sup>4</sup> Where a party telegraphs to his attorney to attach the property of a certain debtor, and through the company's negligence in delaying the message, the property is attached by other creditors and the debt is thereby lost, the company can be held responsible for the amount of the debt together with interest thereon to the date of the trial of the action.<sup>5</sup> So where the company's agent, in order to secure himself and others, will-

ver, 16 N. Y. 489; 69 Am. Dec. 718, allowing damages for "gains prevented;" that the plaintiff should recover five hundred dollars, less the amount he made at home during the time he would have been away.

A cable message for a ship broker in Savannah was delayed one hour and a half after reaching that city, when it should have been delivered in five minutes. Because of the delay the broker lost a commission of \$500. *Held*, that the company was liable therefor. *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877.

1. In *Western Union Tel. Co. v. Clifton*, 68 Miss. 307, a party in W. telegraphed to his attorney to meet him at that place to arrange an assignment. The attorney replied by wire that he would come immediately, but the agent failed to deliver this latter message and the party secured a local attorney, so that when plaintiff arrived his services were not needed. The only information the company had of the circumstances was from the message, which read: "Send Eckford on first train. Am here. Answer," and the reply to the effect that he (Eckford) would come at once. It was held that no more than nominal damages were recoverable. See *Clay v. Western Un-*

*ion Tel. Co.*, 81 Ga. 285 (message asking undertaker to meet remains at a train, not delivered, whereby undertaker lost the fees). See also *Vicksburgh, etc., R. Co. v. Ragsdale*, 46 Miss. 458.

2. See *Bodkin v. Western Union Tel. Co.*, 31 Fed. Rep. 134; 21 Am. & Eng. Corp. Cas. 202.

3. *Cutts v. Western Union Tel. Co.*, 71 Wis. 46; 21 Am. & Eng. Corp. Cas. 199; *Western Union Tel. Co. v. Hall*, 124 U. S. 444; 21 Am. & Eng. Corp. Cas. 211. See also *Western Union Tel. Co. v. Cornwall*, 2 Colo. App. 491.

4. *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257, so where the message is one calling a physician, and the company fails to deliver it, it is for the jury to say whether the patient to whom he was called was injured by the delay, and whether the result would have been different had the dispatch been delivered. *Brown v. Western Union Tel. Co.* (Utah, 1890), 21 Pac. Rep. 988.

5. **Loss of Opportunity to Attach Property to Save Debt.**—*Parks v. Alta, etc., Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; 10 Am. St. Rep. 790 (message read: "You had better come and attend to your claim at once"); *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575.

fully withholds a message to a branch bank, announcing the assignment of its principal, until some time after the bank has opened, the company is liable for all money paid out by the bank between the time when the message should have been delivered and the time when it was actually delivered.<sup>1</sup> And if the company, by an erroneous transmission, cause a party to undergo useless expense and trouble, it is liable therefor.<sup>2</sup>

*h. RECOVERY FOR MENTAL ANGUISH.*—Until a recent date it has been a recognized rule of law that mental anguish and suffering, alone and unaccompanied by actual pecuniary damage or personal injury, could not afford a ground for the maintenance of an action, or be considered as an element of damages, even though the negligence or wrongful act of the defendant were established.<sup>3</sup> Isolated exceptions to this rule were allowed in case of breach of promise suits and in cases where the injury was willful or malicious.<sup>4</sup> But the courts of *Texas*, following the suggestion made

1. *Stiles v. Western Union Tel. Co.* (Arizona, 1887), 15 Pac. Rep. 712. In this case a banker made an assignment, and the assignee telegraphed notice thereof to a branch establishment. In the assignee's suit against the telegraph company to recover for damages caused by delay in sending this message, it appeared that it was received at the office in the town of the branch establishment after nine at night and delivered an hour later than it should have been the next morning, and that money was paid out which, had the message been received, should have been withheld. It was held that the company was liable for money thus lost, but not for money paid out after the delivery of the message.

2. In *Wolfskehl v. Western Union Tel. Co.*, 46 Hun (N. Y.) 542, a party who was applying for a certain situation, having received a message in which the word "not" had been negligently omitted, was induced to believe that the sender desired to employ him and so incurred much expense, loss of time, etc., in further efforts to secure the situation. It was held that he could recover compensation for such loss, in an action against the company.

3. **General Rule as to Damages for Mental Suffering.**—Indianapolis, etc., *R. Co. v. Stables*, 62 Ill. 313; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; *Bovee v. Danville*, 53 Vt. 190; *DAMAGES*, vol. 5, p. 42; *Lynch v. Knight*, 9 H. L. Cas. 577.

In an action for damages for the death of a relative, damages are invari-

ably restricted to pecuniary loss; the consideration of the plaintiff's mental suffering is excluded in every instance, with a few exceptions, which depend upon the peculiar language of the statute. See *DAMAGES*, vol. 5, p. 45; *DEATH*, vol. 5, p. 128; *RAILROADS*, vol. 19, p. 942.

4. An exception to the general rule was made in cases of actions of breach of promise. But while the damages are denominated compensatory, it may well be questioned whether they are not rather punitive. The fact that evidence of the defendant's wealth is admissible and that defendant may give in evidence the motive from which he refused to consummate the contract, shows how shadowy is the line which separates such damages from those which are purely punitive. See *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300; *Harrison v. Swift*, 13 Allen (Mass.) 144; *Kurtz v. Frank*, 76 Ind. 594; 40 Am. Rep. 275; *Thorn v. Knapp*, 42 N. Y. 474; 1 Am. Rep. 561; *Johnson v. Jenkins*, 24 N. Y. 252.

Another exception is said to be made in cases of slander or libel; but in such cases, malice and willful wrong are essential elements, and the ordinary rules of damages for negligent injury do not apply to cases of willful wrong. Moreover, special damage must always be shown except where, from the nature and character of the libel, the law conclusively presumes actual damage. See *LIBEL AND SLANDER*, vol. 13, p. 445; *NEGLIGENCE*, vol. 16, pp. 393, 435; *Chapman v. Western Union Tel. Co.*,

by a leading text writer,<sup>1</sup> have adopted and steadily adhered to a rule by which a party who has undergone mental suffering in consequence of the negligence of a telegraph company, may recover compensatory damages, although he has sustained no other injury.<sup>2</sup> And this rule has been followed to a greater or less extent

88 Ga. 763; 39 Am. & Eng. Corp. Cas. 567.

1. In *Shear. & Red. on Neg.* (4th ed.), § 605, it is said that "in case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages." This passage has no authority to sustain it, but it has been quoted in almost every case upholding a similar rule. The cases of *Phillips v. Hoyle*, 4 Gray (Mass.) 568, and *Roberts v. Graham*, 6 Wall. (U. S.) 578, were also relied on.

2. **Rule Adopted in Texas.**—So *Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 563; 12 Am. & Eng. R. Cas. 90; 46 Am. Rep. 278; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623; *Loper v. Western Union Tel. Co.*, 70 Tex. 689; 21 Am. & Eng. Corp. Cas. 191; 6 Am. St. Rep. 864; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *aff'd* 20 S. W. Rep. 47; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 15 Am. St. Rep. 843; *Western Union Tel. Co. v. Brown*, 71 Tex. 723; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; *Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649; *Western Union Tel. Co. v. Lydon*, 82 Tex. 364; *Western Union Tel. Co. v. Nations*, 82 Tex. 539; *Western Union Tel. Co. v. Erwin* (Tex. 1892), 19 S. W. Rep. 1002; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; 35 Am. & Eng. Corp. Cas. 77; *Western Union Tel. Co. v. Berniger*, 84 Tex. 38; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624

(interment of plaintiff's relative delayed twenty-four hours through delay in delivering message).

"The law will not permit anyone to impose with impunity upon another, by his willful default or neglect, such injury to his feelings as is the natural result from the disappointment shown by the allegations of the appellant's petition, and then protect himself under the plea *damnum absque injuria*. Injury to the feelings, resulting from such disappointment, in our opinion, constitutes general damages, recoverable under a general averment of damage." So *Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805.

In *Gulf, etc., R. Co. v. Levy*, 59 Tex. 563; 12 Am. & Eng. R. Cas. 90; 46 Am. Rep. 278, this telegram was sent to the plaintiff by his son: "Betty and baby dead. Come to Cleburn to-night train to my help. Wade meet you. Tell her mother." The company negligently failed to deliver it for more than a whole day, so that it was received too late, and the complainant was subjected to much annoyance and mental suffering. The complainant's right to recover was denied, and the opinion of the court constitutes a vigorous argument in favor of the old rule of law that mental suffering could not be considered except when accompanied with physical injury or actual damage. The *So Relle* case was overruled, the court saying, "The opinion in that case does seem to maintain the proposition necessary to sustain this action, but we are of the opinion that it cannot be sustained upon principle nor upon the authority of the adjudicated cases." The doctrine of this *Levy* case, however, is repudiated in a subsequent case. *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623, though the case is not overruled outright, but merely "explained" and "distinguished," principally on the ground that in the *Levy* case the action was by the addressee. "In that case the company had no contract with *Levy*; had broken no engagement with him, nor violated any contract it had made with



in several other states.<sup>1</sup> The messages involved in the cases sustaining this rule, are almost invariably those announcing the serious illness, or the death of a relative, or some similar circumstance,<sup>2</sup> and the courts proceed on the ground that since the

any one else for his benefit. It owed him no duty and violated no right of his, and though its conduct may have outraged his sensibilities, it had done him no wrong." *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623. But in the *Stuart* case, the action was by the addressee, and it seems that the two cases are entirely irreconcilable, notwithstanding the explanations of the learned court; the *Levy* case must therefore be regarded as overruled, and the original doctrine of the *So Relle* case established. There is a second case having the style of *Gulf*, etc., *R. Co. v. Levy*, 59 Tex. 542; 12 Am. & Eng. R. Cas. 96; 46 Am. Rep. 278, in which the action was by the sender, the son of the addressee who was plaintiff in the first case. Recovery was allowed in this second case and the two are thus apt to be confused.

In *Loper v. Western Union Tel. Co.*, 70 Tex. 689; 21 Am. & Eng. Corp. Cas. 191; 6 Am. St. Rep. 864, the plaintiff, suing in behalf of his wife, proved that her son, being dangerously ill, sent her a message: "Come immediately. I am very sick," and caused the agent to be informed of his relationship to the addressee. The message was negligently delayed for more than twenty-four hours after it should have been delivered. Plaintiff's wife immediately on receiving the message started to her son, but on reaching an intermediate station was informed of his death and that his body had been sent to E. for burial. She attempted to go to E., but was subjected to hardships on the way and arrived there after the funeral. The court held that plaintiff had a right to damages, and the fact that much of the mental anguish of the wife could have been averted but for the negligence of the railroad company in operating its trains, was no excuse for the breach of duty on the part of the telegraph company.

1. In *Kentucky, Tennessee, Indiana and Alabama*.—In *Kentucky, Tennessee and Indiana*, the *Texas* rule seems to have been adopted to its fullest extent. *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; 30 Am. & Eng. Corp. Cas. 626; *Wadsworth v. Western Union*

*Tel. Co.*, 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Western Union Tel. Co. v. Stratemeier* (Ind. App. 1892), 32 N. E. Rep. 871.

"If in matters of mere trade it (the company) negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that as to matters of a greater interest to a person, it shall not be, because feelings or affections only are involved? . . . Such a rule, at first blush, merits disapproval. It would sanction the company in wrong doing. . . . It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it should be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it." *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; 30 Am. & Eng. Corp. Cas. 626.

In *Alabama*, the question has never been considered at length, but in *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148, it was ruled that damages for mental suffering might be recovered, provided the complainant had an independent right of action. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32.

In *Illinois*, the doctrine is laid down that "nominal damages at least," are recoverable in such cases, but it is nowhere intimated that mental suffering can alone constitute the basis of an action for substantial damages. *Logan v. Western Union Tel. Co.*, 84 Ill. 468. The message in this case was by a father, the plaintiff, to his son, summoning him to the death bed of his mother.

2. *Character of Cases in which Such Damages are Allowed*.—As a matter of fact, every breach of contract for transmission, occasions some degree of mental suffering in the way of annoyance to the disappointed party; but the re-

covery of such damages has been restricted to cases where the message related to the death, burial or serious illness of a relative, or to some similar circumstance. Thus in *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181, the message was: "Dell is worse, come at once." Owing to the company's negligence, the dispatch was delayed and the addressee was prevented from being at the bedside of his dying wife. In *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623, the message was: "John is very low, come on first train." It was delayed two days and the addressee was deprived of the privilege of being with his brother when he died, and of attending his funeral. Very similar cases are *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; 30 Am. & Eng. Corp. Cas. 626; *Loper v. Western Union Tel. Co.*, 70 Tex. 689; 21 Am. & Eng. Corp. Cas. 191; 6 Am. St. Rep. 864 (two messages, one informing sister of her brother's illness, another of his death); *Young v. Western Union Tel. Co.*, 107 N. Car. 370; 35 Am. & Eng. Corp. Cas. 60; 22 Am. St. Rep. 883 ("Come in haste, your wife is at the point of death"); *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739; 21 Am. & Eng. Corp. Cas. 80. In other cases, damages have been allowed where the plaintiff was merely kept away from the funeral of his relative. So *Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805; *Western Union Tel. Co. v. Erwin* (Tex. 1892), 19 S. W. Rep. 1002; *Western Union Tel. Co. v. Nations*, 82 Tex. 539 (message announcing death). Compare *Western Union Tel. Co. v. Brown*, 71 Tex. 723. In *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843, the dispatch sent by plaintiff to his brother-in-law read: "Mrs. Broesche dead, will bring corpse on train to-night." It was delayed for some time, so that the addressee did not receive it until after the arrival of the corpse. One thousand, one hundred and sixty-eight dollars were allowed by the court as a balm to soothe the wounded feelings of the plaintiff. But in another case, it is said that the fact that the funeral of plaintiff's mother took place in his absence, does not entitle him to recover for a delay by the company of six hours in delivering a message to those in charge of the funeral, announcing that plaintiff would be there that evening, where the message was actually delivered before the burial

took place and where those in charge knew that it was impossible for plaintiff under any circumstances to arrive until several hours after the time of burial. *Western Union Tel. Co. v. Andrews*, 78 Tex. 305.

In other cases the message was one requesting the immediate presence of a physician. Thus in *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148, the plaintiff telegraphed to his physician, "Come first train to see my wife. Very low." Owing to a delay by the company the physician came twelve hours later than he would otherwise have done; he could not say whether his arrival earlier would have saved the plaintiff's wife. It was held that in computing the damages, the increase of the plaintiff's mental suffering caused by the delay in the physician's arrival, should be considered.

In *North Carolina*, in *Young v. Western Union Tel. Co.*, 107 N. Car. 370; 35 Am. & Eng. Corp. Cas. 60; 22 Am. St. Rep. 883, it appeared that this message was sent to the plaintiff: "Come in haste; your wife is at the point of death." The company delayed delivering it for eight days, although the addressee's place of business was well known and within a short distance of the company's office; as a consequence of the delay, plaintiff, the addressee, was prevented from being at his wife's bedside when she died and from attending her funeral. The court held that the evidence showed gross negligence on the part of the company, and that the plaintiff was entitled to damages for the agony of mind occasioned by his being kept away from his wife's death bed and burial. The opinion discusses the question at length, and quotes from the cases; it concludes: "It seems to us that this action is in reality in the nature of a tort for the negligence, and that, as is usually the case in such actions, the plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damage done him, and that mental anguish is actual damage. It is very truthfully and appropriately remarked by a learned author that 'the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act recipro-

message bore on its face evidence that a failure or delay to deliver it would cause mental distress and anguish, damages arising from such a cause must have been in contemplation of the parties at the time the contract of sending was made.<sup>1</sup> It is considered that by virtue of the negligent breach of contract to which the plaintiff was a party, or by virtue of the statutes declaring the duties of telegraph companies, the plaintiff has a cause of action; and having thus secured a standing in court, he is entitled to have damages assessed for all the injury suffered by him as a proximate consequence of the defendant's wrongful act.<sup>2</sup> But the correctness of this general rule of law is at least doubtful, and has led to such an abnormal increase in litigation and to so

cally on the other.' 3 *Suth. on Dam.* 260."

Various cases were relied on as upholding, by analogy, the rule applied. *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420 (action for libel); *Fisher v. Hamilton*, 49 Ind. 341 (action for malicious arrest and prosecution); *Stewart v. Maddox*, 63 Ind. 51 (false imprisonment); *Byrne v. Gardner*, 33 La. Ann. 6 (action for illegally suing and attachment); *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657 (female passenger kissed by railroad official—damages allowed); 3 *Suth. on Dam.* 259; *Scott & Jar. on Telegraphs*, § 418.

In another case damages for mental suffering were allowed, but there was actual physical suffering involved. *Thompson v. Western Union Tel. Co.*, 106 N. Car. 549; 30 Am. & Eng. Corp. Cas. 634; 107 N. Car. 449; 35 Am. & Eng. Corp. Cas. 53.

**Evidence of Mental Suffering.**—"The natural utterances and expressions indicative of pleasure, displeasure, pain or suffering, are competent original evidence that may be received in proof of the physical or mental state they indicate, whenever that state is a pertinent inquiry. *Wood Pr. Ev.*, § 147." *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148. See also 1 *Greenleaf on Ev.* (14th ed.), § 102; *Western Union Tel. Co. v. Lydon*, 82 Tex. 364 (evidence that plaintiff was favorite son of his dead mother, admitted); *infra*, this title, *Evidence*. Conduct of plaintiff's wife showing grief at being unable to attend her father's funeral, may be shown by bystanders as evidence of damage by mental suffering. *Western Union Tel. Co. v. Carter* (Tex. App. 1892), 20 S. W. Rep. 834.

#### 1. Basis of the Rule Allowing Recov-

ery.—So *Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805; *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

2. Thus in *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; 30 Am. & Eng. Corp. Cas. 628, the court, by Holt, J., said: "If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is liable for some damage. It has violated its contract; and, whenever a party does so, he is liable, at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled in such a case to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary."

And in *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864, the allowance of such damages was put upon the ground, that the statute declaring the duties of telegraph companies and making them "liable in damages to the party aggrieved," conferred a right of action and the plaintiff thus having a standing in court, might have all the injury suffered by him considered in the computation of damages.

In *Alabama*, in a similar case, damages for mental anguish were allowed in an action by the sender, on the ground that he had an "independent right of recovery, to which distress of feeling can become an aggravating incident." It is clearly implied that an addressee would, in such case, have no

many inconsistencies that the courts are not inclined to extend its operation.<sup>1</sup> Thus it is required in every case that the dispatch shall have shown on its face its character and importance, or that the company shall have been otherwise informed of the results likely to flow from an incorrect transmission or delayed delivery,<sup>2</sup> though it is not necessary that the relationship of the parties should appear.<sup>3</sup> So also the injury suffered, and for which

right of action. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 623; 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Wilson*, 93 Ala. 32. See also *Thompson on Electricity*, § 381, where such distinctions as are made in these cases are considered unsound.

In *Reese v. Western Union Tel. Co.*, 123 Ind. 294, the court, by Berkshire, J., said: "Some of the authorities seek to draw a distinction as to the right to recover damages for mental suffering between cases where there may be a recovery for pecuniary loss and cases where there is or can be no pecuniary loss, to which class the present action belongs."

**Are not Punitive or Exemplary.**—It must be observed that the damages given in these cases are given as compensatory, and not by way of punishment to the negligent company. In several cases allowing damages for mental anxiety, it was expressly held that punitive damages were not recoverable, no malice or willful wrong being shown. See *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623. Compare *Scott & Jar. on Telegraphs*, § 418; *EXEMPLARY DAMAGES*, vol. 7, p. 448.

1. The great increase in the number of cases of this character in *Texas* has been the subject of frequent comment; and as seen from the cases examined herein, the courts have been under the necessity of more than once making distinctions of the most refined character in order to avoid a hurtful extension of their doctrine. See *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300; *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195.

2. **Dispatch Must Show on its Face the Importance of its Being Sent Promptly.**—In *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195, it appeared that the plaintiff sent a message addressed to his father at E., directing the family carriage to be

sent to P. to meet him in order to convey him to his father's house, he having been informed that his father was sick. It turned out that there was no office at E., so the dispatch was never delivered, and plaintiff after waiting six days was obliged to go to his father by a circuitous route in a most uncomfortable conveyance. He claimed to have suffered much mental anguish, fearing that his father was seriously ill, if not dead. The court refused to allow any damages on the ground that the company had no means of knowing and no reason for suspecting that such consequence would follow a delay or failure to deliver the message. See also *infra*, this title, *Where Message is in Cipher or is Otherwise Unintelligible*; *Shear. & Red. on Neg.* (4th ed.), § 605; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423. In this case the plaintiff, Mrs. Simpson, having been informed of the death of her husband in San Francisco, sent a message from Los Angeles, where she then was, to her agent C. in Galveston, *Texas*, at 4 o'clock on January 12th, telling him of her husband's death, and requesting him to send her two hundred dollars immediately; that she would remain at L. A. until 2 p. m. the next day. The company transmitted the message promptly, but as delivered to C. it purported to come from San Francisco. C. thereupon sent the money by telegraph to San Francisco, but upon hearing from Mrs. S. that she had not received it, sent her more money by express, which she received on the 14th and in time to leave Los Angeles with her husband's body. She averred that the delay in receiving the money prevented her from going to San Francisco, and caused her to suffer much anguish of mind. A verdict of one thousand dollars in her favor was not disturbed.

3. It is sufficient if the company is put on inquiry, and the message shows from its language the necessity of its prompt transmission. "To require the family pedigree to be inserted in telegrams announcing serious illness or

compensation is given, must be real, not imaginary, and not the result of a too sensitive and excitable mental constitution, nor of a distorted imagination.<sup>1</sup> And it is the duty of the court, upon request, to caution the jury that the damages are to be confined to the injury directly resulting from the company's breach of duty, and that the plaintiff's mental anguish occasioned by other inde-

death, would deprive the greater part of the public of the benefits of telegraphy" and only serve "to increase the revenue of the company." Therefore, where the telegram was "Emma died last night; will be buried this evening," the court held that the company could not escape liability merely because the message failed to show that the plaintiff was a near relative of Emma. *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; 35 Am. & Eng. Corp. Cas. 77. So where the message ran "Clara, come quick, Rufe is dying," it was held that the plaintiff was not barred from recovery although the message did not indicate that the parties interested were brother and sister; the message was sufficient to inform the company that prompt transmission and delivery were necessary. *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 30 Am. & Eng. Corp. Cas. 594; 16 Am. St. Rep. 920. See the same principle upheld in *Potts v. Western Union Tel. Co.*, 82 Tex. 545; *Western Union Tel. Co. v. Nations*, 82 Tex. 539; *Western Union Tel. Co. v. Moore*, 76 Tex. 66; 18 Am. St. Rep. 25; *Western Union Tel. Co. v. Carter* (Tex. 1892), 20 S. W. Rep. 834 ("G. is dead, answer"); *Western Union Tel. Co. v. Feegles*, 75 Tex. 537. See also *Reese v. Western Union Tel. Co.*, 123 Ind. 294, where message read "My wife is very ill; not expected to live," it was held that the company was not released from liability merely because the relationship of the addressee to the wife spoken of was not apparent.

But in *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37, where a message was addressed by a wife to her husband requesting him to come with "Ferdinand" to her father who was very low, and the company negligently delayed its transmission and delivery, it was held that the company was not liable to the husband in damages for the mental suffering occasioned to the wife in the absence of other notice than that contained in the message itself that the parties were related. The message read: "C. S. Kirkpatrick, H. Station: Come on first train;

bring Ferdinand. His father very low." Signed, "J. L." And in *Western Union Tel. Co. v. Brown*, 71 Tex. 723, it was held in an action by the addressee for delay in delivering this message: "Willie died yesterday evening at six o'clock; will be buried at M. Sunday evening," that damages cannot be recovered for injury to fraternal feelings from failure to hear of his brother's death in time to attend the funeral and condole with his sister, as the message contained nothing to put defendant on notice that the deceased was plaintiff's brother.

**1. Suffering Must Not Be Merely Sentimental or Imaginary.**—In *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195, a case set out in the note immediately preceding, the court, by Maltbie, J., said: "In this case it seems that the plaintiff's mental anguish was not the result of any real or adequate cause. It does not appear that the father was dead or in such condition as demanded the personal presence or attention of his son. On the contrary, the sorrows of the plaintiff were imaginary, and were caused by the failure on the part of the father to send the carriage to P., which the affectionate son attributed to the fact that the father was dead, or too dangerously ill to attend to ordinary business, when in truth the failure was due solely to the fact that no request to send the carriage had been sent. The deduction of the son was not logical, or, at all events, the occurrence might have been well accounted for on other hypotheses than the disability of the father. If grief or sorrow, produced by things unreal, mere figments of the brain, are held to give a cause of action for a breach of a contract or a tort, an individual of a somber, gloomy imagination would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy, for the same breach of duty would not be entitled to anything; and damages, instead of being measured by the rules of law as applied to the facts, would largely depend upon the fertility of the imagination of the suitor." It seems

pendent circumstances, *e. g.*, the death or illness of a relative, cannot be considered.<sup>1</sup>

A rule that is more consistent with recognized legal principles and that is supported by better authority, is that mental suffering, alone and unaccompanied by other injury, cannot sustain an action for damages or be considered as an element of damages. Anxiety of mind and mental torture are too refined and too vague in their nature to be the subject of pecuniary compensation in damages, except where, as in case of personal injury, they are so inseparably connected with the physical pain that they cannot be distinguished from it, and are therefore considered a part of it.<sup>2</sup>

Conspicuous instances under this latter rule are seen in cases where a message is sent to a physician requesting his immediate attendance, and, through the company's failure to transmit the dis-

that this language is a complete answer to any claim for damages for mental suffering and is a refutation of the arguments advanced in other cases in favor of the recovery of such damages.

1. In the first case allowing damages for mental suffering, *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805, in which the company's negligence prevented a son from attending the funeral of his mother, the court said: "It should be remarked that great caution ought to be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the default or neglect of the company; for it is only the latter for which a recovery may be had, and the attention of juries may well be called to the fact." And the necessity of this distinction has been considered so important, that the language quoted has been reiterated in many of the subsequent cases. See *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 543; 12 Am. & Eng. R. Cas. 96; 46 Am. Rep. 278; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772. So also, where the message is sent by a father to his physician, stating that his child is sick and requesting him to come at once, the recovery by the father must be limited to his own distress and mental suffering, and cannot include compensation for the death or sufferings of the child. *Gulf, etc., R. Co. v. Richardson*, 79 Tex. 649.

## 2. Doctrine that Damages Are Not Recoverable for Mental Anguish Alone.

—*Russell v. Western Union Tel. Co.*, 3 Dakota 315; 5 Am. & Eng. Corp. Cas. 218; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300; *Crawson v. Western Union Tel. Co.*, 47 Fed. Rep. 544; *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554; *West v. Western Union Tel. Co.*, 39 Kan. 93; 21 Am. & Eng. Corp. Cas. 185; 7 Am. St. Rep. 530; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; 39 Am. & Eng. Corp. Cas. 567; *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599; *Wymann v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; *Lynch v. Knight*, 9 H. L. Cas. 577; *Wood's Mayne on Dam.* 74; *Cooley on Torts*, p. 271; 2 *Thomp. on Neg.* 849. See also *Johnson v. Wells*, 6 Nev. 224; 3 Am. Rep. 245; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313. In *Wood's Mayne on Dam.*, p. 74, the author, after discussing the allowance of mental damages in particular cases, says: "But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the only injury is mental suffering, as might be thought from a reading of the loose dicta and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced." In the same connection Mr. Cooley says: "But in this country as well as in *England*, the

ground of recovery must be something besides an injury to the feelings and affections, or the loss of the pleasure and comfort of the society of the person killed. There must be a loss to the claimant that is capable of being measured by a pecuniary standard." Cooley on Torts, p. 271.

In *Russell v. Western Union Tel. Co.*, 3 Dakota 315; 5 Am. & Eng. Corp. Cas. 218, the message read: "Libby died last night; funeral tomorrow. Come. Answer quick." In consequence of the negligence of the telegraph company in failing to deliver this message, the plaintiff, to whom it was addressed, was prevented from attending the funeral of his sister. The court, in denying recovery, said by Hudson, J.: "No case can be found where a person has been allowed to recover damages for a shock, injury or outrage to the feelings and sensibilities arising from and caused by the breach of a contract, except it is a marriage contract. Such damages can enter into and become a part of the recovery when the plaintiff has sustained, by the negligence or willful act of another, some corporal or personal injury; they can never be recovered independently and alone, and, if recoverable at all, only in actions of tort. *Masters v. Warren*, 27 Conn. 293; *Stewart v. Ripon*, 38 Wis. 584." See also Civil Code of *Dakota*, section 1287.

In *West v. Western Union Tel. Co.*, 39 Kan. 93; 21 Am. & Eng. Corp. Cas. 190; 7 Am. St. Rep. 530, the delay in delivering the message announcing the death of plaintiff's mother, prevented plaintiff from attending the funeral. The court held that while mental anguish might constitute an element of damages in some cases, yet "in an action of this kind, we do not think that damages for mental anguish or suffering can be allowed. Such damages can only enter into and become part of the recovery, where the mental suffering is the natural legitimate and proximate consequence of the physical injury. *Salina v. Trosper*, 27 Kan. 544."

In *Crawson v. Western Union Tel. Co.*, 47 Fed. Rep. 544, the same doctrine was applied to a similar case. So in *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554.

In *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300, the plaintiff's mental suffering was caused by the negligence of the com-

pany's agent in failing to deliver a telegram informing him of the death of his brother, and of the time and place of burial, until after the last train by which plaintiff could have traveled to attend the funeral had left. Recovery was denied, no other damages being alleged or proven. The opinion of Cooper, J., constitutes a valuable discussion of the subject. It reviews the classes of cases in which mental suffering has been allowed to constitute an element of damage, and shows that they cannot be relied upon as authorizing such damages, when no other damage is shown. It also points out the inconsistencies and harmful results which have followed the adoption of a different rule. The opinion in the case of *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; 39 Am. & Eng. Corp. Cas. 567, is equally valuable and even more exhaustive. Every ground upon which the cases allowing such damages rest, is examined, and its inapplicability to the case under consideration, exposed. Referring to the ground that the plaintiff, having a right to nominal damages, may thus get into court and have all his injuries considered, it is said: "To speak of the right to nominal damages as a condition for giving substantial damages, is a palpable contradiction. To give nominal damages, necessarily denies any further recovery. . . . Throwing away the lame pretense of basing recovery for mental suffering upon an otherwise harmless transgression and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy. If mental suffering be a self-sufficient element of damage, as in reason it must be to recover when no other damage is claimed, why is not the causing of mental suffering itself, an infraction of a legal right? Why should the law of torts lag behind the law of damages? Can it do so in a sound system?" This case is of the more weight in that it was decided in the face of George's Code, section 3067, providing that "in some torts, the entire injury is to the peace, happiness or feelings of the plaintiff. In such cases, no measure of damages can be prescribed except the enlightened conscience of impartial jurors." It was considered that this section was intended merely to declare the existing law, and not to create new torts or

patch with diligence, the physician's arrival is delayed, and mental anxiety and physical suffering are occasioned to the plaintiff for whom his attendance was desired. It is apparent that the allowance of damages in such cases affords no support to the rule that mental suffering alone will authorize a recovery.<sup>1</sup>

*i. EXEMPLARY AND EXCESSIVE DAMAGES.*—Exemplary or vindictive damages are given by way of punishment to the wrongdoer and in excess of what is deemed a proper compensation to

to change the law of damages. *Central R., etc., Co. v. Kelly*, 58 Ga. 107; *Cox v. Richmond, etc., R. Co.*, 87 Ga. 747.

**Obligations to Rule Allowing Damages for Mental Suffering.**—The objections to the rule allowing damages for mental suffering are well exhibited in several *Texas* cases. Thus in *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195, it was insisted that the plaintiff's grief must be logical and not the result of "things unreal, mere figments of the brain." The fact that the amount of suffering, hence of damages, would vary with the character of plaintiff's mental make up, was also recognized. In *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, a distinction was drawn between the negligence of failing to deliver a dispatch which causes mental pain and suffering, and failing to deliver one which, if delivered, would relieve such suffering. The plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently, a dispatch was sent informing them of her mother's improved condition, which message the company failed to deliver. The court held that plaintiff could not recover for the anguish of mind which he and his wife suffered, and which the message would have relieved. The manifest effect of this decision is to deny to a party injured, redress for "mental sufferings contemplated by the parties to the contract, as a probable consequence of its breach;" and it is well said by Cooper, J., in reviewing this case in *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300, that "the distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of intolerable litigation flowing from previous decisions."

In *Gulf, etc., R. Co. v. Levy*, 59 Tex. 563; 12 Am. & Eng. R. Cas. 90; 46 Am. Rep. 278, the opposition to the

rule laid down in the *So Relle* case is shown to be overwhelming in point of both principle and authority; and this case, though it has been "distinguished," has never been overruled. See *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623.

*Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 21 Am. & Eng. Corp. Cas. 161; 6 Am. St. Rep. 864, is deprived of much of its weight by the fact that two of the five justices dissented, while a third justice concurred as special grounds. Lurton, J., delivered a dissenting opinion which constitutes one of the strongest defenses of the better rule of law as stated in the text. See also *Blake v. Midland R. Co.*, 18 Q. B. 93; 83 E. C. L. 93; *Canning v. Williamstown*, 1 Cush. (Mass.) 451; *Walsh v. Chicago, etc., R. Co.*, 42 Wis. 23; 24 Am. Rep. 376; *NEGLIGENCE*, vol. 16, p. 476, note 1.

**1. Messages Requesting Physician's Presence.**—In *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *aff'd* 20 S. W. Rep. 47, a message of this kind was sent by the plaintiff, whose wife was very sick. It appeared that, owing to the delay in the arrival of the physician, caused by the company's negligence, the wife's sufferings in confinement were prolonged and greatly increased, and that she and her husband suffered great mental anguish. The court held that the recovery must be limited to compensation for the wife's sufferings and that the mental agony which the plaintiff himself underwent could not be included. It was also said that if by reason of the company's negligence "the pain and suffering of Mrs. C. were aggravated and prolonged, she could only recover for such aggravated and prolonged suffering, as distinguished from the suffering she would have encountered in case there had been no such negligence and the doctor had arrived in time to have waited on her."



the injured party; they are only recoverable when there is proof of a willful or malicious injury, or where the negligence of the defendant has been of so culpable a character that the law conclusively presumes a willful wrong;<sup>1</sup> therefore, where the proof shows nothing more than mere want of ordinary care on the part of the defendant, exemplary or punitive damages cannot be allowed.<sup>2</sup>

Nor could there be any recovery at all in such a case, if the use of due care on the part of the company would not have prevented the delay in the physician's arrival. See also *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257.

In *Thompson v. Western Union Tel. Co.*, 106 N. Car. 549; 30 Am. & Eng. Corp. Cas. 634; 107 N. Car. 449; 35 Am. & Eng. Corp. Cas. 53, it appeared that T.'s wife being about to be confined, her son, at her instance, telegraphed to his father in another state, "Father, come at once. Mother is sick." The message was not delivered and T.'s wife was obliged to undergo confinement without her husband's presence. The court did not instruct the jury as to whether they could award damages for mental suffering alone, but left them to determine for themselves from the evidence whether the injuries complained of were the proximate consequence of defendant's negligence, and the amount to be recovered by her as compensation. Upon evidence showing great mental and physical suffering by T.'s wife in consequence of her husband's absence, her recital making up a pitiful story, three thousand dollars were awarded. On the first consideration of the case in the supreme court, it was held that the court erred in refusing to instruct the jury as to the right of recovery for mental suffering purely; but on rehearing, a different view was taken and the decision of the trial court affirmed.

In *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, the action was for a failure by the telegraph company to send a message summoning a physician to attend the sick child of plaintiff until several days after it was ordered to be sent, and until after the child was beyond help. It was held that the father might recover, not for the mental suffering which resulted from the sickness and death of his child, but only for the superadded pain and anguish which resulted from the physi-

cian's absence until it was too late. A verdict for one thousand dollars damages was sustained.

1. See *EXEMPLARY DAMAGES*, vol. 7, p. 450; 1 Sedgw. on Dam. (7th ed.) 53; 2 Kent's Com. (13th ed.) \*15, note; Scott & Jar. on Telegraphs, § 417; Gray on Telegraphs, § 80; Thompson on Electricity, § 398; *West v. Western Union Tel. Co.*, 39 Kan. 93; 21 Am. & Eng. Corp. Cas. 190; 7 Am. St. Rep. 530 ("gross negligence" a ground for exemplary damages); *Southern Kan. R. Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766. But as to recovery of exemplary damages for "gross negligence," compare *NEGLIGENCE*, vol. 16, p. 477, where the better doctrine is stated, and in *Western Union Tel. Co. v. Godsey* (Tex. 1890), 16 S. W. Rep. 789, it is said that an allegation of "gross negligence" will not entitle plaintiff to exemplary damages.

The petition should allege whether actual or exemplary damages are claimed, *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195, though it seems that this is not absolutely essential. *Western Union Tel. Co. v. Morris*, 77 Tex. 173; 30 Am. & Eng. Corp. Cas. 633.

2. See *NEGLIGENCE*, vol. 16, p. 477, and cases cited; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Western Union Tel. Co. v. Brown*, 58 Tex. 170; 44 Am. Rep. 610.

In *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; 21 Am. & Eng. Corp. Cas. 195, the plaintiff was informed by the operator that there was a telegraph office at the station to which he sent the message, and the agent, soon after sending the message, discovered that the office had been closed, but concealed this knowledge from plaintiff. The agent was not informed that the message, which in form was an ordinary telegram, was of great importance. It was held that exemplary damages could not be recovered.

*Georgia Code*, § 2943, provides that "exemplary damages can never be

Nor can such damages be recovered except where there is proof of actual damage to the complainant.<sup>1</sup> As to excessive damages, the rule is well settled that the verdict of the jury assessing the damages will not be disturbed as being excessive unless the amount is so large as to indicate that it was the result of passion or prejudice.<sup>2</sup>

allowed in cases arising on contract." Under this it is held that no damages of any kind can be recovered where no willful wrong on the part of the company is shown and the only damage suffered was the mental anguish of plaintiff. *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554.

1. *Schippel v. Norton*, 38 Kan. 567.

2. **Excessive Damages.**—*Thurston v. Martin*, 5 Mason (U. S.) 497.

Six hundred dollars is said not to be excessive where the delayed message was one requesting the presence of a physician, and in consequence of the delay, the sufferings of plaintiff's wife in confinement were prolonged about two hours. *Western Union Tel. Co. v. Cooper* (Tex. 1892), 20 S. W. Rep. 47, *aff'g* 71 Tex. 507; 10 Am. St. Rep. 772.

In *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; 35 Am. & Eng. Corp. Cas. 77, the message announced the death of plaintiff's sister; by its being delayed, he was prevented from attending his sister's funeral, and from being able to "give comfort and consolation to his aged mother in her hour of great trouble." An award of one thousand dollars was considered not excessive.

In *Western Union Tel. Co. v. Brödsche*, 72 Tex. 654; 3 Am. St. Rep. 843, one thousand, one hundred and sixty-eight dollars was held not to be excessive compensation for the mental anguish suffered.

In *Western Union Tel. Co. v. Simpson*, 73 Tex. 423, one thousand dollars was considered not excessive for mental anguish.

In *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 13 Am. & Eng. Corp. Cas. 590; 59 Am. Rep. 623, the company's negligence prevented plaintiff from being at the bedside of his dying brother and from attending his funeral. Twenty-five hundred dollars as actual damages for the mental sufferings was held to be not excessive.

In *Western Union Tel. Co. v. Erwin* (Tex. 1892), 19 S. W. Rep. 1002, where, by the delay in delivering the telegram, plaintiff was kept away from his father's funeral, two hundred dollars were

allowed.

In *Davis v. Western Union Tel. Co.*, 1 Cinc. Super. Ct. 100; *Thompson on Electricity*, § 400, it appeared that the plaintiff was a commercial news agent in Cincinnati, engaged in furnishing to customers financial news and reports from New York City as to the state of the market. The plaintiff alleged a willful and malicious breach of contract on the part of the telegraph company. The verdict was for three thousand dollars, though the actual damage appeared to be not more than five hundred. The court ordered the amount to be reduced by a *remittitur* of two thousand dollars; holding, however, that plaintiff had a right to more than the actual damages sustained.

In *Western Union Tel. Co. v. Evans*, 1 Tex. Civ. App. 297, the company failed to promptly deliver a message to a mother asking her to come to her sick son, and by reason of the delay, she did not see him until after his death, whereas she would have been able to see him fully twenty-four hours before death if the message had been promptly delivered. It was held that a verdict of five thousand dollars in favor of plaintiff was so excessive as to shock a sense of justice, and to indicate clearly that the jury were influenced by passion or prejudice. So in *Western Union Tel. Co. v. Piner*, 1 Tex. Civ. App. 301, owing to the non-delivery of a message, a son was prevented from reaching his father in the latter's sickness, until his father was unconscious. He was with him, however, for several days before his death. The father was seventy-three years old, and his son fifty, and an unusually strong affection was shown to have existed between them. It was held that a verdict of four thousand, seven hundred and fifty dollars was excessive. Each of these last two cases cited and approved the case of *Western Union Tel. Co. v. Houghton*, 82 Tex. 562; 39 Am. & Eng. Corp. Cas. 577, where a verdict of forty-five hundred dollars was held excessive, the evidence showing that a

**X. STATUTORY PENALTIES—1. Generally.**—In order to secure the easier and more complete enforcement of the recognized obligations of telegraph companies as to transmitting and delivering messages offered for transmission, the legislatures of many of the states have enacted statutes providing a fixed money penalty to be recovered of the company for every negligent failure to discharge its duties.<sup>1</sup> The duty designed to be enforced by these statutes is threefold: first, to transmit messages tendered for that purpose with the charges established by the rules of the company; second, to receive and transmit such messages with impartiality as to the order of transmission; and third, to transmit such messages in good faith and with due diligence.<sup>2</sup>

Such statutes are regarded as penal and are therefore to be construed strictly, but not so strictly as to defeat the intention and purpose of the legislature.<sup>3</sup> The statute generally provides by whom the action may be brought, but where it does

message sent to a boy's father was delayed, and by reason of the delay the father was kept away from the bedside of his dying son.

1. Most of the statutes prescribe at length the duties of telegraph companies operating lines within the state, and prescribe specifically for the manner of recovering the penalty. See some of them set out in Scott & Jar. on Telegraphs, §§ 419-446.

2. *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 607.

3. **Such Statutes Are Penal and To Be Strictly Construed.**—*Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78; 21 Am. & Eng. Corp. Cas. 70; *Thurn v. Alta Tel. Co.*, 15 Cal. 472; *Langley v. Western Union Tel. Co.*, 88 Ga. 777; *Greenberg v. Western Union Tel. Co.*, 89 Ga. 754; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; 21 Am. & Eng. Corp. Cas. 72; *Western Union Tel. Co. v. Axtell*, 69 Ind. 199. Compare *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102; *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191 (Sunday message).

Thus where the proof was that the plaintiff contracted with the State Telegraph Company for the transmission of a message to Jackson, and that this company, whose line terminated at Sacramento, took the message to the office of the defendant there and asked to have it forwarded, tendering a price which the defendant refused, it was held that the plaintiff could not maintain his action, under the statute, for the refusal. *Thurn v. Alta Tel. Co.*, 15 Cal. 472.

The statute being strictly construed, a company is not liable in an action to recover the penalty, unless the charges on the message were prepaid or tendered by the sender, or unless there was failure to deliver, or delay in delivering, on or after payment or tender by the person to whom the message was sent, or his agent. *Langley v. Western Union Tel. Co.*, 88 Ga. 777; *Western Union Tel. Co. v. Mossler*, 95 Ind. 29 (complaint must allege such payment of charges); *Macpherson v. Western Union Tel. Co.*, 52 N. Y. Super. Ct. 232.

**Arkansas Statute.**—The *Arkansas* statute provides that every telegraph and telephone company in the state must, under penalty of five hundred dollars, transmit over its wires to localities on its lines every message tendered to it, for the customary charges, without discrimination as to charges or promptness. It was held that there could be no recovery of this penalty where the company made a *bona fide* effort to transmit the message, and acted without impartiality, although the message was lost, and this, no matter how culpable was the negligence of the company by reason of which the loss was caused. *Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78; 21 Am. & Eng. Corp. Cas. 70; *Baltimore, etc., Tel. Co. v. State* (Ark. 1888), 6 S. W. Rep. 513.

Nor does this statute fixing the penalty for "refusal to transmit," impose a penalty for the company's refusal to deliver a message after it has been transmitted over its wires to the locality on

not, the rules applicable in an ordinary action for damages apply.<sup>1</sup> The plaintiff is not bound to show any general or special damage in order to recover the penalty,<sup>2</sup> but, as in other cases, must establish the fact of the company's negligence or breach of duty.<sup>3</sup> It is held in some cases that the complainant must not only prove the negligence of the company, but must show that it acted willfully and in bad faith;<sup>4</sup> but these cases are confined to particular instances, as where the wrong consisted in unduly postponing the complainant's message in favor of some other, and do not apply where there is a breach of the ordinary duty to send; in this latter class of cases proof of the negligence of the company is sufficient.<sup>5</sup>

its line to which it is addressed. *Brooks v. Western Union Tel. Co.*, 56 Ark. 224.

But under the former statute (Gault's Ark. Dig., § 5271), imposing a penalty of one hundred dollars for a failure by the company to transmit messages "with impartiality and good faith," a recovery might be had where the agent at the receiving office failed to deliver the message. *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102.

1. See *infra*, this title, *Parties to the Action*. Code of Mississippi (1892), § 4326; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; 21 Am. & Eng. Corp. Cas. 72.

2. *Western Union Tel. Co. v. Allen*, 66 Miss. 549; 25 Am. & Eng. Corp. Cas. 535 (recovery by addressee); *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102.

3. **Must Establish Company's Breach of Duty.**—In *Western Union Tel. Co. v. Wilson*, 108 Ind. 308; 16 Am. & Eng. Corp. Cas. 257, which was an action brought under the Rev. Stat. *Indiana* (1881), § 4176, for the recovery of the penalty therein prescribed, it appeared that the telegraph company had two offices in the town of G., about eighty yards apart, one on a direct line to B., the other on a line from which B. could be reached only by a circuitous route, and by repetition of the message. The plaintiff presented a message at the latter office to be sent to B., offering at the same time to pay for it; the agent refused to receive it, explaining the difficulty of sending it from that office, but offered to send or take it immediately to the other office, whence it could be sooner or more easily sent to its destination. The plaintiff declined the offer, and notifying the agent that he would sue

the company, took the message to the other office himself and had it sent from there. It was held that there was no proof of a breach of duty on the part of the company, and there could be no recovery of the penalty.

It is a valid defense, where the basis of the action is the failure to deliver, to show that the addressee did not live within the limits prescribed for free delivery. *Western Union Tel. Co. v. Lindley*, 62 Ind. 371.

Where a person asks the operator whether his message can be sent immediately, and is informed that it can, and he pays the charges demanded, and the sending of the message is postponed until the next morning, when it is too late to transmit it, he can recover the penalty, unless the company is able to prove that the delay was caused by some derangement of the lines, or the message was postponed for just cause. *Western Union Tel. Co. v. Ward*, 23 Ind. 377; 85 Am. Dec. 462.

4. *Western Union Tel. Co. v. Swain*, 109 Ind. 405; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; 14 Am. & Eng. Corp. Cas. 139.

5. *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599; *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; 8 Am. & Eng. Corp. Cas. 102; *Western Union Tel. Co. v. Lindley*, 89 Ga. 484.

Where a company receives a message and the money paid for charges for its transmission from a person other than the sender without objection, it cannot, in an action by the sender for the statutory penalty, question the authority of such person to sign the sender's name to the message. *Western Union Tel. Co. v. Buskirk*, 107 Ind. 549.

A delay of several hours by a company, to transmit a message requiring only from five to fifteen minutes, is

The statutes imposing the penalty are not to be construed as awarding liquidated damages for a failure to discharge the duty enjoined, but as affixing a penalty; the right of the sender or addressee to recover damages sustained by the company's neglect of duty remains unaffected.<sup>1</sup> These statutes extend to cases where the dispatch is tendered by a company over whose line it has been partly sent, but whose lines do not extend to the point of destination; and this, notwithstanding there is a provision that no company shall be required to receive dispatches from a competing company owning parallel lines.<sup>2</sup> The penalty may also be recovered although the message was one relating to a gambling transaction.<sup>3</sup>

The fact that the telegraph company tenders and pays to the plaintiff his expenses incurred by reason of the delay or non-delivery of a message will not affect his right of action for the statutory penalty unless it appears that he accepted such payment in full settlement of his claims or by way of accord and satisfaction.<sup>4</sup>

There is no vested right in a penalty; an action to recover it cannot be maintained after the act providing for it has been repealed, although the penalty was incurred before the repeal, unless the repealing act contains a clause saving the right to recover penalties already incurred.<sup>5</sup> The effect of such penal statutes where the message is sent from one state into another is the subject of a preceding section.<sup>6</sup>

**2. Particular Statutes.**—The statutes vary in their extent and effect in the several states, each having its peculiar incidents.

unreasonable, and when shown to exist in an action for the statutory penalty, places the burden of explaining it upon the company. The fact that an operator could not attend to the message in less time would constitute no explanation, since in such case the company should have employed more operators. *Western Union Tel. Co. v. Scircle*, 103 Ind. 227; 10 Am. & Eng. Corp. Cas. 610.

1. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; 8 Am. & Eng. Corp. Cas. 56; 48 Am. Rep. 692; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; 21 Am. & Eng. Corp. Cas. 76; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; 46 Am. Rep. 175; *Wilkins v. Western Union Tel. Co.*, 68 Miss. 6 (sender's name misspelled); *Western Union Tel. Co. v. Lindley*, 89 Ga. 484.

The right of action for a penalty is one that survives, and may be enforced by the representative of the person in whom the right existed before his death. *Western Union Tel. Co. v. Scircle*, 103 Ind. 227; 10 Am. & Eng. Corp. Cas. 610.

2. *U. S. Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46. But, in a *California* case, it was held that the original sender of the message could not maintain an action for the penalty against the connecting line refusing to receive a dispatch for further transmission. *Thurn v. Alta Tel. Co.*, 15 Cal. 472. It will be observed that in the *New York* case the action was by the telegraph company, and not by the sender of the message.

3. *Gray v. Western Union Tel. Co.*, 87 Ga. 350; 35 Am. & Eng. Corp. Cas. 47.

4. *Western Union Tel. Co. v. Taylor*, 84 Ga. 408; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

5. *Western Union Tel. Co. v. Brown*, 108 Ind. 538; 14 Am. & Eng. Corp. Cas. 139; *Thompson v. Bassett*, 5 Ind. 535; *PENALTIES AND PENAL ACTIONS*, vol. 18, p. 269.

6. See *supra*, this title, *Interstate Messages*; *Connell v. Western Union Tel. Co.*, 108 Mo. 459; 39 Am. & Eng. Corp. Cas. 594.

The general language of the statutes and the interpretation given by the courts are set out in the note.<sup>1</sup>

**1. Georgia Statute.**—By Act November 12, 1889 (*Georgia Acts*, 1888-89, p. 176), telegraph companies are required, under penalty, to receive messages from and for any other telegraph company, and properly to transmit the same. They are forbidden to make unjust discriminations, or to divulge the contents or nature of any private communications intrusted to the company for transmission. This act is held not to apply to companies whose lines were constructed before its passage, and since it cannot be construed to embrace more than one subject, it is considered not to repeal Acts of 1886-87, p. 111, regulating telegraph companies. *Western Union Tel. Co. v. Cooledge*, 86 Ga. 104. An action for the penalty under Act of 1887, for failure to deliver a dispatch in due time, is barred by section 2925 of the code, within one year from the time the company's liability thereto was discovered, or by reasonable diligence might have been discovered. *Western Union Tel. Co. v. Nunnally*, 86 Ga. 503.

A "resident," within the meaning of the statute, does not include a transient visitor to the town or city, and a company does not incur the penalty by failure to deliver message to such transient, unless it acted willfully. *Moore v. Western Union Tel. Co.*, 87 Ga. 613. But the residence of the addressee is not involved where the negligence of the company is in not transmitting the dispatch with due diligence, and in such case the penalty is incurred, although the addressee lived far beyond the limits of the town in which the receiving office was. *Horn v. Western Union Tel. Co.*, 88 Ga. 538.

The statute applies even when the message relates to gambling transactions. *Gay v. Western Union Tel. Co.*, 87 Ga. 350; 35 Am. & Eng. Corp. Cas. 47.

**Indiana Statutes.**—*Indiana Rev. Stat.*, § 4176, provided that telegraph companies, engaged in telegraphing for the public, should, during the usual office hours, receive dispatches, and, on payment of the proper charges, transmit the same with impartiality and good faith, and in the order of time in which they were received (with certain exceptions in favor of news reports, etc.), under penalty, in case of

a failure to transmit, or if postponed out of proper order, of one hundred dollars, to be recovered by the party whose dispatch was neglected or postponed. This statute was a mere continuation of the statute of 1852 (1 Gav. & H. 611). Under its provisions the penalty was recoverable upon proof that through the negligence of the company there was a failure to transmit or an undue delay. *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Western Union Tel. Co. v. Ward*, 23 Ind. 377; 85 Am. Dec. 462; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

This act does not apply to messages sent from another state to a point in *Indiana*. *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Rogers v. Western Union Tel. Co.*, 122 Ind. 395; 17 Am. St. Rep. 373; *infra*, this title, *Interstate Messages*. Nor does it apply where the breach of the statute occurs in another state, the message having been sent from a point in *Indiana*. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 18 Am. & Eng. Corp. Cas. 18, *reversing* 95 Ind. 12; 8 Am. & Eng. Corp. Cas. 56; 48 Am. Rep. 692. *Compare* *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181.

The penalty having been fixed by statute, the company cannot change the degree or measure of the statutory liability, by the adoption of rules and regulations. Nor will paying back the amount paid for sending a dispatch, and acceptance of the same (unless it is agreed to be accepted in full of all that the party has a right to recover by virtue of the statute), bar an action for full penalty. *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

See as to pleading and proof in actions under the statute, *Western Union Tel. Co. v. Axtell*, 69 Ind. 199 (declaration must allege that defendant was "engaged in telegraphing for the public," sufficiency of allegations); *Western Union Tel. Co. v. Roberts*, 87 Ind. 377 (same); *Western Union Tel. Co. v. Adams*, 87 Ind. 598; 44 Am. Rep. 776; *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42; *Western Union Tel. Co. v. Buskirk*, 107 Ind. 549 (complaint need not negative matters of defense).

**XI. TAXATION—1. Of Telegraph Companies.**—A telegraphic message sent from one state to another is commerce between the states, and the telegraph line is thus an instrument of interstate commerce.<sup>1</sup> A tax imposed by a state upon all messages sent

The company has a right to provide reasonable office hours, and the agent at one station is not bound to know the office hours at another. *Givin v. Western Union Tel. Co.*, 24 Fed. Rep. 119; 8 Am. & Eng. Corp. Cas. 107; *supra*, this title, *Regulations as to Office Hours*. Therefore, where a message was received in office hours, and promptly transmitted to another office where it was received after office hours, and so not delivered till noon of the next day, the company was not liable, if the office hours at the last office were reasonable. *Western Union Tel. Co. v. Harding*, 103 Ind. 505; 10 Am. & Eng. Corp. Cas. 617.

But the Act of 1885 (Acts, *Indiana*, 1885, p. 151) by implication repeals the former statute (Rev. Stat. *Indiana*, § 4176), and under this new act the penalty can be recovered only when there is proof of bad faith, partiality or unjust discrimination; proof of mere negligence in transmission is insufficient. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; 21 Am. & Eng. Corp. Cas. 76; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Western Union Tel. Co. v. State*, 108 Ind. 163; *Western Union Tel. Co. v. Swain*, 109 Ind. 405; *Western Union Tel. Co. v. Jones*, 116 Ind. 361. The remedy of the aggrieved party for mere negligence is in an action for special damages under § 4177 of Rev. Stat. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; 21 Am. & Eng. Corp. Cas. 76; *Western Union Tel. Co. v. Meek*, 49 Ind. 53.

The Act of 1885 does not, however, by implication or otherwise, repeal § 4178 of the Rev. Stat. requiring telegraph companies to deliver by messenger all dispatches to the persons to whom they are addressed, "provided such persons reside within one mile of the telegraph station or within the city or town in which such station is." *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

**Mississippi Statute.**—The *Mississippi* statute (Code of *Mississippi* (1892), § 4326), imposes a penalty of twenty-five dollars upon every company that "shall neglect, fail, or refuse to transmit and deliver within a reasonable time, without good and suffi-

cient excuse, any message," etc. Under this, either party may recover and without proof of special or other damage. *Western Union Tel. Co. v. Allen*, 66 Miss. 549; 25 Am. & Eng. Corp. Cas. 535. The first statute had no application, however, to cases of erroneous transmission merely; in such a case the party's only remedy is an action for damages. The penalty is not to be regarded as the part of an entire demand for damages. *Wilkins v. Western Union Tel. Co.*, 68 Miss. 6; 35 Am. & Eng. Corp. Cas. 53, note. But under the latter statute the rule is different, and the penalty may be recovered for an incorrect transmission. Code of *Mississippi* (1892), § 4326.

**Missouri Statute.**—The statute does not render a telegraph company liable for negligently failing to deliver a message to persons in another state, but only for failure to receive and transmit it. *Connell v. Western Union Tel. Co.* (Mo. 1892), 18 S. W. Rep. 883; Rev. Stat. *Missouri* (1889), § 2725.

Rev. Stat., § 885, imposes a penalty for the giving of false information as to the time within which a dispatch may be sent. On an application to send a telegram, made on Sunday, on which day telegraph companies are prohibited from transmitting messages, the company does not, by giving false information that the dispatch can be sent on that day, incur the penalty of § 885. *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191.

**Virginia Statute—Jurisdiction of Magistrate.**—Under section 2939 of the code providing that a justice of the peace shall have jurisdiction of any claim to any fine if the amount thereof does not exceed twenty dollars, and of other claims where the amount thereof does not exceed one hundred dollars, a justice has no jurisdiction of an action to recover the penalty of one hundred dollars imposed upon telegraph companies by section 1292, for failure to deliver a dispatch, since such penalty is a "fine" within the meaning of section 2939. *Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296. See also *Baltimore, etc., Tel. Co. v. Lovejoy*, 48 Ark. 301.

1. *In re Pennsylvania Teleph. Co.*,

from points within the state is therefore invalid, as an interference with interstate commerce, except as to messages sent between points wholly within the state; and this whether it is in the form of a tax upon the gross receipts, or of a license or privilege tax, or otherwise.<sup>1</sup> The tax will be valid as to local messages although it is assessed and returned upon all receipts in gross, and without being separated or apportioned.<sup>2</sup> Such general taxes, in so far as

48 N. J. Eq. 91; 35 Am. & Eng. Corp. Cas. 26; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; 25 Am. & Eng. Corp. Cas. 577; *Leloup v. Port of Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 26.

1. **Tax on Messages Sent Out of the State Invalid.**—*Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; 21 Am. & Eng. Corp. Cas. 1; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; 25 Am. & Eng. Corp. Cas. 577; *Western Union Tel. Co. v. Seay*, 132 U. S. 472; 30 Am. & Eng. Corp. Cas. 583; *Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 26; *Charleston v. Postal Tel. Co.* (S. Car. 1891), 9 Ry. & Corp. L. J. 129; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Philadelphia, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232; **TAXATION**, vol. 25.

Where the message is between points within the state, there can be no question as to the right of the state to tax or regulate it. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; 21 Am. & Eng. Corp. Cas. 1.

**Views of the State Courts.**—The state courts have frequently upheld the validity of such taxation. Thus in *Pennsylvania*, a tax on the gross receipts of a telegraph company from messages between points within and points without the state, and from messages between points in other states, which pass over lines partly within the state, was upheld as not being an interference with interstate commerce. But these cases have all been reversed in the federal Supreme Court. *Western Union Tel. Co. v. Com.*, 110 Pa. St. 405, *rev'd* in 128 U. S. 39; 25 Am. & Eng. Corp. Cas. 577. See also *Western Union Tel. Co. v. State Board*, 80 Ala. 273; 60 Am. Rep. 99, *rev'd* in 132 U. S. 472; *Mobile v. Leloup*, 76 Ala. 401, *rev'd* in 127 U. S. 640; *Western Union Tel.*

*Co. v. State*, 55 Tex. 314; *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1; *Western Union Tel. Co. v. Meyer*, 28 Ohio St. 521 (tax on gross receipts); *State v. Western Union Tel. Co.*, 73 Me. 518 (upholding *Maine* Stat. 1880, ch. 246); *Western Union Tel. Co. v. Lieb*, 76 Ill. 172.

In *Illinois*, it is held that the legislature has power to impose taxation upon foreign corporations to whatever extent it may in its discretion choose, as the condition upon which they may exercise their franchises and privileges in the state. The state tax law of 1872, empowering the board of equalization to assess the capital stock of corporations created by or under the laws of the state, is construed, however, as giving such board no authority to assess the stock of foreign corporations doing business in the state. *Western Union Tel. Co. v. Lieb*, 76 Ill. 172.

In *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1, the rule is recognized, that Congress may exempt from taxation a state corporation employed as its agent for certain services; but it is held that such exemption must be confined to such taxation as will really prevent or impede such services, and, in the absence of legislation by Congress, indicating that exemption is deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government.

The constitutionality of such assessment on interstate messages may be considered by a court of chancery. But such a court has not the power to go beyond this and set the assessment aside; this can only be accomplished by a resort to a legal tribunal. *In re Pennsylvania Tel. Co.*, 48 N. J. Eq. 91; 35 Am. & Eng. Corp. Cas. 26.

2. *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; 21 Am. & Eng. Corp. Cas. 1; *Philadelphia, etc., R. Co. v. Pennsylvania* (State Freight Tax Case), 15 Wall. (U. S.) 232. In *Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng.



they affect messages sent by the government or on government business, are open to the further objection that they interfere with a governmental agency, where the company has accepted the privileges conferred by the federal statute.<sup>1</sup> A privilege license tax imposed on all telegraph companies doing business within the state is also invalid, as being an interference with the exclusive power of Congress over commerce between the states.<sup>2</sup>

The property of a telegraph company within a state is subject to state taxation like all other property. The fact that the company is engaged in interstate commerce, or that it is an agent of the government, can afford no immunity from the taxation of its property.<sup>3</sup> Thus, a statute is not invalid which provides that

Corp. Cas. 26, the whole law was declared unconstitutional; it appeared, however, that the tax was not in the separate messages, but was a privilege license tax on the business of sending them.

1. In *Western Union Tel. Co. v. Texas*, 105 U. S. 466, the court, by Waite, C. J., said: "As to the government messages, it is a tax by the state on the means employed by the government of the *United States* to execute its constitutional powers, and therefore, void. It was so decided in *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, and has never been doubted since." *Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 26; *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1.

2. **Privilege License Tax.**—*Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 26. The Western Union Telegraph Company established an office in the city of Mobile and was required to pay a license tax under a city ordinance imposing an annual tax of two hundred and twenty-five dollars on every telegraph company in the city. The agent of the company was fined for non-payment of the tax. In an action to recover the amount of the fine, it was held, reversing the decision of the state supreme court, that such a tax affected the entire business of the company, interstate as well as domestic, and was unconstitutional. The state court relied mainly on the case of *Osborne v. Mobile*, 16 Wall. (U. S.) 479, which held that an ordinance of the city of Mobile was not unconstitutional, which required every express company or railroad company doing business there, and having a business extending beyond the limits of the state, to pay an annual tax of five hundred dollars; if the business was confined within the

limits of the state, a tax of one hundred dollars; if confined within the city, of fifty dollars. The decision of the state court, however, was reversed, the court, by Bradley, J., referring to the ordinance in the *Osborne* case, said: "This was in December, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states." *Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 33.

In a more recent case, a city ordinance imposing a license tax on telegraph companies has been upheld, *Moore v. Eufaula* (Ala. 1892), 11 So. Rep. 921, on the ground that the ordinance differed materially from that declared void in the *Leloup* case.

3. **Property of Company is Taxable.**—"Its property in the state is subject to taxation the same as other property; and it may undoubtedly be taxed in a proper way on account of its occupation and its business." *Western Union Tel. Co. v. Texas*, 105 U. S. 464. See, in support of the proposition of the text, *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; 21 Am. & Eng. Corp. Cas. 13; 33 Fed. Rep. 129; 141 U. S. 40; *Taylor v. Secor*, 92 U. S. 575; *Philadelphia, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 710; 16 Am. & Eng. R. Cas. 1; *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509; 40 Am. Rep. 99.

We may repeat here what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located

every telegraph company owning a line in the state shall be taxed in such proportion of the whole value of its capital stock as the length of its line in the state bears to the whole length of its line.<sup>1</sup>

A message sent from one state to another, being commerce between the states, cannot be prohibited or regulated in either state by injunction against the corporation sending it, merely because such corporation has failed or refused to pay the taxes levied against it, even though the tax may be legal and valid.<sup>2</sup>

As to the details of the subject of taxation of telegraph companies, the same rules of law apply as in case of ordinary prop-

erty within the state, as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage and the like. *Leloup v. Mobile*, 127 U. S. 640; 21 Am. & Eng. Corp. Cas. 34, citing with approval, *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; 21 Am. & Eng. Corp. Cas. 13.

Thus a state statute (Laws of *New York*, 1886, ch. 659), authorizing the taxation, by the several towns of the state, of the portions of telegraph lines in such towns, including the interest on the value of the land occupied by the line, all poles, insulators, wires, apparatus, etc., is valid, though such lines may run into other states. *People v. Tierney*, 57 Hun (N. Y.) 357; *People v. Dolan*, 126 N. Y. 166.

And the fact that the company has paid a privilege tax does not release it from liability for taxes assessed on its property, such as its poles, wires, instruments, etc. *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509; 40 Am. Rep. 99.

*Compare*, in this connection, *Com. v. Smith* (Ky. 1891), 17 S. W. Rep. 187, holding that a statute imposing upon telegraph companies operating in the state a tax of \$1 per mile of wire, and an additional sum for each additional wire, and a penalty of \$500 upon its agent for failure to pay the tax, is unconstitutional, as attempting to regulate interstate commerce.

**1. Tax on Capital Stock of Company.**—*Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; 21 Am. & Eng. Corp. Cas. 13; 33 Fed. Rep. 129 (right of state not affected by Rev. Stat. U. S. §§ 5263-5266). *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Thompson v. Pacific R. Co.*, 9 Wall. (U. S.)

579; *Western Union Tel. Co. v. Lieb*, 76 Ill. 172. See also *Postal Tel. Cable Co. v. Barnard*, 37 Ill. App. 105.

In *Western Union Tel. Co. v. Massachusetts*, 141 U. S. 40, the court, in sustaining the note of the text, said: "The tax, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of the property owned and used by it in the state, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of the property. Such a tax is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes or by the commerce clause of the constitution. The statute of *Massachusetts* is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other state; and the rule adopted to ascertain the amount of the capital engaged in that business within its boundaries on which the tax should be assessed, is not an unfair or unjust one, and the details of the method by which this was determined have not exceeded the fair range of legislative discretion."

**2. Tax Cannot be Collected by Injunction.**—*Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; 21 Am. & Eng. Corp. Cas. 13; *In re Pennsylvania Teleph. Co.*, 48 N. J. Eq. 91; 35 Am. & Eng. Corp. Cas. 26; *Moran v. New Orleans*, 112 U. S. 69; 5 Am. & Eng. Corp. Cas. 311; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *United Lines Tel. Co. v. Grant* (Supreme Ct.), 18 N. Y. Supp. 534; *Postal Tel. Cable Co. v. Grant* (Supreme Ct.), 11 N. Y. Supp. 323.

erty, and it is sufficient to refer to the treatment of the general subject.<sup>1</sup>

**2. Of Telephone Companies.**—The subject of the taxation of telephone companies involves nothing peculiar, and is embraced in the general subject of corporate taxation.<sup>2</sup> In so far as the general rule is affected by the fact that the company is engaged in

1. See TAXATION, vol. 25.

**New York Statute—Mode of Assessment.**—*New York Laws* (1886), ch. 659, provide that telegraph lines shall be assessed "in the manner provided by law for the assessment of lands," and that the word "line" shall include "the interest in the land on which the poles stand, the right or license to erect such poles on land, and all poles, arms, insulators, wires, apparatus, instruments, or other things connected with or used as a part of such line." It is held that, in making the assessment, the property is not to be regarded as a whole, nor as a complete telegraph line in operation, but that the true value is obtained by taking the cost of production of poles, wires, and other apparatus which are in their nature personalty, and adding thereto the value of the company's interest in the land on which the poles stand, and of the right to erect the poles thereon. *People v. Dolan*, 126 N. Y. 166. In the same case it is held that in arriving at the value of the interest in the land on which the poles stand and of the right to erect such poles, it is to be considered that so far as the line is erected upon the highway, the only interest the company has is a mere license revocable at the will of the legislature, of which license any other company may avail itself. The expense which the company incurred in obtaining the interest is the correct criterion by which to judge of its value.

**Interest Where Payment Is Delayed.**—Under a statute providing that interest shall be charged upon all taxes not paid on or before a specified date, a telegraph company is liable for interest from the date prescribed, on the amount of taxes payable by it, notwithstanding the fact that payment was delayed pending the decision of an appeal taken from the assessment, in which a reduction of the assessment was obtained. *Western Union Tel. Co. v. State*, 64 N. H. 265; 21 Am. & Eng. Corp. Cas. 23. See Cooley on Taxation (2d ed.) 456.

2. See TAXATION (CORPORATE), vol. 25.

In *People v. American Bell Telephone Co.*, 117 N. Y. 241; 29 Am. & Eng. Corp. Cas. 616, this state of facts appeared: the American Bell Telephone Company was a *Massachusetts* corporation, with its home in Boston; it owned the telephone patents. Its practice was to organize sub-corporations in the various states, who became its licensees and operated a telephone system in the various localities, and to lease its instruments to them. The entire business of furnishing telephone service was carried on by these local companies, who operated their lines independently, each having the entire management and control of its own business, and paid to the parent company a monthly rental for all instruments furnished to them. The parent company had no offices or place of business outside of its native state. The *New York* statute imposed a tax on the gross earnings of all telephone companies "doing business" within the state. It was held that the parent company, *i. e.*, the American Bell Telephone Company, was not a corporation "doing business" in *New York*, and its receipts were not taxable under the statute. Nor did the fact that the parent company was a stockholder in the local companies of the state, render its local stock taxable under the statute taxing the stock of all corporations "doing business" in the state.

So in *Pennsylvania*, it is held that the Bell Telephone Company did not render itself liable to taxation under the state statute by having an office within the state, and contracting with local corporations for the introduction and operation of its patents, which contracts provided that it should have the reserved right to take possession of the instruments and use them, upon a breach of the agreement therein provided. *Com. v. American Bell Telephone Co.*, 129 Pa. St. 217. See also Thompson on Electricity, §§ 129-130, where the methods of taxation in the several states is given.

interstate commerce, the rules previously stated as to telegraph companies apply.<sup>1</sup>

**XII. TELEGRAMS IN EVIDENCE—1. Admissibility.**—Ordinarily the general rules of law relative to the admission of letters in evidence apply to telegrams.<sup>2</sup> A telegram is not admissible as evidence in the absence of proof of its authenticity, either by proof of the handwriting where the original message is offered, or by other evidence of its genuineness.<sup>3</sup>

Telegraphic dispatches delivered to the company for transmission are admissible as declarations of the sender when proven to be in his handwriting;<sup>4</sup> and such dispatches, in the form in which they are received by the party to whom they are sent, are evi-

1. *In re Pennsylvania Teleph. Co.*, 48 N. J. Eq. 91; 35 Am. & Eng. Corp. Cas. 26.

2. *U. S. v. Babcock*, 3 Dill. (U. S.) 571; *Coupland v. Arrowsmith*, 18 L. T. N. S. 755; *LETTERS*, vol. 13, p. 258 *et seq.*

3. **Authenticity of Telegram Must Be Proven.**—*Burt v. Winona, etc.*, R. Co., 31 Minn. 472; *Chester v. State*, 23 Tex. App. 577.

Thus a paper offered in evidence, purporting to contain a dispatch received at a telegraph office, is not admissible as evidence when no proof is given that it was in the handwriting of any person employed in the telegraph office where it purports to have been received, and no other proof of its authenticity is given. *Richie v. Bass*, 15 La. Ann. 668.

The authenticity of certain telegrams is sufficiently proved *prima facie*, where one was in an agreed cipher proved to a certainty; others were referred to in exhibits of the other party; and others contained directions to draw drafts, which were drawn and paid. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 14 Abb. N. Cas. (N. Y.) 338; 53 Am. Rep. 221.

"Ordinarily the usual course is to show the delivery of the original message of the party sought to be charged, at the office from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of its destination. But even where the original is produced, its authenticity must be established, and this either by proof of the handwriting or by other proof establishing its genuineness. The destruction of all messages sent from the office on the day named is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon

proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents." *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355.

Upon the trial of an action for the rent of rooms, which defendant denied having finally hired, alleging she merely had the refusal of them, the defendant testified that she sent a telegraphic despatch to one H. at Hartford, stating that if she could find rooms in B. she would stay there; that this telegram was written in ink; and that it was the only one sent by her that day. The plaintiff afterwards offered in evidence a paper taken from the files of the telegraph company dated the day in question, purporting to be an original message from the defendant to H. at Hartford, written in pencil, informing him that she had hired rooms in B.; and called the defendant as a witness to show that the handwriting was hers. The defendant testified that the handwriting was not hers, and that the message sent by her to the telegraph office was written by herself. *Held*, that the paper, without other evidence to show that it was written or sent by the defendant, was inadmissible. *Lewis v. Havens*, 40 Conn. 363.

4. *Com. v. Jeffries*, 7 Allen (Mass.) 548; 83 Am. Dec. 712.

Evidence that a telegram was sent by the defendant to the drawee of an order which he had given to the plaintiff, directing the drawee to withhold a part of the amount specified, and pay the remainder, is competent and relevant, as tending to show an admission by the defendant of indebtedness to the amount, at least, of such remainder. *Griggs v. Deal*, 30 Mo. App. 152. See also *Benford v. Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545.

dence of the communication between the parties,<sup>1</sup> and also of the information upon which the addressee may have acted, where his good faith is in question.<sup>2</sup> The admissibility of telegrams in other particular instances is governed by the usual rules of evidence concerning the admission of documentary evidence.<sup>3</sup>

**2. Primary and Secondary Evidence**—(See also LOST PAPERS, vol. 13, p. 1059; SECONDARY EVIDENCE, vol. 21, p. 984).—The principal question arising in this connection is what is the primary or

1. *Com. v. Jeffries*, 7 Allen (Mass.) 548; 83 Am. Dec. 712; *Taylor v. The Robert Campbell*, 20 Mo. 254. In this latter case the telegraphic dispatch in reply to one delivered to a boat at Lexington on the Missouri river, agreeing to transport freight, was allowed to be read to the jury as evidence of a contract by the master to the transport to St. Louis.

2. Telegrams transmitted to plaintiffs in attachment by telephone, and reduced to writing by the person who received them, and in that form acted upon by plaintiffs, are admissible as showing the information upon which the attachment was sued out; and it is not necessary that the dispatches should be verified by comparing them with the originals on file with the telegraph company. *Deere v. Bagley*, 80 Iowa 197.

3. **In Particular Cases.**—A police officer at the station-house in conversation with a prisoner under arrest for larceny, stood by and saw the prisoner receive and read a telegram, which he afterwards passed to the officer to be read aloud. This the officer did, when the prisoner denied all knowledge of the message or its writer. *Held*, that the telegram was admissible in evidence for the purpose of enabling the jury to understand the conversation of which it was a part. *Com. v. Vosburg*, 112 Mass. 419.

Letters and telegrams as to the cancellation of an insurance policy sent by the insurance company to its agent, after a loss, are properly excluded in an action on the policy. *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; 26 Mo. App. 390. See also *Larminie v. Carley*, 114 Ill. 196.

In an action for a conspiracy, telegraphic dispatches from the wife of one of the defendants, being neither written nor sent by either of them, are not admissible as evidence against them, for, as declarations of the wife, they could not affect even her hus-

band. *Benford v. Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545.

In an action for the price of goods sold, a telegram countermanding the order for such goods, though sent to one not a party to the suit, is admissible where it appears that it was intended to be delivered to the plaintiffs, who did in fact come into possession of it and recognized it by replying thereto. *Eldridge v. Hargreaves*, 30 Neb. 638.

And in an action for breach of an oral contract, all letters and telegrams which passed between the parties in reference to the terms of contract are admissible in evidence. *Hammond v. Beeson* (Mo. 1891), 15 S. W. Rep. 1000. Compare *Richmond v. Sundburg*, 77 Iowa 255.

In a prosecution against a person charged with stealing horses, a telegraphic dispatch sent by him offering to sell horses, taken in connection with other circumstances, is evidence tending to show his preparations for flight. *State v. Espinozei*, 20 Nev. 209. See also *Meinert v. Snow*, 2 Idaho 851.

Where copies of telegrams relating to a matter about which there is no dispute, have been filed on notice, it is no error to permit the operator who received them to state their contents, where his statement does not materially differ from the copies filed. *International, etc., R. Co. v. Prince*, 77 Tex. 560.

A telegram from a debtor to persons who have consigned goods to him, informing them of the seizure of the goods by the sheriff under a *feri facias* upon chattel mortgages, is inadmissible in their behalf on the trial of their claim to the property. *Powell v. Brunner*, 86 Ga. 531.

A telegram from the seller of goods to the broker who made the sale, which is partly in cipher and which the buyer is not shown to have read, even if he could, is not admissible to show the terms of the sale, although the tel-

best evidence of the communication sent by telegraph. In such communications there are two distinct messages, the one delivered to the telegraph company by the sender, and the one delivered by the company from its receiving office to the addressee; these are ordinarily identical, but not always or necessarily so, though there may be a presumption that they are.<sup>1</sup> The company is employed as the agent of the party sending the message,<sup>2</sup> and the inquiry usually is as to what message was sent, not what was intended or directed to be sent;<sup>3</sup> the general rule, therefore, may be stated to be that the message delivered at the receiving station to the person addressed is the original and is the best evidence of the communication between the parties.<sup>4</sup> Where, however, the telegraph company acts as the agent of the addressee,

ogram was placed upon the desk before the buyer during the negotiation of the sale. *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299.

Letters and telegrams from a witness to one party, relating to business and not connected with the question involved, are not competent. *Richmond v. Sundburg*, 77 Iowa 255.

Correspondence by wire between operators sending and receiving a message, which was not communicated to the sender, is not admissible to show that the person to whom the message was sent was absent from the place of delivery. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772. Nor is the answer of an operator to an inquiry why a message has not been delivered, admissible in an action against the company for failure to deliver it. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 30 Am. & Eng. Corp. Cas. 615; 18 Am. St. Rep. 148. See also *supra*, this title, *Evidence*.

1. The delivery of a message to the company for transmission, properly directed and paid for, creates a presumption that it was received by the addressee as sent. *Oregon Steamship Co. v. Otis*, 100 N. Y. 447; 53 Am. Rep. 221; *U. S. v. Babcock*, 3 Dill. (U. S.) 575; *Matteson v. Noyes*, 25 Ill. 481; *Gray on Telegraphs*, § 129; *infra*, this title, *Presumptions Arising from the Sending of a Telegram*.

2. *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 21 Am. & Eng. Corp. Cas. 145; 1 Am. St. Rep. 353; *infra*, this title, *Telegraph Company Ordinarily Agent of Sender*.

3. The rule as to what is original evidence of the message, must depend in a

measure upon the subject concerning which evidence is sought. Thus the dispatch delivered to the addressee is original evidence of the communication which passed between the parties, while it may not be original evidence as a declaration of the sender. See *Com. v. Jeffries*, 7 Allen (Mass.) 548; 83 Am. Dec. 712; *Benford v. Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545.

4. **Message Actually Delivered in Primary Evidence.**—*Saveland v. Green*, 40 Wis. 431; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481; *Magie v. Herman* (Minn. 1892), 52 N. W. Rep. 909; *Morgan v. People*, 59 Ill. 58; *Anheuser-Busch Brewing Assoc. v. Hutmacher*, 127 Ill. 652, *aff'd* 29 Ill. App. 316; *Matteson v. Noyes*, 25 Ill. 481; *Barons v. Brown*, 25 Kan. 414; *Howley v. Whipple*, 48 N. H. 487; *Chicago, etc., R. Co. v. Russell*, 91 Ill. 298; 33 Am. Rep. 54; *National Bank v. National Bank*, 7 W. Va. 544; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60; *Thompson on Electricity*, § 497; *Gray on Telegraphs*, § 128; 2 Rice on Ev., pp. 1017-18.

The language of the court, by Redfield, C. J., in *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127, is pertinent here: "In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the transmission across the line, or in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case, inquiry should first be made for the very dispatch delivered. In default of that, its contents may be shown by the next best proof."

Where telegrams are sent by an em-

the message delivered to it for transmission is original evidence of the communication.<sup>1</sup> In an action against the telegraph company for improperly transmitting a message, the inquiry is necessarily as to the contents of both messages, and in such case each message is original evidence of its own contents.<sup>2</sup>

Secondary evidence of the contents of a telegram, as, for example, the testimony of a witness, a letter-press or other copy, is admissible only after proof that the original telegram has been lost or destroyed,<sup>3</sup> or is beyond the jurisdiction of the court.<sup>4</sup>

ployer to his servant, directing him as to the performance of his duties, the copies thereof delivered from the receiving office must be considered originals, and are admissible in evidence in an action to recover for the services of the servant. *Anheuser-Busch Brewing Assoc. v. Hutmacher*, 29 Ill. App. 316; *aff'd* 127 Ill. 652.

The sendee is entitled to put the delivered message in evidence without accounting for the one sent. *Saveland v. Green*, 40 Wis. 431.

In an action by the assignee of the landlord against a tenant, who has held over after the expiration of his year, in which plaintiff claims that the tenant has become liable to pay a certain increased rent, the copy of a telegram received by the tenant, showing upon its face that it was in response to a letter written by him to the landlord asking for the terms of a renewal, and confirmed by a subsequent letter of the landlord containing the same propositions, is admissible, without producing the original. *Thorp v. Philbin*, 15 Daly (N. Y.) 155.

1. It has been already seen that the company is generally regarded as the agent of the party proposing it as a medium for correspondence. In such cases, the message as delivered to the company for transmission to such party is original evidence of the communication. See *infra*, this title, *Telegraph Company Ordinarily Agent of Sender*. *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Pegram v. Western Union Tel. Co.*, 100 N. Car. 28; 21 Am. & Eng. Corp. Cas. 150; 6 Am. St. Rep. 567; *Magie v. Herman* (Minn. 1892), 52 N. W. Rep. 909. See also *Whilden v. Merchants', etc.*, Nat. Bank, 64 Ala. 1; 38 Am. Rep. 1; 2 Rice on Ev., pp. 1017-18.

Thus where a message is sent to a telegraph office to be transmitted in reply to one received which requested an answer by telegraph, the company in transmitting it, acts as the agent of

the party requesting the reply, and the message delivered to the company is the original and primary evidence. *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355.

2. The message delivered by the sender is the original wherever the inquiry is as to what words the company was authorized and agreed to deliver. *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223; *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394; 44 Am. Rep. 620; *Com. v. Jeffries*, 7 Allen (Mass.) 548; 83 Am. Dec. 712. And where the inquiry is as to what words were actually transmitted by the company to the addressee, the message delivered to the addressee is original evidence. *Gray on Telegraphs*, § 129, *citing Morgan v. People*, 59 Ill. 58; *Chicago, etc., R. Co. v. Mahoney*, 82 Ill. 73.

3. When Secondary Evidence Admissible.—This is in accordance with an accepted rule of evidence. See 1 Greenleaf on Ev. (14th ed.), §§ 82, 85; *Prather v. Wilkins*, 68 Tex. 187; *McCormick v. Joseph*, 83 Ala. 401; *Whilden v. Merchants', etc.*, Nat. Bank, 64 Ala. 1; 38 Am. Rep. 1; *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223; *Williams v. Brickell*, 37 Miss. 682; 75 Am. Dec. 88; *Yavapai County v. O'Neil* (Arizona, 1892), 29 Pac. Rep. 430; *LOST PAPERS*, vol. 13, p. 1095; *SECONDARY EVIDENCE*, vol. 21, p. 984.

A letter-press copy of a letter or telegram is secondary evidence. *Anglo-American Packing, etc., Co. v. Cannon*, 31 Fed. Rep. 313.

On proof of the destruction of the original, an uncertified copy of a telegram was held to be admissible upon a trial for forgery to show that the respondent, at a certain time, knew of a material fact therein stated. *State v. Hopkins*, 50 Vt. 316.

4. *Pensacola Railroad Company v. Schaffer*, 76 Ala. 233; *Whilden v. Planters' Bank*, 64 Ala. 1; 38 Am. Rep. 1.

But where it is not shown that the message was ever reduced to writing, either at the sending or receiving office, there is no ground for the exclusion of parol evidence of its contents.<sup>1</sup> What constitutes sufficient proof of the loss or destruction of the original telegram and of proper effort to secure it on the part of the party offering secondary evidence, must depend upon circumstances, and, like other matters of proof, varies with particular cases.<sup>2</sup> The testimony of the clerk who sent the message, that all telegrams were destroyed, is sufficient proof to admit secondary evidence of the message actually delivered to the company for transmission.<sup>3</sup> The testimony of the person to whom a telegram is directed is inadmissible to establish its contents as delivered, without proof accounting for the absence of the original and that the alleged writer sent it.<sup>4</sup>

It has been laid down that, in an action against a telegraph company for damages caused by a failure to transmit a message, the original dispatch offered for transmission must be given in evidence, or, if secondary evidence of its contents is offered, its absence must be accounted for, and notice to produce it must have been given.<sup>5</sup> The better doctrine seems to be that in such case the company is, from the nature of the suit, bound to know that it is charged with possession of the document and will be required to bring it into court; the plaintiff may therefore introduce parol evidence of its contents without previously giving notice to the company to produce it.<sup>6</sup> Where the action is by the addressee for a failure to deliver the message within a reasonable time after its receipt at its destination, the copy written out at the receiving office and eventually delivered to the addressee, is admissible in evidence without

1. Where Message is not Reduced to Writing.—*Terre Haute, etc., R. Co. v. Stockwell*, 118 Ind. 98; *Riordan v. Guggerty*, 74 Iowa 688.

2. See generally LOST PAPERS, vol. 13, p. 1088 *et seq.*; SECONDARY EVIDENCE, vol. 21, p. 984; 2 Rice on Ev., p. 1017.

See, for facts justifying the admission of secondary evidence of the contents of an original dispatch, *Flint v. Kennedy*, 33 Fed. Rep. 820; *Riordan v. Guggerty*, 74 Iowa 688.

3. Testimony of Telegraph Clerk as to Destruction of Messages.—*Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 14 Abb. N. Cas. (N. Y.) 338; 53 Am. Rep. 221; *Western Union Tel. Co. v. Collins*, 45 Kan. 88; *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355; *Riordan v. Guggerty*, 74 Iowa 688.

In an action against the company, the operator in charge of the office from which the telegram was sent, testified that he had sent away all the papers found there shortly after the

telegram in question had been sent, and that he had been informed that they had been destroyed. It was held that such testimony was not competent to show the destruction of the telegram for the purpose of proving its contents by parol. *American Union Tel. Co. v. Daughtery*, 89 Ala. 191.

4. In *Williams v. Brickell*, 37 Miss. 682; 75 Am. Dec. 88, it was said, however, that the admission of the alleged writer of his sending it and of its contents, is competent without proof of the loss or destruction of the original.

5. Production of Original Message in Action against Company.—*Western Union Tel. Co. v. Hopkins*, 49 Ind. 223.

6. In *Reliance Lumber Co. v. Western Union Tel. Co.*, 57 Tex. 395; 44 Am. Rep. 620, the court said: "We have examined the subject and have found but one case in which the action was based on the telegrams, where the original telegrams were required to be produced. In *Western Union Tel. Co.*



accounting for the original message written by the sender, particularly where there is no claim that the message received by the addressee differed from that offered by the sender for transmission.<sup>1</sup>

**3. Presumptions Arising from the Sending of a Telegram.**—The rule that the deposit of a properly stamped and directed letter in the post office, creates a presumption that it was received in due course of the mail by the person to whom it was addressed, applies also to dispatches delivered to a telegraph company for transmission over its lines.<sup>2</sup> The presumption, however, is one of fact only and is therefore open to contradiction; it consists merely of the inference which may be drawn from the experienced certainty of transmission.<sup>3</sup>

While the rule which permits a letter to be admitted in evidence against a party where there is no proof of the handwriting, except that in due course it had been received in reply

*v. Hopkins*, 49 Ind. 227, the point does not seem to have been pressed in the argument by counsel, or to have been much considered by the court, nor do the authorities cited in support of the position sustain the view taken." The court quotes with approval the language of Mr. Wharton (1 Wharton on Ev. (2d ed.), § 159), to the effect that: "Notice to produce is not necessary in respect to a document described in the pleadings as that on which the suit is brought; nor where, from any reason connected with the form of the suit, the party is bound to know that he is charged with the possession of the document, and will be required to bring it into court." See also *Starkie* on Ev. 403; 1 Greenleaf on Ev. (14th ed.), § 561.

1. *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877; (message sent by cable and by telegraph).

In an action for failure to deliver a message, it is not error to admit a copy of the message properly identified fourteen months after its receipt for transmission by the company, where it is first shown by the manager at the transmitting office that the original is not in his office or under his control, and that by the rules of the company, original messages are retained in the transmitting office for six months and then sent to Chicago, where they are destroyed. *Western Union Tel. Co. v. Collins*, 45 Kan. 88.

**2. Presumption of Receipt by Addressee.**—*U. S. v. Babcock*, 3 Dill. (U. S.) 571; *Oregon Steamship Co. v. Otis*,

100 N. Y. 447; 53 Am. Rep. 221; *Com. v. Jeffries*, 7 Allen (Mass.) 548; 83 Am. Dec. 712; *Breed v. First Nat. Bank*, 6 Colo. 235; *State v. Hopkins*, 50 Vt. 316; *VanDoren v. Liebman* (C. Pl.), 11 N. Y. Supp. 769; *Trotter v. Maclean*, 13 Ch. Div. 574; *Gray on Telegraphs*, § 136; *Scott & Jar. on Telegraphs*, § 345; 1 Wharton on Ev., § 76; 1 Greenleaf on Ev. (14th ed.), § 40. Compare *Home Ins. Co. v. Marple*, 1 Ind. App. 411; *Burton v. Payne*, 2 Car. & P. 520; 12 E. C. L. 243. "The letters are transported by government officials, acting under oath, and upon a system framed to secure regularity and precision; the telegrams, by private corporations, whose success and prosperity depend largely upon the promptness and accuracy of the work, and are faithful under the incentives of interest." *Oregon Steamship Co. v. Otis*, 100 N. Y. 452; 53 Am. Rep. 221. See also **PRESUMPTIONS**, vol. 19, pp. 80-81; *Dana v. Kemble*, 19 Pick. (Mass.) 112.

3. *Oregon Steamship Co. v. Otis*, 100 N. Y. 451; 53 Am. Rep. 221. In this case the court, by Finch, J., after laying down the rule stated in the text, said: "It may be that the presumption of correct delivery agreeing in kind with that raised upon delivery to the post office, should be deemed weaker in degree, but in view of the wide extension of telegraph facilities and of their increasing use in business correspondence, and the difficulty of tracing a dispatch to its destination, we think it should be held that upon proof of the delivery of a message for the purpose of transmission, properly addressed, a

to a letter which had been addressed to the same party, applies to a dispatch in answer to a communication by letter, but is inapplicable to a dispatch sent in reply to a communication by telegraph.<sup>1</sup> Nor is the fact that a dispatch was forwarded to a person at a certain place, and that an answer purporting to be from him was received in due course, evidence that such person was at that place at that particular time.<sup>2</sup> The receipt of a message over the wires at the point of destination creates a presumption that the message was sent from the office from which it purports to come.<sup>3</sup>

**4. Telegrams as Privileged Communications.**—In most of the states statutes exist which forbid, under penalty, the disclosure of the contents of any message by the company receiving it for transmission.<sup>4</sup> But these statutes do not, it seems, establish a principle of public policy similar to that which exists in favor of letters sent through the mail.<sup>5</sup> While there is some conflict of opinion as to whether they have the effect of making telegrams privileged communications, the weight of authority is in favor of

presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial and raise an issue to be determined." See also *Home Ins. Co. v. Marple*, 1 Ind. App. 411.

**1. Presumptions—Handwriting.**—*Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355; *Howley v. Whipple*, 48 N. H. 487. See also *Ovenston v. Wilson*, 2 Car. & K. 1; 61 E. C. L. 1; *Gray on Telegraphs*, p. 242.

**2. That Sender Was at Place From Which Message Was Sent.**—"The fact that an answer is received to a letter, may raise such presumption (1 Greenl. Ev. (14th ed.), § 578). But in the case of a telegraphic communication, the ground of belief amounts merely to this: that the operator at one end of the line has informed the operator at the other end, of the presence of the sender of the answer. This is mere hearsay." *Howley v. Whipple*, 48 N. H. 487.

**3. Elwood v. Western Union Tel. Co.**, 45 N. Y. 549; 6 Am. Rep. 140; *Gray on Telegraphs*, § 135, note.

**4. Statutes Forbidding Disclosure of Telegrams by Company.**—Thus the Code of *Tennessee*, §§ 1541-2, provides that all messages, including those received from other companies, "shall be kept strictly confidential," and that any officer or agent of the company who willfully violates this provision is "guilty of a misdemeanor, and he and the telegraph company or proprietor

are also liable in damages to the party aggrieved." See also Code of *Mississippi* (1892), § 1301; *Laws North Carolina* (1889), ch. 41, p. 61; *Pub. Acts, Connecticut* (1889), ch. 30, p. 18; *Wisconsin Rev. Stat.*, § 4557; *Iowa Code*, § 1328; 18 Am. L. Reg. 65 (article by Mr. Cooley); *Gray on Telegraphs*, § 120.

Where the contents of a telegram were disclosed by the agent who received it, the sender is entitled to damages sustained thereby, notwithstanding his failure to comply with a stipulation by presenting a claim therefor within 60 days, the disclosure having been fraudulently concealed until after the expiration of such time, and then discovered by accident. *Gulf, etc., R. Co. v. Todd* (Tex. 1892), 19 S. W. Rep. 761. In such a case the jury is to judge as to what is a reasonable time within which presentation must be made. *Thorp v. Western Union Tel. Co.*, 84 Iowa 190.

**5. Ex p. Brown**, 72 Mo. 91; 37 Am. Rep. 426. In this case the court, by Henry, J., said: "There is no such analogy between the transmission of communications by mail, and their transmission by telegraph, as would justify the application to the latter of the principles which obtain with respect to the former; and certainly penal statutes in relation to the one, cannot by the courts be declared applicable to the other." *Wharton on Ev.* (3d ed.), § 595.

the rule that under such statutes telegrams are not privileged, and their production into court may be compelled under a subpoena *duces tecum* or other appropriate process, even at the instance of one not a party to the communication.<sup>1</sup> The authorities which favor a different rule do so on the ground that telegraphic correspondence is analogous to that conducted by mail,

Mr. Cooley insists, however, that such statutes are not restricted in their force to the imposition of penalties for disobedience, but they announce and establish a principle of public policy which is violated as distinctly when a telegram is brought into court for public exposure as when it is privately shown to persons having no right to see it. 18 Am. L. Reg. 72.

**1. Are Not Privileged From Process of Courts.**—*State v. Litchfield*, 58 Me. 269; *Ex p. Brown*, 7 Mo. App. 484; 72 Mo. 83; 37 Am. Rep. 426; *Woods v. Miller*, 55 Iowa 168; 39 Am. Rep. 170 (production ordered by one of parties to the message); *Com. v. Jeffries*, 7 Allen (Mass.) 548; 83 Am. Dec. 712; *Henisler v. Friedman*, 2 Pars. Sel. Cas. (Pa.) 274; *National Bank v. National Bank*, 7 W. Va. 546.

*In re Wadell*, 8 Jur. N. S. 181; *In re Ince*, 20 L. T. N. S., 421; *Wharton on Ev.* (3d ed.), § 595; *Gray on Telegraphs*, § 117 *et seq.*; 20 Abb. L. J. 108 (article by Grosvenor Lowrey); 5 Smith L. Rev. N. S. 473 (article by Henry Hitchcock); *Thompson on Electricity*, § 493. See also *Lee v. Birrel*, 3 Camp. 337; *Amey v. Long*, 9 East 484.

In *State v. Litchfield*, 58 Me. 269, the court said: "Nor can telegraphic communications be deemed any more confidential than any other communications. They are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. . . . Telegraphic companies cannot rightfully claim that the messages of rogues and criminals, which they may innocently or ignorantly transmit, should be withheld whenever the cause of justice renders their production necessary." *Compare* 18 Am. L. Reg. 72.

"The facts that railroad train orders are generally communicated by telegraph, that a vast amount of trade and traffic is transacted through this medium, that it has become of almost equal importance in the commerce of this country with the postal system,

and that in a business sense men are compelled to communicate by telegraph, are for the consideration of the legislative branch of the government in determining the propriety of placing telegraphic communications on the same footing with correspondence by mail, or declaring them privileged; but the annunciation of such a doctrine by the court would be an assumption of power which belongs to the legislative department. *Ex p. Brown*, 72 Mo. 91; 37 Am. Rep. 426."

In *Henisler v. Friedman*, 2 Pars. Sel. Cas. (Pa.) 274, it is said in ordering the production of a telegram: "The telegraph may be used with the most absolute security for purposes destructive to the well-being of society, a state of things rendering its usefulness at least questionable. The correspondence of the traitor, the murderer, the robber and the swindler, by means of which their crimes and frauds could be the more readily accomplished and their detection and punishment avoided, would become things so sacred that they could never be accessible to public justice, however deep might be the public interest involved in their production." Mr. Cooley, in answer to this, suggests that the same correspondence of the traitor and murderer are already made so "sacred" by the laws of the *United States* that they are not accessible; that "the same law that protects the correspondence of offenders against the laws, protects that between the husband and wife, the parent and child, the lover and his mistress, the principal and his agent, the partner and his associate, the official and his constituent; in short, the correspondence in every relation of life. To protect the correspondence of the criminal is not the purpose of the post office laws; it is protected incidentally in protecting the general correspondence of the country and because no possible method could be devised of discovering that which is meretricious without disclosing the infinitely larger quantity which is innocent." 18 Am. L. Reg. 72.

and that the policy of the law which protects letters from the process of the courts should extend to telegrams.<sup>1</sup>

Under the constitutional provisions for the protection of private papers from unreasonable searches and seizures, the subpoena or other process for the production of the telegrams must specify with exactness the particular dispatches to be produced; a general description, as for example, all the dispatches which passed between certain parties during a time specified, is too indefinite.<sup>2</sup>

1. Cooley's Const. Lim. (5th ed.), P. 372.

In 18 Am. L. Reg. 65 *et seq.*, Mr. Cooley discusses the subject and ably contends for a rule opposed to that of the text. He announces, in conclusion, that the doctrine that telegraph authorities may be required by legal process to produce private messages upon the application of third persons, is objected to on the following grounds:

"1. That it defeats the policy of the law, which invites free communication, and to the extent that it may discourage correspondence, it operates as a restraint upon industry and enterprise, and, what is of equal importance, upon intimate social and family correspondence.

"2. It violates the confidence which the law undertakes to render secure, and makes the promise of the law a deception.

"3. It seeks to reach a species of evidence which, from the very course of the business, parties are interested to render blind and misleading, and which, therefore, must often present us with error in the guise of truth, under circumstances which preclude a discovery of the deception.

"4. It renders one of the most important conveniences of modern life susceptible at any moment of being used as an instrument of infinite mischiefs in the community."

In *England*, in a contested election case, the court held that telegrams were not subject to a subpoena from the court. This case is explainable, however, on the ground that in *England* the telegraph service, like that of the mails, is under governmental control. See Wharton on Ev. (3d ed.), § 595, note.

2. Sufficiency of Description in Subpoena Duces Tecum.—In *Ex p. Brown*, 72 Mo. 83; 37 Am. Rep. 426, reversing 7 Mo. App. 484, the subpoena *duces tecum*, commanding the production of certain telegrams before the grand jury, de-

scribed them as follows: "Dispatches between Dr. J. C. N. and A. B. W., and W. L. and J. C. N., and W. L. and Dr. N., between W. McC. and A. B. W., between W. McC. and J. C. N., between the latter and J. S. P., between A. B. W. and J. S. P., between the latter and W. L. and between G. W. A. and A. B. W., sent or received by or between any or all of said parties within fifteen months last past." In the lower court it was held that the description was sufficiently definite, Lewis, J., dissenting in an opinion which was adopted as the correct view by the supreme court. This court considered that to allow the seizure and search of private papers under such a subpoena would be unwarrantable and a gross violation of the constitutional provisions against the invasion of private property, and said: "A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed, to the annoyance and shame of the only persons interested. Nor is it any answer to this that the obligation of secrecy imposed by law on grand juries would prevent such exposure." It is also said, "To permit an indiscriminate search among all the papers in one's possession, for no particular paper, but for some paper which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people." See also 5 South. L. Rev. (N. S.) 473 (article by Henry Hitchcock, Esq.); *Shaftesbury v. Arrowsmith*, 4 Ves. 66; *Thompson on Electricity*, § 495; *Gray on Telegraphs*, §§ 122-4; 2 Fonbl. Eq., bk. 6, ch. 8, § 1; Cooley's Const. Lim.

**XIII. TELEPHONIC COMMUNICATIONS AS EVIDENCE.**—Conversations conducted through the medium of a telephone do not differ in their essential characteristics from any other verbal communications; their admissibility and effect as evidence are therefore governed by the same legal principles which apply in case of ordinary oral declarations. The instrument merely enables the parties to carry on their conversation at a greater distance than under ordinary circumstances.<sup>1</sup> There may be cases, however, in which the fact that the voice is not recognizable and that neither party can be absolutely sure of the identity of the person conversing with him, may necessitate the application of exceptional rules.<sup>2</sup>

(5th ed.), p. 372. See also *U. S. v. Hunter*, 15 Fed. Rep. 712.

The rule for specification and description in subpoenas for such cases is thus laid down by Dillon, J., in *U. S. v. Babcock*, 3 Dill. (U. S.) 570: "The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the papers on the trial, so that they can be used if the court shall then determine that they are competent and relevant evidence." The conclusion of this case is considered incorrect in *Ex p. Brown*, 72 Mo. 96; 37 Am. Rep. 426. See *Gray on Telegraphs*, § 125.

In *Re Smith*, L. R., 7 Ir. 286, a subpoena from the Irish bankruptcy court ordered the production of all telegrams sent by the bankrupt after a certain date. The secretary of the post office was required by the court to produce the documents described.

1. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473; 10 Am. St. Rep. 331; *People v. Ward*, 3 N. Y. Crim. Rep. 483; *Banning v. Banning*, 80 Cal. 271; 13 Am. St. Rep. 156; (acknowledgment of deed by means of telephone held good); *Thompson on Electricity*, § 121; 24 Wkly. Law Bull. 246.

In *Oskamp v. Gadsden*, 35 Neb. 7, defendant at the public telephone station at S. asked the operator to call up plaintiff at his place of business in O. Plaintiff answered the call, but owing to peculiar atmospheric conditions then prevailing they were unable to communicate directly with each other. The operator at F., an intermediate station, offered to and did transmit to plaintiff, defendant's message offering to sell him goods, and repeated plaintiff's reply. In an action for a breach

of contract it was held that the conversation was admissible in evidence and that the defendant might state the contents of plaintiff's answer as repeated to him by the operator at F. See also *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901; *Globe Printing Co. v. Stahl*, 23 Mo. App. 458.

In an action against a carrier for goods received, a witness testified over objection that he demanded the goods of the defendant's agent through the telephone, but did not remember the name of the person of whom he made the demand. It was held that the objection was properly overruled, as the witness's failure to remember the name affected only the weight of the evidence, and not its competency. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195.

"The use of this instrument (the telephone) facilitates business to such an extent that it would be very prejudicial to the interests of the business community, if the courts were to hold that business men are not entitled to act upon the faith of being able to give in evidence replies which they received to communications made by them to persons at their usual places of business in this way." *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *Thompson on Electricity*, § 125.

2. **Recognizing Voice of Speaker.**—The fact that the witness, testifying as to a conversation between himself and another, did not recognize the speaker's voice, does not affect the admissibility of the evidence, but only its weight. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473; 10 Am. St. Rep. 331; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451. See this latter case discussed and quoted from in *Thompson on Electricity*, §§ 124-125.

In a criminal case, where a witness testifies that he called up a particular

A notice by telephone is verbal and is, therefore, insufficient under a statute requiring all notices to be in writing.<sup>1</sup>

**XIV. CONTRACTS BY TELEGRAPH—1. In General.**—Communication by telegraph does not differ essentially from correspondence through the mails, and contracts may be made by it as well as by letter.<sup>2</sup> The written message given for transmission is a sufficient writing to constitute a memorandum within the meaning of the Statute of Frauds,<sup>3</sup> and it seems that the same is true of a message dic-

person over the telephone, and recognized his voice, he may give in evidence the communication which the latter made to him. *People v. Ward*, 3 N. Y. Crim. Rep. 483.

In *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901, it appeared that appellee, K., being unaccustomed to the telephone, asked the operator at M. to converse with appellant S. through the telephone for him. The operator consented and conducted a conversation with S. repeating to K. what S. had to say, and replying as K. dictated. It was held that the operator must be regarded as K.'s agent, and that it was competent to prove by him the messages sent by S.

1. *In re Shier's Estate* (S. Car. 1892), 14 S. E. Rep. 931; *South Carolina Code Civ. Proc.*, § 408.

2. **Contract May Be Made by Telegraph.**—*Duble v. Batts*, 38 Tex. 312; *Calhoun v. Atchison*, 4 Bush (Ky.) 261; 96 Am. Dec. 299; *Trevor v. Wood*, 41 Barb. (N. Y.) 255; 36 N. Y. 307; 93 Am. Dec. 511; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Uteley v. Donaldson*, 94 U. S. 29; *Wells v. Milwaukee, etc., R. Co.*, 30 Wis. 605; *Franklin Bank v. Lynch*, 52 Md. 270; 36 Am. Rep. 375; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *Beach v. Raritan, etc., R. Co.*, 37 N. Y. 457; *Taylor v. The Robert Campbell*, 20 Mo. 254; *Godwin v. Francis, L. R.*, 5 C. P. 295; 3 Minor's Insts., p. 127; 1 Wharton on Contracts, § 27. See also *Oskamp v. Gadsden*, 35 Neb. 7; *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901, admitting conversation by telephone made through an intermediate station, as evidence of a contract; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481; *infra*, this title, *Telephonic Communications as Evidence*.

"A message, so far as the responsibility of its sender is concerned, may be deemed equivalent to a letter, or, rather, since it is open to the inspection of the telegraph company, to a

postal card coming from the same person and containing the same intelligence. For instance, such a message may satisfy the Statute of Frauds or may be a libel." *Gray on Telegraphic Communication*, § 103, citing *Coupland v. Arrowsmith*, 18 L. T. N. S., 755; *Beach v. Raritan, etc., R. Co.*, 37 N. Y. 457; *Williamson v. Freer, L. R.*, 9 C. P. 393.

A telegram from an employer to one whom he has employed to render certain services, that he will leave at a certain time direct for the mine, is admissible against the former's estate as evidence of the employment. *Meinert v. Snow*, 2 Idaho 851.

A telegram sent by C. to R. saying: "You can lease Glen Allen for ten thousand dollars," with a response accepting the proposition by saying: "Satisfactory, will take Glen Allen," in connection with a previous letter proposing to lease the premises, shows a specific proposition accepted by one of the parties, and constitutes a contract. *Calhoun v. Atchison*, 4 Bush (Ky.) 261; 96 Am. Dec. 299.

3. **As to Statute of Frauds.**—*Smith v. Easton*, 54 Md. 146; 39 Am. Rep. 355; *Watson v. Baker*, 71 Tex. 739; *Little v. Dougherty*, 11 Colo. 103; *Ex p. Brown*, 7 Mo. App. 487; *McBlain v. Cross*, 25 L. T. N. S. 804; *Godwin v. Francis, L. R.*, 5 C. P. 295; *Gray on Telegraphs*, § 138 *et seq.* B. having contracted with C., defendant's brother, for the sale of hay, brought an action against defendant for not accepting. At the trial, the judge admitted letters and telegrams signed by C., as evidence against defendant, and the jury found for the plaintiff. *Held*, that there was sufficient evidence of the authority, and that the two telegrams, of which one was signed in C.'s name, and in the other the name of the defendant was not mentioned as buyer, together constituted a sufficient memorandum of the contract to satisfy the Statute of Frauds, on the ground that

tated by the sender and written out by the operator at the receiving station.<sup>1</sup>

Contracts made by telegraph are governed by the same rules applying in the case of contracts by letter, the details of which have been examined in a previous article.<sup>2</sup> The contract in the latter case becomes complete when the party to whom the offer was made deposits his acceptance of the offer in the mail; the post office is made the agent of the party making the offer, to communicate the offer to the offeree and to receive his acceptance.<sup>3</sup> A revocation of the offer can have no effect unless com-

the defendant might be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal. *McBlain v. Cross*, 25 L. T. N. S. 804.

A telegram sent in pursuance of a previous correspondence by letter, may constitute "an unconditional promise in writing to accept a bill before it is drawn," and amount to an actual acceptance under the statute, so as to preclude the necessity of presentment for acceptance or payment. *Whilden v. Merchants', etc.*, Nat. Bank, 64 Ala. 1; 38 Am. Rep. 1.

Telegrams, however, which are signed by a person and relate to a contract, but do not state its terms or conditions, are not sufficient to take the contract out of the Statute of Frauds. 2 *Rice on Ev.*, p. 1020; *Hazard v. Day*, 14 Allen (Mass.) 487; 92 Am. Dec. 790; Allen Tel. Cas. 319.

A defective memorandum of sale cannot be helped out by a telegram from one of the parties with which the other is in no wise connected. *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299.

So also telegrams between a sheriff and a third person are inadmissible to show an agreement between a sheriff and a county in relation to their subject-matter. *Yavapai County v. O'Neil* (Arizona, 1892), 29 Pac. Rep. 430.

Telegrams concerning the sale of property are not a sufficient memorandum under the statute, where it is impossible to tell from them exactly what property is intended to be included, and the parties disagree as to what property is meant. *Breckinridge v. Crocker*, 78 Cal. 529.

1. In the greater number of cases, the telegraph company is the agent of the sender, and he is therefore bound by the message it delivers, whether correct or not. In such cases it is apparent that the real telegram is that

delivered to the sendee and it has all the binding effect of the one actually signed by the sender, the party to be charged. See *infra*, this title, *Telegraph Company Ordinarily Agent of Sender*. *Magie v. Herman* (Minn. 1892), 52 N. W. Rep. 909; *Saveland v. Green*, 40 Wis. 431; *Henkel v. Pape*, L. R., 6 Exch. 7.

2. See LETTER, vol. 13, pp. 233-236; LETTERS, vol. 13, pp. 254-256; Gray on Telegraphs, § 103; 3 Minor's Insts. 127.

3. *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. (U. S.) 431; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Baker v. Holt*, 56 Wis. 100 (message sent by offeree misinterpreted as a counter-offer, instead of an acceptance); *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Colb v. Foree*, 38 Ill. App. 255; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *Wheat v. Cross*, 31 Md. 99; 1 Am. Rep. 28; *Duncan v. Topham*, 8 C. B. 225; 65 E. C. L. 225; *Adam v. Lindsell*, 1 B. & Ald. 681; *Household F., etc., Ins. Co. v. Grant*, 4 Exch. Div. 216; *Dunlop v. Higgins*, 1 H. L. Cas. 381; 3 Minor's Insts. p. 127; LETTERS, vol. 13, p. 255. See also *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *Stevenson v. McLean*, 5 Q. B. Div. 346; Gray on Telegraphs, § 112.

This rule applies, of course, only where the acceptance is forwarded within a reasonable time. *Maclay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35; SALES, vol. 21, p. 444.

The rule of the *Massachusetts* courts is contrary to that generally adopted, and is recognized by that court as being opposed by the weight of authority. It is there held that where a party makes an offer by mail, and afterwards revokes it, the letter of revocation takes effect as a revocation at the time it is

municated to the offeree before his acceptance.<sup>1</sup> The same rules apply where the telegraph, instead of the postal service, is made the means of communication.<sup>2</sup> The fact that the message, unlike the letter, is liable to become materially changed in the process of transmission by negligence on the part of the operators of the telegraph, introduces no element of difference; the message as handed to the addressee is the real message and any damage sustained by either party is to be redressed by an action against the negligent company.<sup>3</sup> Nor does the fact that the telegraph, unlike the post office, is a private institution, owned and operated by private individuals, create any distinction between the effect of correspondence conducted through them.<sup>4</sup>

It will be observed that in the case of contracts by telegraph the telegraph company is the agent of the party who proposes it as a means of communication; this is usually, though not always,

deposited in the mail, and not at the time it was received by the addressee. So that where an offer is made on Monday, by letter, and revoked by another mail on Tuesday, and the acceptance is mailed on Wednesday (before receipt of revoking letter), there is no contract. *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Lewis v. Browning*, 130 Mass. 173. In this latter case, an offer was made by letter, in which the offerer requested an answer by telegraph, "yes" or "no," and stated that unless he received the answer by a certain day he would conclude "no." It was held that the offer was made dependent upon the actual receipt and not the mere sending of the telegram. In *Langdell on Contracts*, §§ 6, 11, 15, it is contended that a contract by mail is not made until the offerer reads the letter of acceptance. See *Gray on Telegraphs*, p. 197, note.

A necessary result of the rule of the text is the principle that the contract takes place where the acceptance is deposited in the mail; its formation is complete at that time and place, without regard to the place of performance. *SALES*, vol. 21, p. 444; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380; 2 Am. St. Rep. 902.

1. *Tayloe v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390. The doctrine proposed in this case is strongly objected to in 3 *Minor's Insts.* 127. See also *Benj. on Sales*, § 50; *Lewis v. Browning*, 130 Mass. 175; *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Holmes on Com. Law* 305-307. A debtor offered his creditor's agent a certain amount in discharge of all his indebted-

ness, with the agreement that the creditor's acceptance or rejection should be telegraphed to him. It was held that an acceptance so telegraphed completed the contract and became binding upon the debtor, notwithstanding the fact that a few minutes after it was delivered to the telegraph company for transmission, and before it reached him, the debtor telegraphed to the creditor his revocation of the offer. *Cobb v. Foree*, 38 Ill. App. 255.

2. *Saveland v. Green*, 40 Wis. 431; *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. (U. S.) 431; *Stevenson v. McLean*, 5 Q. B. Div. 346.

3. *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 21 Am. & Eng. Corp. Cas. 145; 1 Am. St. Rep. 353; *Magie v. Herman* (Minn. 1892), 52 N. W. Rep. 909; *Saveland v. Green*, 40 Wis. 431; *Thompson on Electricity*, § 484; *infra*, this title, *Telegraph Company Ordinarily Agent of Sender*.

4. "This distinction is immaterial, it seems, upon the question whether either a telegraph company or the post office is the agent of a private individual to complete a contract in his behalf. A telegraph company is employed to communicate a certain message. It neither undertakes, nor is authorized to go further, and effect as an agent, the purposes for which the communication of that message is desired by the employer. It is simply a forwarder of messages." *Gray on Telegraphs*, § 113, citing *Dickson v. Reuter's Tel. Co.*, 2 C. P. Div. 62; 19 *Moak's Rep.* 313; *aff'd* 3 C. P. Div. 1; 30 *Moak's Rep.* 1.



the sender of the first dispatch in the transaction. Such party, by sending a telegram, impliedly invites a continuance of the correspondence by the same means. He is, therefore, bound by the terms of the messages as delivered to the addressee and as delivered by the addressee to the company for transmission to himself; he assumes responsibility for errors both ways.<sup>1</sup> A party by acceding to the proposition made by another to correspond by telegraph does not thereby impliedly warrant that his communication will be received as sent or received at all.<sup>2</sup>

The ordinary rules of law, as to the character of the offer and the acceptance, prevail where the contract is by telegraph; and a party cannot claim that the negligence of the company prevented the consummation of an important contract, and recover damages accordingly, when the communication would not have completed the contract if it had been delivered.<sup>3</sup>

1. **Telegraph Company the Agent of Party Proposing It as the Means of Communication.**—In the case of *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511, reversing 41 Barb. (N. Y.) 255, the parties mutually agreed to correspond by telegraph on January 30th, 1860. T. telegraphed to W. to know at what price he would sell a given number of Mexican dollars. On the 31st W. answered, "Will deliver fifty thousand" at a price named. On the same day, T. replied, "Your offer accepted," and again to the same effect on February 1st. In consequence of a derangement of the lines, it did not reach W. until February 4th. On the 3d of February, W. telegraphed, "No answer to our dispatch of the 31st. Dollars sold." It was held that the correspondence showed a valid acceptance and the contract was binding upon W. See also *Magie v. Herman* (Minn. 1892), 52 N. W. Rep. 909; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 483; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127. In *Pegram v. Western Union Tel. Co.*, 100 N. Car. 28; 21 Am. & Eng. Corp. Cas. 150; 6 Am. St. Rep. 567, a broker sent a telegram to plaintiff asking information as to certain stocks, concluding: "Answer." Plaintiff sent a telegram in reply, but it was incorrectly transmitted. The court held in substance, that the telegraph company was not the plaintiff's agent.

2. *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 512.

3. As to the ordinary rules of law in such cases, see *CONTRACTS*, vol. 3, p. 842 *et seq.*; *SALES*, vol. 21, p. 444.

In *Alexander v. Western Union Tel.*

*Co.*, 67 Miss. 386, it appeared that plaintiff's agent wrote to him, stating that he had "hit on" a desirable piece of property which could be bought on certain terms, and advising him to respond by wire if a purchase was desired. Plaintiff replied instructing the agent to close the contract, but the message was not delivered for several days and the opportunity to make the purchase was lost. It was held that the correspondence did not constitute a contract, there having been no distinct offer. So in the case of *Ford v. Gebhardt*, 114 Mo. 298, A made B an offer to purchase his land, to which B replied by telegraph, "Will accept \$900 if not sold otherwise." Soon afterwards B sold the land to a third party with whom he had been negotiating before he sent the telegram. It was held that the message did not constitute an absolute agreement to sell.

In reply to a proposition by letter to sell from three to five thousand bales of cotton on stated terms, a cablegram was sent: "We offer firm for 1,000 bales," etc. In response, the following telegram was delivered by plaintiff for transmission and was lost, "Accept the offer. How much?" It was held that the trial court should have held as a matter of law, without submitting the question to the jury, that had the contract been consummated by the delivery of the telegram, it would only have been for the sale of 1,000 bales, and damages should have been allowed accordingly. *Western Union Tel. Co. v. Way*, 83 Ala. 542. See also *Breckinridge v. Croker*, 78 Cal. 529 (correspondence held not to constitute a contract).

**2. Telegraph Company Ordinarily Agent of Sender.**—Ordinarily, in communication by telegraph, the telegraph company is to be regarded as the agent of the party sending the dispatch.<sup>1</sup> An exception prevails, however, where a continued correspondence is conducted by telegraph; in such case the company acts as the agent of the party proposing it as a means of communication.<sup>2</sup> The effect of this rule of law is to make the telegram delivered to the addressee original evidence of the communication,<sup>3</sup> and to make the sender bound by the terms of the message delivered to the addressee, however much it may have become changed in the process of transmission.<sup>4</sup>

**1. Company is Sender's Agent.**—*Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481; *Magie v. Herman* (Minn. 1892), 52 N. W. Rep. 909; *Howley v. Whipple*, 48 N. H. 487; *Dunning v. Roberts*, 35 Barb. (N. Y.) 463; *Rose v. U. S. Tel. Co.*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 408; *New York, etc., Print. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Saveland v. Green*, 40 Wis. 431; *Anheuser-Busch Brewing Assoc. v. Hutmacher*, 127 Ill. 652, *aff'd* 29 Ill. App. 315; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *supra*, this title, *Measure of Damages*.

See also as indirectly sustaining the same view, *Matteson v. Noyes*, 25 Ill. 481; *Morgan v. People*, 59 Ill. 58; *Chicago, etc., R. Co. v. Mahoney*, 82 Ill. 73; *Chicago, etc., R. Co. v. Russell*, 91 Ill. 298; 33 Am. Rep. 54; *Barons v. Brown*, 25 Kan. 410; *Culver v. Warren*, 36 Kan. 391 (ratification of agency); *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355; *State v. Hopkins*, 50 Vt. 316; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60. *Compare Williams v. Brickell*, 37 Miss. 682; 75 Am. Dec. 88.

**2. Durkee v. Vermont Cent. R. Co.**, 29 Vt. 127; *Thompson on Electricity*, § 487.

**3. Smith v. Easton**, 54 Md. 138; 39 Am. Rep. 355; *Morgan v. People*, 59 Ill. 58; *infra*, this title, *Telegrams in Evidence*.

**4. Sender Bound by Terms of Message as Delivered to Addressee.**—*Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Rose v. U. S. Tel. Co.*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 408; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

In *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 21 Am. & Eng. Corp. Cas. 145; 1 Am. St. Rep. 353, the plaintiff

sent by the telegraph company a message offering to sell to the addressee "800 M laths, two ten net." The message as delivered to the addressee read "two net," the word "ten" being omitted. The addressee replied by telegraph accepting the offer. The plaintiff at his insistence shipped the laths at two dollars per thousand and brought an action against the telegraph company to recover the difference in the prices, ten cents per thousand. It was held that he might recover such difference on the ground that the company acted as his agent; and that he was bound by the terms of the message as delivered by the addressee.

*Western Union Tel. Co. v. Shotter*, 71 Ga. 760, is a parallel case. The sender wrote his message, "Can deliver hundred turpentine at sixty-four;" as delivered to the addressee it read "sixty" instead of "sixty-four." The addressee having sent an acceptance of the offer, the court held that the sender was bound by the terms of the incorrect message and was bound to ship the hundred at "sixty," but that he might recover of the company for the loss sustained.

In *Dunning v. Roberts*, 35 Barb. (N. Y.) 463, the plaintiff, D., requested R., who was not an employé of the telegraph company, to send a message to the effect that he would guarantee the payment of a bill for certain goods. R., having by mistake sent an original instead of a collateral promise, it was held that he acted as D.'s agent and D. thereby became liable as an original promisor.

In *Pegram v. Western Union Tel. Co.*, 100 N. Car. 28; 21 Am. & Eng. Corp. Cas. 150; 6 Am. St. Rep. 567, S., a broker in Richmond, sent to plaintiff a letter: "If your customer will offer 100 shares C. stocks at 43, please wire us at our expense." Shortly afterward

In *England*, a different rule is adopted, in that the sender is held to be not bound by the terms of a message incorrectly transmitted, even though the addressee incurs trouble and expense acting upon the faith of the message delivered to him.<sup>1</sup> In view of another rule prevailing in this jurisdiction, to the effect that the addressee of a message has no right of action against the telegraph company for incorrectly transmitting a message,<sup>2</sup> it seems that cases might not infrequently occur in which an injured party

plaintiff addressed this message to B.: "Party offer 100 shares C. stock at forty-three. Answer quickly;" but the company in transmitting this message left out the word "three." B. on receiving the message (incorrectly transmitted) answered: "Will take the hundred shares," etc. Thereupon the plaintiff purchased one hundred shares, made his draft on B. for their price at "forty-three" (*i. e.* \$43.00 per share), and sent it to a Richmond bank with stock attached to be delivered to B. upon payment of the draft. B. sold the stock while *in transitu* at forty-one seventy-five; but when the draft was presented, refused to pay it because it was at forty-three instead of forty. B. was compelled to purchase other stock to fulfil his contract of sale, and he afterwards brought suit in Richmond and recovered of the plaintiff the amount lost by him from his being compelled to discharge his contract with other stock purchased at higher prices. The plaintiff then brought his action in *North Carolina* against the telegraph company to recover as damages the amount recovered of him by B. The court held that he had a cause of action and might recover the price paid for the transmission of the message, but that beyond that he could recover nothing. *Merrimon, J.*, said: "But he could not recover damages for any injury sustained by the persons—the brokers—to whom his message was falsely transmitted, by reason thereof, because the injury done to them was not an injury to him. He had no cause of action on that account; they had, if they so sustained injury. Nor was the plaintiff liable to the brokers for any such injury sustained by them, or on account of the breach of any contract with them, created by the message as transmitted, because he did not send, or direct the defendant to transmit, the message it transmitted. He did not offer or agree to sell to the brokers the stock at 'forty.' They had no contract with him. . . .

It (the company) transmitted the false message to them in its own wrong, and it alone was answerable to them for any injury they sustained thereby. The plaintiff had done them no injury." It appeared that when the suit in Richmond was begun against plaintiff, he notified the company to defend, which it declined to do. In *Thompson on Electricity*, § 484, note, this decision is considered wrong. See *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511, where a party sending an offer by telegram, was held bound by an acceptance which the company wholly failed to transmit. Compare *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

1. *Doctrine in England.*—Thus in the case of *Henkel v. Pape*, L. R., 6 Exch. 7, the defendant wrote a message for transmission by telegraph to the plaintiffs, ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three," and the plaintiffs thereupon, acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number to him. He declined to take more than three. In an action against him to recover the price of the fifty rifles, held, that he was not responsible for the mistake of the telegraph clerk, and that therefore the plaintiffs were not entitled to recover the price of more than three rifles. *Verdin v. Robertson*, 10 Sc. Sess. Cas. (3d Series) 35. See *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, in which the English rule is accounted for by the fact that over there the telegraph is a governmental institution. But it seems that this was not the case at the time these decisions were made: See 8 Jac. Fish. Dig., "Telegraphs."

2. *Playford v. United Kingdom Tel. Co.*, 10 B. & S. 759; L. R., 4 Q. B. 706; *Dickson v. Reuter's Tel. Co.*, 2 C. P. Div. 62; 19 Moak's Rep. 313; *aff'd* 3 C. P. Div. 1; 30 Moak's Rep. 1; *supra*, this title, *Right of Addressee*.

would be without redress.<sup>1</sup> In at least one state in the Union the English rule is adopted and the company is not regarded as being the sender's agent, but as an independent contractor.<sup>2</sup>

1. Of the holding of English cases in this regard, Mr. Thompson says: "The result is, that he (the addressee) acts on the message at his peril, and if there is a mistake in it, in consequence of which he suffers loss, he cannot recover damages of anyone. Such a condition of the law illustrates an obtuse sense of justice on the part of the judges by whom it has been formulated." Thompson on Electricity, § 480.

2. *Tennessee Doctrine.*—In *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 25 Am. & Eng. Corp. Cas. 542; 10 Am. St. Rep. 699. B., merchants of Birmingham, sent to plaintiff by the defendant company, asking for quotation of prices of certain meats; plaintiff replied that for the meat specified, their price was "six sixty," meaning six dollars and sixty cents. The telegraph company transmitted the message "six thirty," instead of "six sixty." B. thereupon ordered a carload of the meat, amounting to twenty-five thousand pounds, but after it was delivered refused to pay for it at a greater rate than six thirty (*i. e.* six dollars and thirty cents per hundred weight). The plaintiff accepted payment at six thirty, and brought an action against the telegraph company for the loss sustained from the difference in prices. The court held that, ordinarily, the loss would not be the difference in the price at which the sender was willing to sell and the price at which, in consequence of the error, he was obliged to sell; but under the circumstances of this particular case the difference in the prices should be taken as the proper measure of damages. It was held however, that the plaintiff was not bound to sell at six thirty merely because the incorrect message so stated; that the telegraph company was not the plaintiff's agent nor was he bound by its acts. In defense of this holding, the court, by Folkes, J., said: "Ordinarily there is no relation of master and servant between the sender of the telegram and the company. Where this relationship does not exist the principal is not responsible for the torts of the agent, and the negligent delivery of an altered message, when acted on by the receiver to his detriment, is a tort for which

the telegraph company alone is responsible. The company retaining exclusive control of the manner of performance and of its own employes and instrumentalities, the sender of the message being absolutely without voice in the matter, it seems to us that the position of the company to its employer is that of 'independent contractor,' as defined and understood in the well-settled class of cases, where the employer is held to be not responsible for the negligence of the contractor in the performance of his work or undertaking. The many and marked differences between the employment of such companies to transmit a dispatch and the employment of a private person to deliver a verbal message, are so manifest that we cannot assume the liability of the sender in the first instance from his conceded liability in the last, for the negligence of the instrumentality employed. Such a holding not only does violence to the well-settled principles of the law of agency, but may lead to the absolute ruin of the party employing this useful and now necessary public medium of rapid transmission of intelligence." The court then proceeds to a criticism of the American authorities holding the other way. It seems that this case is justly pronounced "self-contradictory." Thompson on Electricity, § 480. It laid down one rule of damages as correct, but applied another; moreover, it affirmed the judgment of the lower court, which was based on the principle that the company acted as the sender's agent.

*Texas Rule.*—The view taken by the English and the *Tennessee* courts has also been adopted to some extent in *Texas*. It is held in *Harrison v. Western Union Tel. Co.* (Tex. 1885), 10 Am. & Eng. Corp. Cas. 600, that one who uses the telegraph as a mode of communication, is not responsible for, nor bound by, the errors of the operator, and any sums which such party pays to the addressee in consequence of such errors are voluntary and gratuitous, and cannot be recovered of the company. The case does not seem to have been thoroughly considered, however; nor was it a decision of the supreme court.

And this view is deemed the correct one also and has received the countenance of a leading text writer.<sup>1</sup>

**XV. DISTRICT TELEGRAPH COMPANIES.**—Companies of this kind exist in all cities; their business is principally, if not exclusively, the furnishing of messenger boys to perform such services as delivering or calling for messages or parcels or attending to other similar matters. Such companies are subject to the same general duties as ordinary telegraph companies; they are liable for damages caused by the negligence of their servants to whom the performance of any service is intrusted.<sup>2</sup>

**TELLER.**—(See also **BANKS AND BANKING**, vol. 2, p. 120; **NATIONAL BANKS**, vol. 16, p. 204; **SAVINGS BANKS**, vol. 21, p. 716).—The office of a teller is implied in the word used to designate it—to tell or count the moneys of the bank which are received or paid out. The office is often divided into two branches: that of receiving teller and of paying teller, where the business of the bank is large and the duties cannot conveniently be united in one person.<sup>3</sup>

**TEMPERATE; TEMPERANCE.**—(See also **LIFE INSURANCE**, vol. 13, pp. 636, 639).—The word temperance has no fixed legal meaning as contradistinguished from its usual import. Webster defines it as “habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate indul-

1. In *Gray on Telegraphs*, § 104, note, the English rule is strongly contended for. The cases are all examined by that authority, and the conclusion reached is that “as a matter of fact it has been decided in a single instance only (*Western Union Tel. Co. v. Shotter*, 71 Ga. 760), that the sender is bound by the terms of a message incorrectly transmitted.” The expressions used in the other cases are pronounced to be *dicta* and uncalled for.

2. In *American Dist. Tel. Co. v. Walker*, 72 Md. 454; 35 Am. & Eng. Corp. Cas. 90; 20 Am. St. Rep. 479, the plaintiffs had hired a buggy and horses, and on returning, stopped at the office of the district telegraph company, and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but owing to his negligence and incompetence, the horses ran away and injured themselves and the vehicle. It was held, that the company was liable for the damages thus occasioned; also that the plaintiffs, though they were only bailees for hire, could maintain the action to recover such damages. See also *Newton v. Pope*, 1 Cow. (N. Y.) 109; *Brind v. Dale*, 2 M. & Rob.

90; 8 Car. & P. 207; 34 E. C. L. 355; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Harker v. Dement*, 9 Gill (Md.) 13; 52 Am. Dec. 670. This latter case involved the question of plaintiff's right to maintain the action.

So, also, such a company is liable for a loss occasioned by the delivery, by its messengers, of a parcel, contrary to the instructions of the sender. *Feiber v. Manhattan Dist. Tel. Co.*, 22 Abb. N. Cas. (N. Y. C. P.) 121.

Although such companies are called telegraph companies, and are organized under the statute providing for the incorporation of telegraph companies, it may well be questioned whether they are like telegraph companies in the character of their liability. It would seem that in serving the public as carriers of parcels, their liability would be that of an insurer. See *Feiber v. Manhattan Dist. Tel. Co.*, 22 Abb. N. Cas. (N. Y. C. P.) 121; **CARRIERS OF GOODS**, vol. 2, pp. 782-3; *supra*, this title, *Legal Status of Telegraphs and Telephones*.

3. *Mussey v. Eagle Bank*, 9 Met. (Mass.) 311. And see that case for a summary of the duties, liabilities, etc., of a teller.

gence; moderation, as temperance in eating and drinking, temperance in the indulgence of joy and mirth."<sup>1</sup>

**TEMPEST.**—An extensive current of wind rushing with great velocity and violence; a storm of extreme violence.<sup>2</sup>

**TEMPORARY.**—That which is to last for a limited time, as a temporary statute, or one which is limited in its operation for a particular period of time after its enactment; the opposite of perpetual.<sup>3</sup>

**TENANCY.**—(See LANDLORD AND TENANT, vol. 12, p. 670).—A tenancy exists where one has let property to another.<sup>4</sup>

**TENANCY, JOINT.**—See ESTATES, vol. 6, p. 891; JOINT TENANTS (AND TENANTS IN COMMON), vol. 11, p. 1057.

**TENANCY AT SUFFERANCE.**—(See also ESTATES, vol. 6, p. 890; LANDLORD AND TENANT, vol. 12, p. 668).—A tenancy at sufferance is where one comes into possession by a lawful demise, and, after his term is ended, continues wrongfully to hold over;<sup>5</sup> provided, however, that he does not come in by act of law; for if he comes in by act of law and then holds over, he is regarded as an intruder, abator, or trespasser.<sup>6</sup>

**TENANCY AT WILL.**—(See also ESTATES, vol. 6, p. 887; LAND-

1. *People v. Dashaway Assoc.*, 84 Cal. 123. And in that case it was held that the term was too vague and uncertain to establish a public charity.

In *Meacham v. New York State Mut. Ben. Assoc.*, 120 N. Y. 237, it was said: "This court said in *Van Valkenburgh v. American Popular L. Ins. Co.*, 70 N. Y. 605, that the question, 'Do you use intoxicating liquors or substance?' did not direct the mind to a single or incidental use, but to a customary or habitual use. Much less, therefore, does an inquiry as to whether an applicant be temperate call his attention to occasional use. The word 'temperate' suggests moderation, not abstinence, and the warranty is to the effect that his habit is to refrain from excessive indulgence in the use of intoxicants, and not that he abstains from all use."

2. *Thistle v. Union Forwarding, etc., R. Co.*, 29 U. C. C. P. 84. In that case it was held that damage done by the action of ice at the time of unusually high water, but in ordinary wind and weather, is not the result of a "tempest." The court said: "The word 'tempest' has an undoubtedly plain, popular meaning and significance, however varying that may be, from its apparent root, 'tempus,' 'temps,' 'tempestive,' 'intempestive,' 'tempestus,' time,

weather generally, seasons and seasonable, etc., the modern meaning being universally, 'an extensive current of wind, rushing with great velocity and violence. A storm of extreme violence. We usually apply the word to a steady wind of long continuance; but we say also of a tornado, it blew a tempest. The currents of wind are named according to their respective degrees of force or rapidity, a breeze, a gale, a storm, a tempest; but gale is also used as synonymous with storm, and storm with tempest.' Imperial Dictionary."

3. *Bouv. L. Dict.* Quoted in *Le Moyne v. Quimby*, 70 Ill. 399. See also CONSTITUTIONAL LAW, vol. 3, p. 696.

**Temporarily.**—Power in the authorities of a city to "temporarily" close liquor shops will not authorize the closing of such shops "until further notice." *State v. Strauss*, 49 Md. 299. See also PERIOD, vol. 18, p. 299.

4. *Morill v. Mackman*, 24 Mich. 284.

5. *Godfrey v. Walker*, 42 Ga. 574; *Pleasants v. Claghorn*, 2 Miles (Pa.) 304; *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 130; *Livingston v. Tanner*, 12 Barb. (N. Y.) 484; *Johnson v. Donaldson*, 17 R. I. 107.

6. 4 Kent's Com. 116; followed in *Johnson v. Donaldson*, 17 R. I. 107.

LORD AND TENANT, vol. 12, p. 670).—Tenancy at will is one which may be determined at the will or pleasure of either party.<sup>1</sup>

**TENANCY BY CURTESY.**—See CURTESY, vol. 4, p. 958.

**TENANCY FOR LIFE.**—See ESTATES, vol. 6, p. 880; LANDLORD AND TENANT, vol. 12, p. 679; REMAINDER, vol. 20, p. 828; REVERSION, vol. 21, p. 345.

**TENANCY FROM MONTH TO MONTH.**—See LANDLORD AND TENANT, vol. 12, p. 679.

**TENANCY FROM YEAR TO YEAR.**—See ESTATES, vol. 6, p. 888; LANDLORD AND TENANT, vol. 12, p. 675.

**TENANCY IN COMMON.**—See ESTATES, vol. 6, p. 892; JOINT TENANTS (AND TENANTS IN COMMON), vol. 11, p. 1057.

**TENANCY IN COPARCENARY.**—See PARCENARY, vol. 17, p. 313.

**TENANCY IN DOWER.**—See DOWER, vol. 5, p. 884.

**TENANCY IN FEE-SIMPLE.**—See ESTATES, vol. 6, p. 876; REAL PROPERTY, vol. 19, p. 1028.

**TENANT.**—One who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will.<sup>2</sup>

In the popular sense, he is one who has the temporary use and occupation of lands or tenements which belong to another, the

1. Davis v. Murphy, 126 Mass. 145.

2. Clift v. White, 12 N. Y. 527; Hosford v. Ballard, 39 N. Y. 151; Powers v. Ingraham, 3 Barb. (N. Y.) 576; Harrison v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600; Walker v. McCusker, 71 Cal. 597; Bouvier's L. Dict.

The word means holders, from the word *teneo*, to hold. Stevens v. Enders, 13 N. J. L. 280. The word "tenant," when taken in its largest sense, includes everyone who holds lands, whatever may be the nature or extent of his interest.

The word "tenant" conveys a much more comprehensive idea in the language of the law than it does in its popular sense. In popular language, it is used more particularly as opposed to the word landlord, and always seems to imply that the land or property is not the tenant's own, but belongs to some other person to whom he immediately holds it. In the language of the law, every possessor of landed property is called a tenant with reference to such property, and this, whether such landed property is absolutely his own or whether he merely holds it under a lease for a certain number of years. Brown's L. Dict. (Sprague's ed.).

Under the feudal system, all real property was supposed to be *holden* of some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. 2 Bl. Com. 59. And this nomenclature still obtains, although the system from which it is derived has been abolished. See also REAL PROPERTY, vol. 19, p. 1028.

"A tenant is a person who holds of another; he does not necessarily occupy. In order to occupy, a party must be personally resident by himself or his family." Rex v. Ditchet, 9 B. & C. 176; 17 E. C. L. 355.

The word "tenant," as used in the Van Ness Ordinance, is not restricted in its meaning to a mere conventional tenant, as was intimated in Brooks v. Hyde, 37 Cal. 366; but applies to any party who holds the actual possession in subordination to another party under or by virtue of an agreement, either express or implied. Irvine v. Adler, 44 Cal. 559.

**Tenant in Possession.**—As used in a statute providing that notice in eject-

duration and other terms of whose occupation are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant.<sup>1</sup>

**TENANTABLE.**—See note 2.

**TENANT'S FIXTURES**—(See also **FIXTURES**, vol. 8, p. 41).—Tenant's fixtures, in its strict legal definition, is understood to signify those things which are fixed to the freehold of the demised

ment must be served upon the "tenant in possession," it was held, that the term "tenant in possession" did not include a soldier of the *United States* claiming to be in charge, under superior officers, of real property of the *United States*. The court said: "A tenant in possession is simply one who holds the lands in possession or occupancy." *People v. Ambrecht*, 11 Abb. Pr. (N. Y.) 97. See also **OCCUPANT**, vol. 17, p. 29.

In *California*, it is provided by the Code of Civil Procedure, § 707, that the purchaser of real property at a sheriff's sale from the time of the sale until a redemption is entitled to receive "from the tenant in possession" the rents of the property sold. In *Harris v. Reynolds*, 13 Cal. 514; 73 Am. Dec. 600, it was held that a judgment debtor was a tenant in possession, and required to pay the rents and profits to the purchaser. The court said: "The phrase 'the tenant in possession' is a generic term, intended to designate the class of persons from whom the purchaser was to receive the rents. The language is not that, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor, when in possession, shall not; but the phraseology designed evidently to fix a general right, applying to all cases of tenancy, for none are excluded." And, further, "The owner in fee in possession is no less, in legal contemplation, a tenant, than the man who occupies under him. The definition of tenant is: 'One that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will.'"

In *Walker v. McCusker*, 71 Cal. 594, it was held, that where real property is sold at a foreclosure sale, a party to the foreclosure suit, who thereafter remains in possession under a claim of title which is subject to the mortgage, is "a tenant in possession" within the meaning of the section. See also **SHERIFFS' SALES**, vol. 22, p. 570.

The assignee of a lessee, or a sub-lessee, is a "tenant." *Whitfield v. Roe*, 3 Taunt. 402; *Williams v. Bosanquet*, 1 B. & B. 238; *Doe v. Byron*, 1 C. B. 623; 50 E. C. L. 623. To occupy "as tenant," within the English acts conferring the parliamentary franchise, involves the idea of some permanent occupation and independent interest, and "excludes some occupation of less independence, such as of servants for their service—e. g., the porter to a lodge, the gardener at a dwelling in the garden, and also such as that of a surgeon to a hospital of rooms therein (*Dobson v. Jones*, 5 M. & G. 112; 44 E. C. L. 68); also the occupation of premises by objects of a charity, occupying under the permission of the charity, as in *Heartley v. Banks* (28 L. J. C. P. 144), and *Davis v. Waddington* (7 M. & G. 37; 49 E. C. L. 37)." *Cook v. Humber*, 11 C. B., N. S. 33; 103 E. C. L. 31. See also *Smith v. Seghill*, L. R., 10 Q. B. 422; *Hughes v. Chatham*, 5 M. & G. 54; *Bridge-water v. Durant*, 11 C. B., N. S. 7; 103 E. C. L. 5; *Fryer v. Bodenham*, 19 L. T., N. S. 645; *Durant v. Carter*, L. R., 9 C. P. 261; *Ford v. Pye*, L. R., 9 C. P. 269.

1. *Bouvier's L. Dict.* See also **LANDLORD AND TENANT**, vol. 12, p. 660.

**Lodger not a Tenant.**—A mere lodger in the house of another is not a tenant. *White v. Maynard*, 111 Mass. 253; 15 Am. Rep. 28. See also **LODGE**, vol. 13, p. 999; **LODGINGS AND APARTMENTS**, vol. 13, p. 1003.

2. **Tenantable Repair.**—(See also **LANDLORD AND TENANT**, vol. 12, p. 726.)

Under an obligation to keep premises in "tenantable repair," decorative repair is not included; papering, always, and painting, unless needed for the protection of the property, are decorative repairs; nor does the obligation extend to repairing or restoring what is worn out by age; but waste, whether voluntary or permis-



premises, but which nevertheless the tenant is allowed to disannex and take away, provided he seasonably exerts his right to do so.<sup>1</sup>

**TENANT FOR YEARS.**—See ESTATES, vol. 6, p. 884; LANDLORD AND TENANT, vol. 12, p. 658.

**TENDER.**—(See also PAYMENT, vol. 18, p. 148.)

- I. Definition, 897.
- II. Necessity of Tender, 898.
  - 1. Generally, 898.
  - 2. Unliquidated Damages, 900.
  - 3. Waiver of Tender, 900.
- III. What Constitutes a Valid Tender, 901.
  - 1. Generally, 901.
  - 2. When Actual Production of the Money is Excused, 904.
  - 3. The Medium, 907.
  - 4. Election to Pay in Money or Property, 909.
  - 5. Premature Tender, 909.
  - 6. Must Cover Entire Debt, 910.
  - 7. Must be Absolute and Without Conditions, 912.
  - 8. Mere Readiness and Willingness to Pay, not Sufficient, 916.
  - 9. Waiver of Objections, 916.
- IV. Parties; Place, 918.
  - 1. By Whom to be Made, 918.
  - 2. To Whom Made, 918.
  - 3. Tender of Specific Property, 918.
  - 4. Place of Tender, 920.
  - 5. Time of Tender, 921.
  - 6. Equity Will not Supply Defects, 922.
- V. Keeping Tender Good, 922.
- VI. Effect of Tender, 924.
  - 1. Of Money, 924.
  - 2. Of Property, 925.
  - 3. Effect on Interest and Costs, 926.
- VII. Acceptance or Refusal of Tender, 927.
  - 1. Reasonable Time for Decision, 927.
  - 2. Acceptance Must be Absolute, 927.
  - 3. Effect on Lien of Mortgage, etc., 927.
- VIII. Pleading Tender, 932.
- IX. Payment of Money into Court, 935.
  - 1. General Rule, 935.
  - 2. In Satisfaction, 935.
  - 3. To Abide the Event, 939.
  - 4. As Security for Costs, 940.
  - 5. To Keep Tender Alive, 940.
  - 6. Effect of, 940.
    - a. Admits the Contract and the Breach, 940.
    - b. Admits Plaintiff's Right to Sue, 942.
    - c. Money Belongs to the Plaintiff, 943.

**I. DEFINITION.**—Tender is an offer to perform an act which the party offering is bound to perform.<sup>2</sup>

sive, is a breach of the obligation. *Crawford v. Newton*, 36 W. R. 54; *Proudfoot v. Hart*, 59 L. J., Q. B. 129.

1. *Wall v. Hinds*, 4 Gray (Mass.) 270; 64 Am. Dec. 64.

2. Bouvier's definition is: "An offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer." *Bouv. L. Dict.* "A formal offer; a proffer which binds him who refuses it." *And. L. Dict.*

**Plea of Tender.**—A plea that defendant has always been ready to pay the debt demanded, and before action was begun had tendered the amount to the

plaintiff, which amount, with interest and accrued costs, the defendant brings into court for the plaintiff. *And. L. Dict.*

A fuller definition would be thus: A plea that the party setting it up has always been ready to pay the amount or perform the act required, and before action was begun had offered so to do, and if the act to be done is the payment of money, the plea must also contain an averment that the amount with interest and accrued costs is brought into court for the benefit of the other party.

**Legal Tender.**—Anderson defines it to be: "1. An offer to do a thing conformably to the requirements of the law in

**II. NECESSITY OF TENDER—1. Generally.**—Where a right is made dependent upon the payment of money or delivery of property, the general rule is that an action cannot be maintained to enforce such right, without proof of a tender of the money or property.<sup>1</sup>

the case. 2. Money that may be offered in payment of a debt." And. L. Dict.

1. *Dulin v. Prince*, 124 Ill. 76; *Askew v. Carr*, 81 Ga. 685; *Counce v. Studley*, 81 Me. 431; *Mansfield v. Hodgdon*, 147 Mass. 304; *National Oleo Meter Co. v. Jackson*, 56 N. Y. Super. Ct. 609.

An action may not be maintained, upon a contract to pay a certain sum provided certain securities are surrendered to the payor, where no tender has been made, and the payee has parted with such security. *Scott v. Patterson*, 1 Pa. Dist. Ct. Rep. 603.

Where one seeks to enforce a unilateral contract by which he is not bound, he must not only show that he is willing to perform all the necessary requirements, but also, that he tendered performance of them before filing his bill. *Miller v. Cameron*, 45 N. J. Eq. 95; 1 L. R. A. 554; *Ducie v. Ford*, 8 Mont. 233.

Tender is a condition precedent to a suit to rescind a judicial sale. *Farquhar v. Iles*, 39 La. Ann. 874.

Tender of the purchase-money is a prerequisite to maintain a suit for specific performance of a contract to sell land, *Askew v. Carr*, 81 Ga. 685; even though the Statute of Limitations has run against the notice given for such purchase-money. *McPherson v. Johnson*, 69 Tex. 484.

It is held in *West Virginia*, that it is unnecessary in a bill for specific performance of a contract to purchase land, to tender a deed, even though the execution of the deed and the payment of the purchase-money are dependent covenants. *Vaught v. Cain*, 31 W. Va. 424.

Where a bill to cancel a conveyance procured by fraud, is filed, it is not necessary to make a prior tender of the consideration received; it is sufficient that the complaint contains an offer to return the amount of such consideration. *Maloy v. Berkin*, 11 Mont. 138; *Beedle v. Crane*, 91 Mich. 429.

In action to recover damages incurred by reason of a fraudulent purchase, it is not necessary that the vendor should tender back the money received. *Gaunt v. Taylor* (Supreme Ct.), 15 N. Y. Supp. 589.

Where action is brought to recover the amount paid for worthless stock, a return of the certificate need not be tendered, if the plaintiff has it at the trial and offers to surrender it. *Lewis v. Andrews* (Ct. App.), 38 N. Y. St. Rep. 808.

Where a note is executed for the price of stock, tender of the stock is a prerequisite to a maintenance of an action on the note, if the stock was to be delivered to the maker of the note; *Holmes, etc., Mfg. Co. v. Morse*, 53 Hun (N. Y.) 58. But not if the delivery was to be made to a third person. *Holmes, etc., Mfg. Co. v. Holmes, etc., Metal Co.*, 53 Hun (N. Y.) 52.

A corporation is not bound to tender a certificate of stock before it can maintain an action on the subscription for the stock. *Columbia Electric Co. v. Dixon*, 46 Minn. 463.

It is not necessary, before bringing suit to redeem from the incumbrance of a mortgage, that the plaintiff should tender the amount due on the mortgage, or even that he should offer to pay it. It is not even necessary that he should make such offer in his bill of complaint. *Cassery v. Wetherbee*, 119 N. Y. 522. Compare *Franklin v. Ayer*, 22 Fla. 654.

Where the mortgagee, in a chattel mortgage, has taken possession of the property upon default, and has fraudulently bought it in at the sale, for much less than its actual value, and has then disposed of it so that it cannot be redeemed by the mortgagor, the latter may, without payment or tender of the amount of the debt, maintain an action to recover the excess of the value of the property over the amount of the debt. *Wygat v. Bigelow*, 42 Kan. 477.

If a pledgee sells the pledge before the maturity of the debt, the owner may maintain an action of trover without first making tender of the amount due. *Kilpatrick v. Dean* (City Ct.), 3 N. Y. Supp. 60.

Where a wife has been overreached by her husband, and induced to surrender certain obligations of the husband, and take a certain sum in cash therefor, she cannot recover against the husband's executors on the prior obligations, without tendering back the money she has received. *Fallinger v.*

Mandeville, 113 N. Y. 427; 28 Am. Law Reg. 466.

Where goods were to be delivered in several shipments, each to be paid for on delivery, a refusal to pay for the goods first shipped, releases the vendor from the necessity of making tender of the remaining goods. *Azema v. Levy* (City Ct.), 5 N. Y. Supp. 418.

Where the defendant has put it out of his power to comply with his agreement, a tender on the part of the plaintiff is not necessary to support the action. *Davis v. Van Wyck* (Supreme Ct.), 18 N. Y. Supp. 885.

Where a party repudiates the contract, and absolutely denies all liability thereunder, a tender by the other party, before bringing suit, is not necessary. *Mattocks v. Young*, 66 Me. 459; *Davenport v. Jennings*, 25 Neb. 87; *Eddy v. Davis*, 116 N. Y. 247; *Baumann v. Pinckney*, 118 N. Y. 604.

Where the vendee absolutely and unqualifiedly refuses to accept a transfer of the property, it is unnecessary to tender a written assignment. *MacDonald v. Wolff*, 40 Mo. App. 302.

Where goods were manufactured to order, and the party ordering refuses to accept them, a tender of the goods is not necessary. *Howe v. Moore* (Supreme Ct.), 14 N. Y. Supp. 236.

Where a mortgagee claims absolute ownership of a chattel, a tender by the mortgagor of the amount of the debt accrued by the chattel mortgage before suing to recover the chattel, is unnecessary. *Soell v. Haddon*, 85 Tex. 182.

It is held, however, by the supreme court of *Iowa*, that while this is the equitable rule, it does not obtain in actions at law. There plaintiff sought to recover a balance due on the purchase price of his interest in a certain piece of land. He did not, before bringing the action, execute and tender the writing contracted for, nor did he at any time do so. He proved, however, that he offered to execute and deliver any instrument which should be deemed sufficient for the purpose intended, and which should be satisfactory to defendant, but the latter was advised that no instrument could be executed which would have the effect intended, and declined either to pay the money or proceed further in the matter. Upon this state of facts the court, by Reed, J., says: "The district court instructed the jury that plaintiff would be entitled to recover upon proof of an offer by him to execute the release. This we think is

erroneous. The covenants are mutual and dependent. The execution of the release is what the defendant contracted for. That is, he agreed to pay the money, in part at least, for it; and plaintiff's undertaking, or, rather, the covenant in the agreement which he is seeking to enforce, was that he would execute and deliver it upon the payment of the money. Now plaintiff is seeking by this action to enforce the contract, but he will not be entitled to recover the money until he has done the particular thing which he agreed to do as the consideration for its payment. Any offer on his part to perform, short of a tender of the thing he agreed to deliver, is insufficient. It makes no difference that defendant declared in advance that he would not accept the release; for, as plaintiff's covenant was to execute and deliver it, and defendant was bound to pay the money only when that was done, he would not be put in default by anything short of that, or, at least, until a tender of performance was ready. This is the doctrine of *Courtright v. Deeds*, 37 Iowa 503, and it is the rule when relief is sought in actions at law. When relief is sought in equity, a different rule obtains. But in actions in equity, the court can by the decree grant the plaintiff such relief as he shows himself entitled to, upon such conditions as will fully protect the rights of the defendant." *Nelson v. Wilson*, 75 Iowa 710.

On the other hand, the *United States* court of claims holds that, even in an action at law, a tender is not necessary, where the defendant is in default, and knows that plaintiff is ready and willing to perform his part of the contract. *Cole v. U. S.*, 23 Ct. of Cl. 341.

The accommodation maker of a note paid it to the bank which was the owner of it at maturity. The payee of the note had deposited with the bank certain securities to protect it against loss by reason of his dealings with the bank. Plaintiff brought suit to have the amount which the payee owed the bank, ascertained and subrogated to the rights of the bank in the securities. *Held*, that a tender of the amount due the bank from the payee was not necessary. *Koehler v. Farmers', etc., Nat. Bank*, 6 N. Y. Supp. 470; 53 Hun (N. Y.) 637; *Farquhar v. Iles*, 39 La. Ann. 874; *Nelson v. Wilson*, 75 Iowa 710.

Where one obtains possession of furniture, under a promise to repair and return it, and refuses to return it on

**2. Unliquidated Damages.**—No tender was allowed at common law in actions for damages for a tort.<sup>1</sup>

**3. Waiver of Tender.**—The creditor may waive the tender, and proof of such waiver will support a plea of tender.<sup>2</sup>

demand, the owner, after waiting a reasonable time for the repairs to be completed, is not bound to tender the money agreed to be paid for the repairs as a condition precedent to making the demand. *Phillips v. McNab* (C. Pl.), 9 N. Y. Supp. 526.

Where a note is given as conditional payment, no recovery can be had on the original cause of action, unless the note is produced at the trial, and tendered for cancellation. *McMurray v. Taylor*, 30 Mo. 263; 77 Am. Dec. 611; *Schepflin v. Dessar*, 20 Mo. App. 569; *O'Bryan v. Jones*, 38 Mo. App. 90.

The supreme court of *Texas* held that it is not necessary for the state to tender back the purchase-money paid for its lands, before it can maintain a suit under the act of April 14th, 1883, to cancel sales fraudulently procured. *State v. Snyder*, 66 Tex. 687.

Where a vendee is indebted to the vendor in a sum greater than the amount of the part payment made, the vendor may rescind the sale without offering to return the money so paid. *Ware v. Berlin*, 43 La. Ann. 534.

Where an electrical company is entitled to use a subway for its wires, upon payment of a fair rental, it cannot maintain a suit in equity to fix the amount of the rental, and to enjoin the collection of any rental until it is so fixed, unless it first tenders or brings into court some amount which it deems to be a fair rental. *Brush Electric, etc., Co. v. Consolidated Tel., etc., Co.* (Supreme Ct.), 15 N. Y. Supp. 477.

Tender is not a prerequisite to a suit by residents and taxpayers of a township to set aside the sale of the school section; the price having been paid by the purchaser into the state treasury. *Telle v. St. Tammany*, 44 La. Ann. 365.

A tutor may not demand a tender of the amount received by a minor, under a former settlement, as a condition precedent to a suit for an account by the minor, in which the prior settlement is attacked as unlawful, and for concealment on the part of the tutor. *Rist v. Hartner*, 44 La. Ann. 430.

A tender of the price paid is not a prerequisite to an action to set aside a deed for fraud, although the purchaser is entitled to be restored to his former

condition as far as possible. *Saxton v. Seiberling*, 48 Ohio St. 554.

As to necessity, and time of tender in actions for specific performance, see *SPECIFIC PERFORMANCE*, vol. 21, p. 908.

**1. In Cases of Tort.**—*Nanson v. Jacob*, 93 Mo. 331; *Kaw Valley Fair Assoc. v. Miller*, 42 Kan. 20; *Breaux v. Negrotto*, 43 La. Ann. 426; *Johnston v. Crawford*, Phil. (N. Car.) 342. No valid tender may be made in an action for false imprisonment. *Bennett v. Smerdon*, 16 L. T. N. S. 296.

But under the *Kansas* statute (Civ. Code *Kansas*, § 523), if a defendant, in his answer, offers to confess judgment for a certain sum, and the plaintiff does not recover more, the costs accruing after filing the answer, and those which accrued before its filing against the defendant, should be taxed against the plaintiff. *Kaw Valley Fair Assoc. v. Miller*, 42 Kan. 20.

There can be no valid tender, where the damages are unliquidated, and are incapable of being made definite except by the judgment of a court. *McDowell v. Keller*, 4 Coldw. (Tenn.) 258; *Lawrence v. Gifford*, 17 Pick. (Mass.) 366; *Hodges v. Lichfield*, 3 M. & S. 201; 9 Bing. 713; 23 E. C. L. 434; 2 Dowl. P. C. 741. Even though they grow out of breach of contract. *Roberts v. Beatty*, 2 P. & W. (Pa.) 63; 21 Am. Dec. 410.

In *Illinois*, in order to maintain replevin for animals taken *damage-feasant*, a tender of unliquidated damages for injuries done by them, must be kept good by bringing the money into court. *Dunbar v. De Boer*, 44 Ill. App. 615.

A bill to enjoin a water company from shutting off water for non-payment of an excessive charge for water wasted, may not be maintained without a tender, approximately, of the amount due. *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273. But see *Breaux v. Negrotto*, 43 La. Ann. 426, in which it was held that a tender is unnecessary where the amount is uncertain.

**2. Waiver.**—*Holmes v. Holmes*, 12 Barb. (N. Y.) 137; 9 N. Y. 525; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

A waiver of a tender cannot be shown by asking defendant if he would have

**III. WHAT CONSTITUTES A VALID TENDER—1. Generally.**—To make a valid tender of money, the debtor must produce the precise sum due, in current money such as is by law made legal tender, and must actually offer it to the creditor; to make a valid tender of goods, the specific articles agreed for must be produced at the place agreed upon, and offered to the other party.<sup>1</sup>

received if it had been made. *Bluntzer v. Dewees*, 79 Tex. 272.

Actual tender is dispensed with, where the one to whom the money is due makes any declaration or demand equivalent to a refusal to accept it if tendered. *Root v. Johnson* (Ala. 1891), 10 So. Rep. 293. But in *Arkansas*, it was held that a tender of the amount legally due for freight charges, is not waived by a statement that not less than a certain amount would be accepted, though through an error in computation, that amount exceeds the legal rate. *Loewenburg v. Arkansas*, etc., R. Co., 56 Ark. 439.

When a person absolutely and unqualifiedly refuses to accept an assignment of a patent right, to which he is entitled as a condition to the liabilities sued for, his refusal is regarded as a waiver of tender, and the liability may be enforced without tender. *MacDonald v. Wolff*, 40 Mo. App. 302.

Where the tender of a check is refused, not because of the form of the tender, but because of a refusal to accept the agreement upon which the tender is made, a tender in specie is waived. *Walsh v. St. Louis Exposition*, etc., Assoc., 101 Mo. 534.

Joining issue on a replication to a plea of accord and satisfaction, is a waiver of tender. *Knoxville*, etc., R. Co. v. *Acuff* (Tenn. 1892), 20 S. W. Rep. 348.

1. 2 Greenl. Ev. (Redf. ed.), §§ 601, 609; Benjamin on Sales (Bennett's Notes), § 713; *Thomas v. Evans*, 10 East 101; *Dickinson v. Shee*, 4 Esp. 68; *Dixon v. Clark*, 5 C. B. 365; 57 E. C. L. 365; 5 Dowl. & L. 155; *Sherwood v. Whitmore*, 11 M. & W. 347; *Wade's Case*, 5 Co. Rep. 115; *Kraus v. Arnold*, 7 Moore 59; *Finch v. Brook*, 1 Bing. N. Cas. 253; *Peugh v. Davis*, 113 U. S. 542; *Ladd v. Patten*, 1 Cranch (C. C.) 263; *Smith v. Anders*, 21 Ala. 782; *Walker v. Brown*, 12 La. Ann. 266; *Howard v. Miner*, 20 Me. 325; *Veazy v. Harmony*, 7 Me. 91; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Bakeman v. Pooler*, 15 Wend. (N. Y.) 637; *Newton v. Galbraith*, 5 Johns. (N. Y.) 119; *Blewett v. Baker*, 37 N. Y.

Super. Ct. 23; *Parmenter v. Fitzpatrick* (Supreme Ct.), 14 N. Y. Supp. 748; *Breed v. Hurd*, 6 Pick. (Mass.) 356; *McJilton v. Sintzer*, 18 Mo. 111.

The tender must be made in good faith, and if it be shown that the party making the tender did not intend to deliver the money or property, if the tender had been accepted, the tender is invalid. *Fisk v. Holden*, 17 Tex. 408. See also, *infra*, this title, *Keeping Tender Good*.

The debtor must be ready to pay, and must actually offer to pay. *Sands v. Lyon*, 18 Conn. 18; *Holmes v. Holmes*, 12 Barb. (N. Y.) 137. And the money must be actually present. *Pinney v. Jorgenson*, 27 Minn. 26.

It is not a legal tender to say, "Here, I am ready." The party making the tender must have the money ready also. *North v. Mallett*, 2 Hayw. (N. Car.) 151; 2 Am. Dec. 622. Nor is a proposition to get the money in five minutes, sufficient. *Breed v. Hurd*, 6 Pick. (Mass.) 356.

Where the debtor's agent pulled out his pocket-book, at the same time offering to pay the whole sum demanded by the creditor, if the latter would go into a public house near by, this was held to be a sufficient tender. *Read v. Goldring*, 2 M. & S. 86.

It is essential to the validity of a tender, that the debtor have the money ready to deliver. It is not enough that a third person has the money on the spot, and would loan it, unless he actually consents to loan it for the purpose of the tender. *Breed v. Hurd*, 6 Pick. (Mass.) 356; *Sargent v. Graham*, 5 N. H. 440; 22 Am. Dec. 469; *Bakeman v. Pooler*, 15 Wend. (N. Y.) 637; *Eastland v. Longshore*, 1 Nott. & M. (S. Car.) 194.

The money must be in the power, or within the immediate control, of the party making the tender. *Steele v. Biggs*, 22 Ill. 643.

If the money is in an envelope, it is not sufficient to show the envelope; the money must be taken out so that the creditor may see it. *Strong v. Blake*, 46 Barb. (N. Y.) 227.

But it is held in *Mississippi*, that an offer of money in bags is a legal tender, and it is the business of the party to whom it is tendered to count it and see that there is enough to satisfy him. *Behaly v. Hatch, Walker (Mich.)* 369; 12 Am. Dec. 570. See *Finch v. Brook*, 1 Bing. N. Cas. 253; 27 E. C. L. 378. And compare *Wade's Case*, 5 Co. Rep. 115.

If the money is in a purse which the debtor holds in his hands, and when he is about to take it out, the creditor declares that he will not receive it, this excuses an actual tender. *Thorne v. Morber*, 20 N. J. Eq. 257; *Hanna v. Phillips*, 1 Grant Cas. (Pa.) 253.

But when the party making the tender has the money in his pocket, and asks the other party if he will take it, telling him the money is ready for him, but does not take the money out of his pocket, this is of itself not sufficient to constitute a valid tender, unless the other party, by some positive act or declaration, dispenses with its production. 3 Bl. Com. 304; *Thomas v. Evans*, 10 East 101; *Douglas v. Patrick*, 3 T. R. 683; *Bakeman v. Pooler*, 15 Wend. (N. Y.) 637; *Thorne v. Mosher*, 20 N. J. Eq. 257; *Appleton v. Donaldson*, 3 Pa. St. 381. See *infra*, this title, *When Actual Production of the Money is Excused*.

Mr. Greenleaf says that great importance is attached to the production of the money, as the sight of it might tempt the creditor to yield and accept it. 2 Greenl. Ev., § 602, citing *Finch v. Brook*, 1 Bing. N. Cas. 253; 27 E. C. L. 378.

Where the creditor refuses to take or count the money, but does not dispute that the money actually offered him is, in amount, what it is claimed to be by the debtor, the tender is a good one. *Brewer v. Fleming*, 51 Pa. St. 102; *Pinney v. Jorgenson*, 27 Minn. 26.

So where the tender is refused, but the debtor leaves the money with the creditor, who afterwards refuses to give it up, this is a good tender. *Rogers v. Rutter*, 11 Gray (Mass.) 410.

A mere offer to the plaintiff, of the amount due, made by defendant's counsel in the progress of the argument of the case, is not a valid tender. *Keys v. Roder*, 1 Head (Tenn.) 19.

Where separate claims are held by the same person, the tender need not be divided to meet each claim. *Johnson v. Cranage*, 45 Mich. 141; *Thetford v. Hubbard*, 22 Vt. 440.

So if the creditor makes one demand, based on several accounts, some of which are legally due and others are illegal, he cannot compel the debtor at his peril, to separate the legal from the illegal demands. *Johnson v. Cranage*, 45 Mich. 14.

As a tender admits absolutely that the amount tendered is due, and an offer by way of compromise admits nothing, an offer of money in compromise is not a legal tender, though no greater amount than that offered is ultimately recovered. *Latham v. Hartford*, 27 Kan. 249; *Elderkin v. Fellows*, 60 Wis. 339.

Where one who was indebted to his firm, tendered his check in payment, and the partner to whom the check was tendered, refused to receive it unless it was made payable to him individually, whereupon the debtor tore up the check, it was held that there had been no tender. *Murphy v. Gold, etc., Tel. Co. (City Ct.)*, 3 N. Y. Supp. 804.

The payor of a note must be at the place of payment, at the time it matures, ready and willing to pay the same, and must deposit the amount due in some bank or other place to be paid, or must keep it intact, and if suit be commenced, carry it into court, and deposit it there when he files his answer. *Adams v. Rutherford*, 13 Oregon 78.

Where one seeking to redeem a mortgage, tendered the principal and interest alone, without including the costs which had been properly incurred in connection with a sale, the sale having been enjoined by the party seeking to redeem, and the mortgagee declined either to accept or refuse the tender, because of his apprehension as to the effect which his acceptance of it might have upon a pending suit which had been brought against him by the party seeking to redeem to set aside the mortgage for alleged fraud, and also because he was unwilling to accept the tender without the advice of his counsel, this was held to constitute a sufficient tender. *Lambert v. Miller*, 38 N. J. Eq. 117.

At maturity of a mortgage, the mortgagor offered to the mortgagee, accounts against the latter which he had paid at the latter's request, and upon the agreement that they should be credited on the mortgage debt, and tendered the balance of the debt in cash. It was held by the *Michigan* court that the costs of a proceeding to foreclose, should not be taxed against the mortgagor. *Castle v. Castle*, 78 Mich. 298.

An offer to buy a note and mortgage, does not constitute a tender of the amount due on the debt. *Magnusson v. Williams*, 111 Ill. 450. See also *Chielovich v. Krauss* (Cal. 1886), 11 Pac. Rep. 781.

The rules governing tender are so clearly stated by the supreme court of *New Hampshire*, in an early case arising in that state, that it seems not out of place to give the opinion of the court, by Green, J., at length. "It is clearly settled," says that court, "as a general rule, that in order to constitute a legal tender, he who makes it must be ready to pay, or at least must have within his immediate reach, the means to pay, and must actually offer to pay." *French v. Watson*, 2 Wil. 74; Co. Lit. 208, a; *Thomas v. Evans*, 10 East 101; *Leatherdale v. Sweepstone*, 3 C. & P. 342; 14 E. C. L. 338; *Glascott v. Day*, 5 Esp. 48. But it is not necessary, in all cases, in order to constitute a legal tender, that the money should be actually brought forward, as well as offered. If, when there is an offer to pay, the party to whom the offer is made, refuses absolutely to receive the money, the objection that the money was not brought forward, is waived. *Read v. Goldring*, 2 M. & S. 86; *Glascott v. Day*, 5 Esp. 48; 19 Ves. 381; *Breed v. Hurd*, 6 Pick. (Mass.) 356. And it is not necessary that the person making the tender, should have the money in his own possession on the spot. If the sum offered is absolutely refused, it is enough that the money was upon the spot and ready for the purpose. *Harding v. Davis*, 2 C. & P. 77; 12 E. C. L. 35. It is not necessary, in all cases, that the party making a tender should be ready to pay in money which is a legal tender. Bank bills are not a lawful tender. *Grigley v. Oakes*, 2 B. & P. 526; *Warren v. Mains*, 7 Johns. (N. Y.) 476; *Hallowell, etc., Bank v. Howard*, 13 Mass. 235; 4 Stark. Ev. 1391. Yet a tender in bankbills is well enough, if there be no objection to the tender at the time, on that account. *Wright v. Read*, 3 T. R. 554; *Alexander v. Brown*, 1 C. & P. 288; 11 E. C. L. 395. In such a case, the person who makes the tender is not prepared to make a tender that can avail him anything, if an objection is made to the money offered. But as bank bills pass current as money, if, when bills are offered, no objection is made on that account, all objection is presumed, with great propriety, to be waived. So when

a man goes with the money in his pocket, and offers to pay, and the other, to whom the offer is made, absolutely refuses to receive the money, it is not necessary to take the money and actually offer it, in order to constitute a tender, because that would be an idle ceremony. In this case, the person who made the tender had not the money to pay, had the tender been accepted. But it was proved there was money on the spot which he might have borrowed. We were strongly inclined at first, to think this case came within the principle of *Harding v. Davis*, 2 C. & P. 77; 12 E. C. L. 35, but a more attentive consideration of the subject has convinced us that we were mistaken in this. In that case, the money was not only in the house where the tender was made, but the person who owned the money actually offered to go to the room above and produce it for the purpose of the tender. In this case, there was no attempt to borrow. There was no offer to lend. It was not known to either party that the money could be borrowed. In the case of *Harding v. Davis*, 2 C. & P. 77; 12 E. C. L. 35, the money may be considered as ready to be tendered, because the owner of it offered to produce it and deliver it to the person to whom the tender was made. But in this case, how can the money of Mr. Currier be considered as ready to be applied to the purpose of the tender, when no mortal thought, at the time, of thus applying his money? In the case in *Carrington and Payne*, the owner had assented that his money should be applied to the purposes of the tender. In this case there was no such assent. And this is a most material difference. How could his money be considered as ready for the tender before he assented that it should be so applied? We are, on the whole, of opinion that to hold the tender made in this case a legal one, would be going much beyond any adjudged case to be found in the books. Indeed, it would be to hold that an offer of the money absolutely refused is a legal tender, although he who makes the offer has not the money to pay. This would be contrary to a principle of law perfectly well settled, that he who makes a tender must be ready to pay in all cases." *Sargent v. Graham*, 5 N. H. 440; 22 Am. Dec. 469.

**Place of Tender.**—Where a note is made payable at the counting room of E. L., the placing of funds in his hands for the purpose of paying the note, with

**2. When Actual Production of the Money is Excused.**—The actual production of the money is not required where the party is ready and willing to pay it, but is prevented by the creditor's declaring that he will not receive it, or by his making any declaration equivalent to a refusal to accept it if tendered.<sup>1</sup>

authority given him by the promisor to pay the note when due, from those funds, and the readiness of E. L. to make payment if the promisee had attended to receive payment, constitutes a good tender, if such readiness to pay continues. *Carley v. Vance*, 17 Mass. 389.

If the creditor is at the window of his own house, and will not admit the debtor into the house, it is sufficient to make the tender at the window. *Wing v. Davis*, 7 Me. 31.

As to place of tender of specific articles, see *infra*, this title, *Tender of Specific Property*.

**Statutory Offer.**—An offer in writing, under a statute, to pay a definite sum of money, or to deliver a specific article of property, takes the place of, and is equivalent to, a tender; but it does not dispense with the necessity of a readiness and ability on the part of the person making the offer, to pay or deliver at the time the offer is made. *Ladd v. Mason*, 10 Oregon 308. See *Cassidy v. Bosler*, 11 Iowa 242; *Herberger v. Husman*, 90 Cal. 583.

Where defendant makes an offer of judgment for a specific sum, "and accrued costs," this is sufficient, under the *Minnesota* statute. *Petrosky v. Flanagan*, 38 Minn. 26.

An oral offer made before a justice, and entered by him in his docket, is sufficient under the *Wisconsin* statute. *Williams v. Ready*, 72 Wis. 408.

Under the *Iowa* code, the fact that money tendered, but refused, was kept in the possession of the party making it, until its payment into court, does not invalidate the tender. *Loughridge v. Iowa Life, etc., Assoc.*, 84 Iowa 141.

A tender essential to the maintenance of an action, will not be allowed to be made on a motion for judgment for want of a sufficient affidavit of defendants, where the statement does not allege a tender, and the affidavit of defendants sets up as a defense, the fact that no tender has been made. *Scott v. Patterson*, 1 Pa. Dist. Ct. Rep. 603.

The provision of the *New York* code (Code Civ. Proc., § 738), does not apply to joint debtors; where there is more

than one debt, it is expressly limited to cases in which the action can be served. *Heckemann v. Young*, 55 Hun (N. Y.) 406. These provisions of the *New York* code apply to equitable as well as to legal actions. *Singleton v. Home Ins. Co.*, 121 N. Y. 644, reversing 9 N. Y. Supp. 947.

1. 2 Greenl. Ev. (10th ed.) 603; *Odum v. Rutledge, etc.*, R. Co. (Ala. 1891), 10 So. Rep. 222; *Root v. Johnson* (Ala. 1891), 10 So. Rep. 293; *Rudolph v. Wagner*, 36 Ala. 698; *Sands v. Lyon*, 18 Conn. 18; *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87; 18 Am. Dec. 128; *Blair v. Hamilton*, 48 Ind. 32; *Champion Machine Co. v. Maine*, 42 Kan. 372; *Dorsey v. Barbee*, Litt. Cas. (Ky.) 204; 12 Am. Dec. 296; *Ware v. Berlin*, 43 La. Ann. 534; *Parker v. Perkins*, 8 Cush. (Mass.) 319; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Rogers v. Rutter*, 11 Gray (Mass.) 410; *Duffy v. Patten*, 74 Me. 396; *Pinney v. Jorgenson*, 27 Minn. 26; *Guthman v. Kearn*, 8 Neb. 502; *Brown v. Simons*, 45 N. H. 211; *Vaupell v. Woodward*, 2 Sandf. Ch. (N. Y.) 143; *Dana v. Fiedler*, 1 E. D. Smith (N. Y.) 463; *Slingerland v. Morse*, 8 Johns. (N. Y.) 474; *Bellinger v. Kitts*, 6 Barb. (N. Y.) 273; *Holmes v. Holmes*, 12 Barb. (N. Y.) 137; *Stone v. Sprague*, 20 Barb. (N. Y.) 509; *Strong v. Blake*, 46 Barb. (N. Y.) 227; *Hoyt v. Sprague*, 61 Barb. (N. Y.) 497; *Meserole v. Archer*, 3 Bosw. (N. Y.) 376; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Appleton v. Donaldson*, 3 Pa. St. 381; *Brown v. Dysinger*, 1 Rawle (Pa.) 408; *Hampton v. Speckenagle*, 9 S. & R. (Pa.) 212; 11 Am. Dec. 704; *Barker v. Packenhorn*, 2 Wash. (U. S.) 142; *Calhoun v. Vechio*, 3 Wash. (U. S.) 165; *Hepburn v. Auld*, 1 Cranch (U. S.) 321; *Johnson v. Hocker*, 1 Dall. (U. S.) 406; *Peckham v. Stewart*, 97 Cal. 147. See *Dedekam v. Vose*, 3 Blatchf. (U. S.) 44; *Shipp v. Stacher*, 8 Mo. 145.

While the actual production of the money to be paid is essential, unless the creditor dispense with it, either by an express declaration, or other equivalent act, *Brown v. Gilmore*, 8 Me. 107; 22 Am. Dec. 223; yet the creditor may, by express declaration, as well as



by act, relieve the debtor from actually producing it, *Cromwell v. Burr* (C. Pl.), 12 N. Y. St. Rep. 132; *Koon v. Snodgrass*, 18 W. Va. 320; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105; *McKnight v. Watkins*, 6 Mo. App. 118; as where the party to whom the tender was made, says: "There have been costs made, and you have got to settle with my attorney," *Ashburn v. Poulter*, 35 Conn. 553; or says, where the tender is in legal-tender notes, that he will take nothing but coin, *Hanna v. Ratekin*, 43 Ill. 462; for courts do not require an offer of money to be made, when, from the facts and circumstances of the case, it is apparent that such offer would be useless, and the receipt of the money refused by the opposite party. *Wright v. Young*, 6 Wis. 127; 70 Am. Dec. 453; *Chinn v. Bretches*, 42 Kan. 316.

In a case declaring the law to be as stated in the text, the court, by Lurton, J., says: "The refusal of defendant, when approached by the attorney of complainants, to even consider the question of a repurchase, and his contention that he was not bound by his agreement, rendered a formal tender of the purchase-money, a meaningless form." *Bradford v. Foster*, 87 Tenn. 11.

When the party to whom the offer is made, refuses to receive the money, before it is actually produced, and bases his refusal, not on the ground that it is not produced, nor on the ground that the amount produced was not the exact sum offered, but on some collateral and entirely distinct ground, this will dispense with the actual production of the money. *Koon v. Snodgrass*, 18 W. Va. 320.

A lessee went to a lessor with the money in his hand, and a receipt which he proceeded to read to the lessor; whereupon the lessor refused the payment, and told the lessee that it would be altogether unnecessary to show the money. It was held that the tender was good. *Westmoreland, etc., Natural Gas Co. v. DeWitt*, 130 Pa. St. 235; 25 W. N. C. (Pa.) 103.

But a hesitating refusal does not dispense with the actual production of the money. *Dunham v. Jackson*, 6 Wend. (N. Y.) 22.

Where the purchaser at a tax sale named as the sum which he was willing to receive in redemption of the property, an amount larger than he was entitled to by law, this would relieve the owner from the necessity of pro-

ducing the money at the time of making the tender. But it would not dispense with the necessity of his being fully ready to pay at the time of offering to redeem. *Lamar v. Sheppard*, 84 Ga. 561.

But the *New York* courts have held that the mere statement by the creditor that he will not receive the amount due, accompanied by a demand of a larger sum, will not excuse the debtor from actually producing the money. *Dunham v. Jackson*, 6 Wend. (N. Y.) 22; 1 Greenl. Ev. (10th ed.), § 603.

Where the creditor, upon the offer being made, referred the debtor to his attorney, saying that his office was open and that it was but a step there, but did not in terms refuse to receive the money, nor interpose any objection to the production of the money, nor intimate that its production was not required, this would not excuse the failure to produce the money. *Strong v. Blake*, 46 Barb. (N. Y.) 227.

If the creditor absents himself from home, so that a tender cannot be made, and the debtor does all in his power to make the tender, the creditor cannot object to want of tender, and it would seem that this is so, whether the absence was or was not for the express purpose of avoiding the tender. *Southworth v. Smith*, 7 Cush. (Mass.) 391; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *Judd v. Ensign*, 6 Barb. (N. Y.) 258; *Smith v. Smith*, 25 Wend. (N. Y.) 405; 2 Hill (N. Y.) 351; *Howard v. Holbrook*, 9 Bosw. (N. Y.) 237; *Houbie v. Volkening*, 49 How. Pr. (N. Y.) 169; *Trimble v. Williamson*, 49 Ala. 525; *Barton v. McKelway*, 22 N. J. L. 165; *Watson v. Sawyers*, 54 Miss. 64; *Thomas v. Mathis*, 92 Ind. 560; *Kling v. Childs*, 30 Minn. 366.

And the debtor is not bound to go to another state to make the tender. *Gill v. Bradley*, 21 Minn. 15.

If the creditor purposely avoids a tender, and brings his action so soon thereafter that a tender could not be made, the debtor is thereby excused from making the tender. *Gilmore v. Holt*, 4 Pick. (Mass.) 257; *Fisk v. Williams*, 75 Me. 217; *Shroeder v. Laubenheimer*, 50 Wis. 480.

In an early case, decided by the court of appeals of *Virginia*, this question of constructive tender was passed upon. There, Harris offered to repair a mill for Dandridge, and to receive payment for it either in money or in property, and if in property, the same was to be valued by

two men. On the day the work was finished, the parties settled their accounts and fixed the balance due Harris at £48. Harris called upon Dandridge to sign this account, which he refused to do unless Harris would state that the payment was to be made in property. Dandridge then desired Harris to join in naming persons to value the property and to receive it, which Harris promised to do, but did not. Dandridge then wrote a letter to Harris requesting him to come and have the property valued. Harris did not make the objection that the property ought to be carried to him, but declared that he would not receive property; and in forty-one days after the work was finished and before Dandridge would probably have had time to make a legal tender, brought suit on the account. The court held that Dandridge was excused from making the tender. *Dandridge v. Harris*, 1 Wash. (Va.) 326; 1 Am. Dec. 465.

In the case of *Sands v. Lyon*, 18 Conn. 18, the defendant was proceeding in a wagon to the house of the plaintiffs, having in his pocket a bag containing specie sufficient to pay a legacy, due the female plaintiff. On his way to the house, he saw Sands, the husband of the legatee, and one of the plaintiffs, coming towards him on foot. When they met, defendant stopped his wagon and said to Sands: "I have got the money here to pay you the legacy my father, Joshua Lyon, left your wife in his will," at the same time putting his hand into his pocket to draw therefrom the bag containing the money. While he was so doing, Sands, who was at that time walking rapidly, said to him: "I want nothing to do with such cut-throats as you," and without stopping or slacking his pace, walked by and away from the defendant. Immediately afterwards, and on the same day, defendant proceeded to the residence of Sands, and there tendered to his wife, the legatee, the amount of the legacy, which she positively refused to receive. This was held to be a sufficient tender. And so, the supreme court of *Vermont* held, in a very similar case. *Knight v. Abbott*, 30 Vt. 577. In *Meserole v. Archer*, 3 Bosw. (N. Y.) 376, the party to whom the offer to pay was made, said: "Get away, I will have nothing to do with it." And this was held to dispense with an actual production of the money, it being shown that the party making the offer had the money with him at the time.

If the creditor refuses to remain till the money can be counted, the tender is good. *Raines v. Jones*, 4 Humph. (Tenn.) 490; *Knight v. Abbott*, 30 Vt. 577; *Leatherdale v. Sweepstone*, 3 C. & P. 342.

But where the debtor offered bank bills which were not legal tender, and while the creditor was counting them, having made no objection on the ground of their being bank bills, the debtor made an insulting remark to him which caused him to leave the room, it was held that the tender was insufficient. *Harris v. Mulock*, 9 How. Pr. (N. Y.) 402.

Where plaintiff stated to defendant that he was willing to give him £10, and a witness who stood by stated that she had the money up stairs, and she would go up stairs and fetch it, but plaintiff said she need not trouble herself, he could not take it, this was held to be a good tender. But, says the court, by *Best, C. J.*: "It would not do if a man said, 'I have got the money, but must go a mile to fetch it.'" *Harding v. Davies*, 2 C. & P. 77; 12 E. C. L. 35.

And the same view is taken by the supreme court of *Tennessee*, though the English case is not cited. *Farnsworth v. Howard*, 1 Coldw. (Tenn.) 215.

Where the creditor has assigned the claim, and refuses not only to receive the money himself, but to give the name of the assignee, the debtor is excused from making the tender. *Strafford v. Welch*, 59 N. H. 46; *Fritz v. Simpson*, 34 N. J. Eq. 436; *Noyes v. Clark*, 7 Paige (N. Y.) 179; 32 Am. Dec. 620.

It would seem that in admiralty, the question will not be considered whether the money was actually produced or not, if a real offer to pay it was made without condition, by one ready and willing to pay, and the offer is renewed in the answer or upon the record, at some time during the litigation. *Boulton v. Moore*, 14 Fed. Rep. 922.

Where the creditor told the debtor's agent that he need not make a formal tender, as he would not accept it, this excused the failure to actually produce the money at the time of making tender. *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

Where there is an express refusal to receive notes which were to be delivered in part payment of land, a formal tender of them is unnecessary. *Ware v. Berlin*, 43 La. Ann. 534.

If a party offers to deliver a bond which the other party expresses his

### 3. The Medium.—A tender in anything which is by law made legal money, is good.<sup>1</sup>

intention not to accept, though admitting its sufficiency, this is a good tender, though the bond is not exhibited, and there is no proof that it has been prepared and executed. *Abrams v. Suttles*, Busb. (N. Car.) 99.

Where the holder of a note refuses to receive the amount, on the ground that it had been attached at the suit of a third person, this will not excuse the actual production of the money. *Bacon v. Smith*, 2 La. Ann. 441; 46 Am. Dec. 549.

Where an antecedent tender is required, a written communication demanding the cancellation of a contract, and expressing a willingness to return what had been paid, when not answered or expressly declined, is not a substitute for a tender, and does not constitute an excuse for not making it. *Adams v. Friedlander*, 37 La. Ann. 350.

A subscriber to the capital stock of a corporation is not excused from making a tender, by reason of a statement to him by the secretary of the company, that he has no stock for him. *Ohio Ins. Co. v. Nunemacher*, 10 Ind. 234.

In an English case, where a debtor, on leaving home, left ten pounds with his clerk for the creditor, and the creditor was informed of this when he called, but demanded a larger sum and said he would not receive anything less than the whole demand, and the clerk did not offer the ten pounds, it was held that there was no valid tender. *Thomas v. Evans*, 10 East 101. See also *Dickinson v. Shee*, 4 Esp. 68.

1. *Wright v. Jacobs*, 61 Mo. 23.

A deed made while the *Pennsylvania* Act of 1793 was in force, making Spanish dollars legal tender, provided that ground rent should be payable in Spanish milled dollars. It was held by the common pleas court, that tender in those coins is good. *Perot v. Eichholz*, 6 Pa. Co. Ct. Rep. 191.

A promissory note executed subsequent to the act of Congress of Feb. 25th, 1862, known as the "Legal-Tender Act," which note is, by its express terms, payable in American gold, is not discharged by the tender of *United States* treasury notes. *McGoon v. Shirk*, 54 Ill. 408; 5 Am. Rep. 122. This case overrules the earlier decisions of the *Illinois* supreme court, as found in *Hull v. Kohlsaat*, 36 Ill. 130; *Whit-*

*stone v. Colley*, 36 Ill. 328; *Humphrey v. Clement*, 44 Ill. 299, and follows the decision of the *United States* Supreme Court, as announced in *Bronson v. Rodes*, 7 Wall. (U. S.) 229, and *Butler v. Horwitz*, 7 Wall. (U. S.) 258.

The case first cited, that of *Bronson v. Rodes*, was originally decided by the *New York* court of appeals, in harmony with the decisions of the supreme court of *Illinois*, and will be found reported in 34 N. Y. 649. It is interesting, not only because it contains a full discussion of the coinage laws, but because the opinion of the majority of the court was rendered by Mr. Chief Justice Chase, who had been the secretary of the treasury at the time when the legal-tender act was adopted.

In both *Bronson v. Rodes*, 7 Wall. (U. S.) 229, and *Butler v. Horwitz*, 7 Wall. (U. S.) 258, the court held that the judgment should be for the sum agreed to be due with interest in coin, and not for the value in treasury notes, assessing as damage the value in treasury notes of the coin to be paid under the terms of the note.

In cases already cited from the *United States* Supreme Court, the notes, in express terms, provided that the amount should be payable in coin. A case afterwards came before that court, in which the note, while executed prior to the passage of the legal-tender act, was not made payable expressly in coin. The question was therefore squarely presented to that court, whether a note executed prior to the passage of the legal-tender acts could be discharged by a tender of treasury notes made legal tender by those acts. This is the case of *Hepburn v. Griswold*, 8 Wall. (U. S.) 603. In this case, the legal-tender acts were declared void and unconstitutional as to contracts made prior to their passage. But in the next year, the supreme court reversed this decision, and held the acts to be constitutional, even when applied to contracts executed before their passage. *Knox v. Lee*, 12 Wall. (U. S.) 457.

It was held, however, in *New York*, that, after the decision of the *United States* Supreme Court in *Hepburn v. Griswold*, 8 Wall. (U. S.) 605, which declared the act void as to contracts made prior to its passage, a tender by

the mortgagor or his grantee, of payment of the mortgage debt in legal-tender notes, was not valid where the mortgage was executed before the passage of the act; and the validity of this tender was not affected by the fact that the *United States* Supreme Court subsequently reversed, in *Knox v. Lee*, 12 Wall. (U. S.) 457, its decision in *Hepburn v. Griswold*, and held the act to be constitutional and valid, even as to debts contracted prior to its passage. *Harris v. Jex*, 55 N. Y. 421; 14 Am. Rep. 285. See also *Hart v. Flynn*, 8 Dana (Ky.) 190; *MONEY*, vol. 15, p. 701.

It is interesting to note in this connection, that it has been held by the courts of *North Carolina* and *Georgia*, that a tender in 1863 of Confederate money, in payment of debts contracted before the war, was not a valid tender. *Love v. Johnston*, 72 N. Car. 415; *Phillips v. Gaston*, 37 Ga. 16.

Where the contract is expressly or impliedly to pay money, a tender of bank-notes is insufficient. *Donaldson v. Benton*, 4 Dev. & B. (N. Car.) 435. Compare *Keyes v. Jasper*, 5 Ill. 305; except where the objection is expressly put on some other ground. *Jennings v. Mendenhall*, 7 Ohio St. 257; *Keyes v. Jasper*, 5 Ill. 305; *Ewing v. Anderson*, 3 Tenn. Ch. 364; *Koehler v. Buhl*, 94 Mich. 496; *Hortsock v. Mort*, 76 Md. 281.

As between a bank and its debtors, a tender by the latter, in notes of the bank, is sufficient. *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311; 42 Am. Dec. 297.

The offer of a check is not a sufficient tender, where objection is made to the form of tender. *Collier v. White*, 67 Miss. 133; *Larsen v. Breene*, 12 Colo. 480; *Martin v. Clover* (Supreme Ct.), 17 N. Y. Supp. 638; *Grussy v. Schneider*, 50 How. Pr. (N. Y.) 134; 55 How. Pr. (N. Y.) 188; *Sloan v. Petrie*, 16 Ill. 262; *Harding v. Commercial Loan Co.*, 84 Ill. 251; *Poague v. Greenlee*, 22 Gratt. (Va.) 724; *Lewis v. Larson*, 45 Wis. 353. Compare *Wilby v. Warren*, 1 Tidd's Pr. 187.

But if no such objection is made, a tender by check is sufficient. *Dale v. Richards* (D. C.), 21 Wash. L. Rep. 86; *McGrath v. Gegner* (Md. 1893), 26 Atl. Rep. 502; *Jones v. Arthur*, 8 D. P. C. 442; *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280; *Becker v. Boon*, 61 N. Y. 317; *Jennings v. Mendenhall*, 7

Ohio St. 257; *Sloan v. Petrie*, 16 Ill. 262; *Thorne v. San Francisco*, 4 Cal. 127.

A tender of a certified check is no more effectual than of one not certified. *Thorne v. San Francisco*, 4 Cal. 127; *Larsen v. Breene*, 12 Colo. 480.

Where a certified check is tendered, and is afterwards deposited in court, the failure pending the suit of the bank on which it was drawn, does not relieve the party depositing it, from payment. *Larsen v. Breene*, 12 Colo. 480.

A bank certificate of deposit is not a lawful tender. *Dougherty v. Hughes*, 3 Greene (Iowa) 92; nor is a postal order. *Gordon v. Strange*, 1 Exch. 477.

But if no objection is made on the ground that it is not lawful money, a certificate of deposit is a sufficient tender. *Gradle v. Warner*, 140 Ill. 123.

Where, on rescission of a contract, the money received thereunder is tendered back, it is not necessary that the identical money received should be offered back. *Michigan Cent. R. Co. v. Dunham*, 30 Mich. 128. See also *Mayo v. Knowlton*, 134 N. Y. 250.

Where a railroad company receives a passenger into its cars, and allows him to commence his journey, it is not necessary that the passenger should offer legal tender in payment of his fare; the company is bound to receive payment in any good and lawful money which the passenger may offer. *Farbell v. Central Pac. R. Co.*, 34 Cal. 616. See also *Jersey City, etc., R. Co. v. Morgan*, 52 N. J. L. 60; *aff'd* by court of appeals, 52 N. J. L. 558.

A tender of past-due paper of the party to whom the tender is to be made, is not a tender of a payment which, by the contract, is required to be made in cash. *Hughes v. Daniells* (Mich. 1891), 49 N. W. Rep. 542. Compare *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311; 42 Am. Dec. 297.

Where payment is to be made in collaterals, the party making the tender must aver and prove that the collaterals tendered were of the kind contracted for. *Mason v. Croom*, 24 Ga. 211.

A tender of goods in satisfaction of a note payable in money, will not avail. *Wilson v. McVey*, 83 Ind. 108.

An offer in a complaint, to deliver up a draft received in settlement of a claim, is a sufficient tender, in an action to rescind the settlement. *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49.

4. **Election to Pay in Money or Property.**—Where the debtor has the election to pay either money or property, if he fails to make tender on the day fixed for payment, he thereby loses his election, and the obligee has the right to demand money.<sup>1</sup>

5. **Premature Tender.**—A premature tender is of no avail.<sup>2</sup>

1. *Roberts v. Beatty*, 2 P. & W. (Pa.) 63; 21 Am. Dec. 410; *Farmers' L. & T. Co. v. Canada, etc.*, R. Co., 127 Ind. 250; 11 L. R. A. 740.

On the question of the delivery of property in payment of a note, the supreme court of *Maine*, by Mellen, C. J., uses the following language: "The defense is placed on two facts: 1. That at the time the note became due, the defendant had, at the place agreed upon, a large quantity of lumber, and that, before and after the note was given, he informed the plaintiff that such would be the fact. The plaintiff did not attend at the time and place agreed on for payment. The general principle is, that he who would avail himself of the benefit of a tender, must do all in his power, and he will then be excused. *Lancashire v. Killingworth*, 1 Ld. Raym. 687; *Chipman on Spec. Con.* 211. It is contended by the counsel for the plaintiff, that, as he did not attend on the day the note became due, it was his duty to do all in his power towards paying it; that is, that he should have caused a sufficient quantity of the lumber, then at the place, to be set apart and surveyed to and for the use of the plaintiff, and so separated from the residue of the lumber and distinguished as that it might be taken by the plaintiff, without any danger of mistake; or, in other words, he should have done all those acts which would have vested in the plaintiff the property of the portion so set apart and appropriated. It is not denied that there is an essential difference between a tender of money and of cumbersome specific articles of property." And the court held that the defendant had not made a legal tender of the lumber, inasmuch as he had not designated any particular property which could vest in the plaintiff, concluding the opinion with this language: "Notwithstanding everything which the defendant did, and which has been relied on as a tender, it is evident that the plaintiff could not have taken and appropriated any portion of the lumber at the place agreed upon, without being chargeable as a trespasser." *Wyman v. Winslow*, 11 Me.

398; 26 Am. Dec. 542. See also *Robbins v. Luce*, 4 Mass. 474.

In a *New York* case, one Galbraith sued one Newton, on notes payable in produce at the latter's residence. On the trial, Newton proved that on the day the notes became due, he had hay in his barn, and was then ready to pay in hay, but that no particular quantity was set apart, and the court held that the tender was insufficient. *Newton v. Galbraith*, 5 Johns. (N. Y.) 119. To the same effect are *Barns v. Graham*, 4 Cow. (N. Y.) 452; 15 Am. Dec. 394; *Smith v. Loomis*, 7 Conn. 110; *Rix v. Strong*, 1 Root (Conn.) 55; *Nichols v. Whiting*, 1 Root (Conn.) 443; *McConnell v. Hall*, Bravt. (Vt.) 223.

2. *Abshire v. Corey*, 113 Ind. 484.

A case of some interest, involving this question, was decided by the *New York* court of appeals not long since, the opinion being by Andrews, C. J. The maker of a promissory note made tender of the amount on the day the note matured on its face, without allowing any days of grace. The holder of the note made no objection on this ground, but refused to receive the tender, and deliver up the note and collaterals which he held, on the ground that he was entitled to hold the latter as security for another claim which he had against the maker of the note. On this state of facts, the court decided that the tender was good. "There is no doubt," says the court, by Andrews, C. J., "of the general principle, that the tender of a debt before it is due is ineffectual. The debtor cannot be compelled to pay the debt before maturity, and the creditor is not bound to accept payment before that time. But the circumstances in this case are peculiar. Both parties, in respect to the tender, treated the debt as due when the tender was made, and the refusal to accept it was put by the defendants solely upon the ground that they were entitled to hold the bonds as security for the loss in the transaction of January 16th, 1880. It is not necessary to decide in this case what the rights of the parties would have been, if the defendants had refused to accept the sum

## 6. Must Cover Entire Debt.—There can be no valid tender of part of an entire debt.<sup>1</sup>

tendered, on the ground that the note was not due, or that the tender did not include interest on the note for the days of grace. But in view of the fact that days of grace were originally an indulgence created by commercial authority for the benefit of the debtor—although they have come to be regarded as part of the contract itself—we are of the opinion that if the parties to a bill or note, treat it as due on the day when by its terms it is payable, and a transaction at that time takes place between them, based on this acceptance, and the rights of third parties have not intervened, the days of grace will be deemed waived, and the same legal consequences will follow as though the transaction took place on the day of the legal maturity of the paper.” *Wyckoff v. Anthony*, 90 N. Y. 442.

If a note is payable on demand, a tender made by the maker, before demand, will have the same effect as if the note were payable on a day certain and the tender were made on that day. *Wooten v. Sherrard*, 68 N. Car. 334.

1. *Benj. on Sales (Bennett's Notes)*, § 719; *Dixon v. Clark*, 5 C. B. 365; 57 E. C. L. 365; *Hardingham v. Allen*, 5 C. B. 793; 57 E. C. L. 793; *Searles v. Sadgrove*, 25 L. J. Q. B. 15; 5 E. & B. 639; 85 E. C. L. 639; *Rand v. Harris*, 83 N. Car. 486; *Moore v. Norman*, 43 Minn. 428; 9 L. R. A. 55; 19 Am. St. Rep. 247; *Coulter v. Clark*, 2 Ind. App. 512; *Rose v. Duncan*, 49 Ind. 269; *Benton v. Roberts*, 2 La. Ann. 243; *Baker v. Gasque*, 3 Strobb. (S. Car.) 25; *Weld v. Adams*, 152 Mass. 74; 9 L. R. A. 244. Compare *McCartney v. Lindsley* (Can.), Mont. L. Rep., 5 Q. B. 455. A tender insufficient in amount, is of no avail. *Montague v. Longan*, 68 Mich. 98.

A deposit of money with the clerk of the court, subject to the order of the person entitled thereto, is not equivalent to payment or tender, unless the full amount due is deposited. *Repp v. Wiles*, 3 Ind. App. 167.

It makes no difference that the insufficiency in amount arises from an honest mistake on the part of the debtor. *Patnote v. Sanders*, 41 Vt. 66; 98 Am. Dec. 564; *Baker v. Gasque*, 3 Strobb. (S. Car.) 25; *Brandt v. Chicago, etc., R. Co.*, 26 Iowa 114; *Helphrey v. Chicago, etc., R. Co.*, 29 Iowa 480.

It is held by the supreme court of

*New Hampshire*, that the debtor is not excused from tendering the entire amount of the debt, because of an agreement with the creditor that a sum of money in the creditor's hands, which belonged to a third party, should be applied or accounted for as a part payment of the debt, unless there was a valid consideration to support such agreement; and that therefore a tender of the difference between the sum in the creditor's hands and the sum justly due, was insufficient. *Fisher v. Willard*, 20 N. H. 421.

Where \$50 is deposited with the clerk, and after some evidence is taken in the case, an additional \$10 is deposited, the tender is not good. *Frank v. Pickens*, 69 Ala. 369.

It is not sufficient, in a proceeding to redeem from a tax sale, to tender the amount paid by the purchaser, where a premium is allowed by law. The tender must include the premium. *Lamar v. Sheppard*, 84 Ga. 561.

An offer of judgment “in the sum of \$407.72 principal, and interest due to date and costs,” has been held to be an offer of the sum specified as the total amount, and not of costs and interest in addition thereto. *Upton v. Foster*, 148 Mass. 592.

Plaintiff was the owner of fifty interest-bearing bonds of \$1,000 each, which were due July 1st. The maker of the bonds had on deposit, a sum sufficient to pay the face of the bonds, but not quite enough to pay the principal and interest. It was held that the plaintiff was not bound to receive payment of forty-nine of the bonds, and retain the remaining one, the circumstances showing that it was the intention that the depository should pay all the bonds as a single transaction. *People's Sav. Bank v. Norwalk*, 56 Conn. 547.

A tender of the amount actually due under the condition of a bond, is a good tender, though it is less than the penalty, and is made after default. *Tracy v. Strong*, 2 Conn. 659.

Where a carrier is sued for loss of a part of the goods, and for damage by water to the remainder, the defendant is not justified in refusing a tender of the value of the goods lost, because the amount of the damage to those injured was not also tendered. *East Tenn., etc., R. Co. v. Wright*, 76 Ga. 532.

Where a sum is to be paid in state

scrip and part in money, a tender of the whole in scrip is not good, even as to a part. *White v. Prigmore*, 29 Ark. 208. See also *Dubuque v. Miller*, 11 Iowa 583.

Where there are several distinct claims in a declaration, a tender of the whole amount of one of the claims, with the costs, is a legal tender *pro tanto*. *Carleton v. Whitcher*, 5 N. H. 289.

Where an award was made in favor of the same person against five insurance companies, a tender made by one company, of the entire sum awarded, is a valid tender by that company. *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

Where a railroad company tendered a certain sum in payment of the damages to two animals, it was held not to be good as to either, if plaintiff afterward recovered a sum for the injuries to both, larger in the aggregate than the amount tendered, though the tender was larger than the amount recovered for either animal singly. *Shack v. Chicago, etc., R. Co.*, 73 Iowa 333.

**Including Interest.**—A tender made after the day of payment, must include interest. *Hamar v. Demick*, 14 Ind. 105; *Francis v. Deming*, 59 Conn. 108; *Woodsworth v. Morris*, 56 Barb. (N. Y.) 97; *Weid v. Elliot, etc., Bank*, 158 Mass. 339.

If, after tender is made, the debtor mingles the money with his own and uses it in his business, he must, upon afterwards paying the money into court, upon action brought by the creditor, include interest to the date of payment. *Murphy v. Gold, etc., Tel. Co. (City Ct.)*, 3 N. Y. Supp. 804.

A tender by executors, of an amount which does not equal the legacy and accrued interest, and which the legatee refuses to accept as a partial payment, does not stop the running of interest. *Welch v. Adams*, 152 Mass. 74.

A tender of interest upon railroad bonds, which is made for the purpose of arresting an action brought by a bond-holder after refusal by the trustees to foreclose the mortgage, must include all the interest upon all the bonds whose holders have not agreed to postpone their claim, and it is not sufficient to tender the amount of interest due on the bonds held by the plaintiff. *Van Benthuyzen v. Central, etc., R. Co. (Supreme Ct.)*, 17 N. Y. Supp. 709.

**Tender after action brought** must include the accrued costs. 2 Benj. Sales (4 Am. Ed.) 922; *Smith v. Anders*, 21 Ala. 782; *Thurston v. Blaisdell*, 8 N. H.

367; *Francis v. Deming*, 59 Conn. 108; *Hill v. Place*, 7 Robt. (N. Y.) 389; *Eaton v. Wells*, 22 Hun (N. Y.) 123; 82 N. Y. 576; *Barnes v. Greene*, 30 Iowa 114; *Martin v. Whisler*, 62 Iowa 416; *Call v. Lothrop*, 39 Me. 434; *Hay v. Ousterout*, 3 Ohio 384; *Burt v. Dodge*, 13 Ohio 131; *Berry v. Davis*, 77 Tex. 191; 19 Am. St. Rep. 748. See *Fishburne v. Sanders*, 1 Nott. & M. (S. Car.) 242; *Smith v. Curtiss*, 38 Mich. 393; *Audensreid v. Hull*, 45 Mo. App. 202.

Whether a tender of the debt without costs is sufficient, after an attorney has been employed and a writ issued, but not served, is answered in the affirmative in *Hull v. Peters*, 7 Barb. (N. Y.) 331, *overruling* the earlier decision of the Supreme Court in *Retan v. Drew*, 19 Wend. (N. Y.) 304; and in *Brown v. Ferguson*, 2 Den. (N. Y.) 196; and in the negative in *Emerson v. White*, 10 Gray (Mass.) 351. See also *Thurston v. Blaisdell*, 8 N. H. 367.

The party to whom the tender is made, is not bound to inform the party making the tender what costs he has incurred, unless inquiry be made. *Smith v. Wilbur*, 35 Vt. 133.

If the tender is not made till after suit is brought, the fee of the clerk of one per cent. (U. S. Rev. Stat., § 828) for receiving, keeping, and paying out the money, must be included in the amount paid into court. *The Serapis*, 37 Fed. Rep. 436.

**Excessive Amount.**—A tender is not invalidated because the sum tendered is larger than the amount due. *Patterson v. Cox*, 25 Ind. 261. But it must be in such shape that the creditor can take from it the amount actually due. 2 Greenl. Ev. (Redf. ed.), § 604.

A tender of an amount larger than that which is due, is not good, if the party making the tender requires change for the balance. 9 Bac. Abr. 317; *Belterbee v. Davis*, 3 Campb. 70; *Robinson v. Cook*, 6 Taunt. 336; *Cadman v. Lubbock*, 5 D. & R. 289; 16 E. C. L. 235; *Patterson v. Cox*, 25 Ind. 261; *Perkins v. Beck*, 4 Cranch (C. C.) 68.

In *Brady v. Jones*, 2 D. & R. 305; 16 E. C. L. 87, it appeared that the debtor, who owed £6 17s. 6d., called upon the creditor at the latter's residence and laid seven sovereigns upon the table, together with a paper containing a counter demand upon the creditor to the amount of £1 5s. saying: "There, take your demand." The creditor did not take up either the money or the paper, but simply re-

## 7 Must Be Absolute and Without Conditions.—The tender must be absolute and not hampered by conditions.<sup>1</sup>

plied: "You must go to my attorney," upon which the debtor retired with the money. It was held that such facts did not constitute a good tender.

It has been held, however, that a passenger on a street car is not bound to tender the exact fare, but the conductor must furnish change to a reasonable amount; and five dollars is not an unreasonable sum to tender in payment of fare. *Barrett v. Market St. R. Co.*, 81 Cal. 296; 40 Am. & Eng. R. Cas. 671; 29 Am. L. Reg. 191.

A tender of the amount of a note not due and the accrued interest, is a good tender of the interest. *Saunders v. Frost*, 5 Pick. (Mass.) 259; 16 Am. Dec. 394.

1. *Odum v. Rutledge, etc., R. Co.* (Ala. 1891), 10 So. Rep. 222; *Sanford v. Bulkley*, 30 Conn. 344; *Cothran v. Scanlan*, 34 Ga. 555; *Pulsifer v. Shepard*, 36 Ill. 513; *Rose v. Duncan*, 49 Ind. 269; *Shaw v. Sears*, 3 Kan. 236; *Latham v. Hartford*, 27 Kan. 249; *Brown v. Gilmore*, 8 Me. 107; 22 Am. Dec. 223; *Richardson v. Boston Chemical Laboratory*, 9 Met. (Mass.) 42; *Loring v. Cooke*, 3 Pick. (Mass.) 48; *Henderson v. Cass County*, 107 Mo. 50; *Berthold v. Reyburn*, 37 Mo. 586; *Kitchen v. Clark*, 1 Mo. App. 430; *Butler v. Hinckley*, 17 Colo. 523; *Currie v. White*, 45 N. Y. 843; *Bakeman v. Pooler*, 15 Wend. (N. Y.) 637; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47; *Holmes v. Holmes*, 12 Barb. (N. Y.) 137; *Strong v. Blake*, 46 Barb. (N. Y.) 227; *Cass v. Higenbotam*, 27 Hun (N. Y.) 406; *Fuller v. Little*, 7 N. H. 535; *Wagenblast v. McKean*, 2 Grant's Cas. (Pa.) 393; *Smith v. Keels*, 15 Rich. (S. Car.) 318; *Eastland v. Longshorn*, 1 Nott. & M. (S. Car.) 194; *Flake v. Muse*, 51 Tex. 98; *Morton v. Wells*, 1 Tyler (Vt.) 384; *Hunter v. Warner*, 1 Wis. 141; *Elderkin v. Fellows*, 60 Wis. 339; *Ladd v. Patten*, 1 Cranch (C. C.) 263; *Perkins v. Beck*, 4 Cranch (C. C.) 68; *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316; *Robinson v. Cook*, 6 Taunt. 336; *Wetherbee v. Davis*, 3 Campb. 70; *Hastings v. Thorley*, 8 C. & P. 573; 34 E. C. L. 530; *Brace v. Doble* (S. Dak. 1892), 52 N. W. Rep. 586.

But a demand for a reconveyance, upon tendering the amount of a loan, to secure which, a deed absolute in form

has been given, is not such a condition as to impair the tender. *Mankel v. Belscamper*, 84 Wis. 218.

It must at least be free from any condition to which the creditor may rightfully object. *Benj. on Sales* (Bennett's Notes), § 721; *Wheelock v. Tanner*, 39 N. Y. 481; *Moore v. Norman* (Minn. 1892), 53 N. W. Rep. 809.

"The condition which the debtor is the more apt to impose, is one to which the law does not permit him to subject the creditor. The debtor has no right to insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made. He may exclude any presumption against himself that he admits the payment to be only for a part, but can go no further, and his tender will not be good if he add a condition that the creditor shall acknowledge that no more is due." *Benj. on Sales* (Bennett's Notes), § 722, citing *Bowen v. Owen*, 11 Q. B. 131; 63 E. C. L. 131; *Cincinnati v. Mt. Auburn Cable R. Co.* (Cin. Super. Ct.), 28 Ohio L. J. 276; *Doty v. Crawford* (S. Car. 1893), 17 S. E. Rep. 377.

A tender, therefore, on condition that the creditor give a receipt or a release of all demands, is not good unless such release is especially stipulated for in the contract. *Laing v. Meader*, 1 C. & P. 257; 11 E. C. L. 382; *Griffith v. Hodges*, 1 C. & P. 419; 11 E. C. L. 440; *Glasscott v. Day*, 5 Esp. 48; *Hepburn v. Auld*, 1 Cranch (U. S.) 321; *Perkins v. Beck*, 4 Cranch (C. C.) 68; *Thayer v. Brackett*, 12 Mass. 450; *Loring v. Cooke*, 3 Pick. (Mass.) 48; *Kitchen v. Clark*, 1 Mo. App. 430; *Sanford v. Bulkley*, 30 Conn. 344; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47; *Roosevelt v. Bull's Head Bank*, 45 Barb. (N. Y.) 583; *Thayer v. Brackett*, 12 Mass. 450; *Wagenblast v. McKean*, 2 Grant's Cas. (Pa.) 399; *Brown v. Gilmore*, 8 Me. 107; 22 Am. Dec. 223. See *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316. And compare *Richardson v. Boston Chemical Laboratory*, 9 Met. (Mass.) 42; *Benj. on Sales*, § 726.

So where the money was tendered as "all that was due" (*Sutton v. Hawkins*, 8 C. & P. 259; 34 E. C. L. 380), or "in payment of the half-year's rent due at Lady Day last" (*Hastings v. Thorley*, 8 C. & P. 573; 34 E. C. L. 530), or as



"balance account railing" (Hough v. May, 4 Ad. & El. 954; 31 E. C. L. 235), in either case, it was bad. See also Strong v. Harvey, 3 Bing. 304; 11 E. C. L. 112; Evans v. Judkins, 3 Campb. 156; Wood v. Hitchcock, 20 Wend. (N. Y.) 47.

The following tender: "Defendant in this action tenders the plaintiff \$15.42 as a settlement of the matter," is not sufficient. Rand v. Harris, 83 N. Car. 486.

Where the debtor says: "I showed him (the creditor) \$500, and told him he could have it for his claim," this shows a conditional offer which is not a good tender. See Tompkins v. Batie, 11 Neb. 147; 38 Am. Rep. 361, where, however, the facts are not given.

It has been held in Iowa, that where an offer of judgment of a certain sum was made "with costs to date; said amount to be a full settlement of the above case," the offer is good, the last clause not constituting a condition, but stating only the legal and logical consequence of its acceptance (*distinguishing* Quinton v. Van Tuyl, 30 Iowa 554). DeLong v. Wilson, 80 Iowa 216.

In a case in *New York*, the plaintiff testified that he made the tender "unconditionally and in payment and extinguishment of" a certain lien. It was held that the tender was bad as attaching a condition. Noyes v. Wyckoff, 114 N. Y. 204.

The mere fact that the party making the tender, tells the other party that this closes the whole matter, does not make the tender a conditional one, if the creditor is not required to accept the money on that condition or understanding. Preston v. Grant, 34 Vt. 201; Foster v. Drew, 39 Vt. 51.

Where a mortgagor tenders the amount appearing to be due, according to an account made up by himself from documents furnished by the mortgagee, this is sufficient to throw the costs of the action to redeem upon the latter, in case the amount tendered is all that is due, although the mortgagor when making it, reserves the right to dispute the mortgagee's accounts, and to have the costs taxed. Greenwood v. Sutcliffe, C. A. [1892], 1 Ch. 1.

If a county treasurer refuses to receive money tendered in redemption of land sold for taxes, solely on the ground that he has no right to receive the money or give the certificate, the fact that a receipt or certificate was demanded, will not invalidate the ten-

der. People v. Edwards, 56 Hun (N. Y.) 377.

It is sometimes held that, in order to vitiate a tender, the condition must be one which there was no right to exact, Flake v. Nuse, 51 Tex. 98; as that the note which is to be paid be delivered up. Stafford v. Welch, 59 N. H. 46.

Where defendant tendered the amount due, and demanded the return of certain diamonds which had been pledged as collateral, this was not an unconditional tender. Cass v. Higgenbotam, 27 Hun (N. Y.) 406. Compare Loughborough v. McNevin, 74 Cal. 250.

Where, by the terms of a bond, a right was reserved to pay it before maturity, a tender of the face of the bond with interest to date of tender, is effectual to stop the running of interest, though it was coupled with a condition that the bond and all the coupons then in possession of the holder, be surrendered. Bailey v. Buchanan County, 115 N. Y. 297; 6 L. R. A. 562. The same principle is recognized in Halpin v. Phenix Ins. Co., 118 N. Y. 165.

This question was passed upon by the supreme court of *Vermont* in Holton v. Brown, 18 Vt. 224; 46 Am. Dec. 148, where the court, by Bennett, J., says: "When the money was tendered, the note secured by the mortgage was demanded, and the defendant refused to part with the money, unless the note was surrendered. The note was at that time mislaid, and Seymour, the attorney for the mortgagee, proposed to receive the money and discharge the note and mortgage; but the defendant declined to leave the money on such terms. This note was payable to Jesse Stratton or order, and has never been negotiated by the payee. The plaintiff might have recovered in an action at law upon the note, provided it had been shown to have been lost. The right of the holder in such case at law is fully recognized in the case of Lazell v. Lazell, 12 Vt. 449; 36 Am. Dec. 352. If the plaintiff could maintain an action on the note, at law, upon proof of its loss, without producing it, it would seem that the defendant, to have such action, must have made an absolute and an unconditional tender. A tender, with a condition annexed to the acceptance, is invalid. The party has not a right to demand a receipt, or a surrender of the security or obligation upon which the money is ten-

dered." *Holton v. Brown*, 18 Vt. 224; 46 Am. Dec. 148.

So a demand for a discharge of the party by or for whom the tender is made, will vitiate it. *Richardson v. Boston Chemical Laboratory*, 9 Met. (Mass.) 42.

The qualifications which may be attached to a tender, without making it obnoxious to the above rule, are thus stated in *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468. Plaintiff employed defendant to repair a carriage, and defendant retained the carriage, claiming a lien on it for the amount due for the repairs. Plaintiff tendered a sufficient amount to discharge the lien, but required as a condition of the payment that the carriage be delivered to him. The court, by Martin, C. J., in holding that this did not vitiate the tender, says: "This tender necessarily operated to release the property, and the plaintiff was entitled to immediate possession of it. That such would be the effect of an unconditional tender is not doubted; but as the tender in this case was made upon condition that the carriage should be delivered up, it is thought that it has not such effect. A tender made to procure the possession of property, can hardly be called conditional, because it is accompanied with a demand for the property. But it does not appear that any objection was made to the tender by the defendant, except for insufficiency, he demanding more than the sum offered; and as the jury find that sufficient was tendered, the tender was good, even were the strictest rule to prevail, upon the well-established principle, that an objection made at the time of the tender, precludes all others, and if that be not well grounded, the tender will be held good."

In a case recently decided by the supreme court of *Missouri*, the facts were as follows: The county of Cass issued bonds payable twenty years after date, which contained a stipulation that they might be redeemed at any time after five years, upon payment by the county of the principal and accrued interest. At the expiration of the five years, the county determined to redeem the bonds by paying cash or exchanging them for new bonds. Plaintiff being the owner of a number of the bonds, presented them to the agent of the county and demanded an exchange of the old for new bonds, dollar for dollar. The agent of the county offered to pay cash or to exchange old bonds

for new bonds, at their market value, which was above par. Thereupon the holder served upon the agent a written protest against the terms of the exchange, but offered to accept the money. The agent declined to pay the money, unless the protest was withdrawn. The court held that there was no tender, since the offer by the agent was not an unconditional one, and that the county was liable for the interest which subsequently accrued. *Henderson v. Cass County*, 107 Mo. 50.

If the condition is one on which the debtor has right to insist, and to which the creditor has no right to object, it will not vitiate the tender. *Wheelock v. Tanner*, 39 N. Y. 481.

So the *Michigan* courts hold that a tender may very properly be coupled with conditions such as the party has a right to make, and is entitled to, as resulting from a payment or tender legally made. *Brink v. Freeoff*, 40 Mich. 614; *Lamb v. Jeffrey*, 41 Mich. 719; *Johnson v. Cranage*, 45 Mich. 14. In the last cited case, there was a claim for boomage and tolls on certain logs, which the owners were compelled to pay before they could get possession of the logs. A Mr. Johnson claimed to hold a lien on the logs for said boomage and tolls in behalf of the companies which had rendered the services, and an order from him was necessary to enable the owners to get possession, even after they had paid all that was demanded. It was held that in making a tender to Johnson, the owners had a right to couple it with a demand for the logs, or for an order which would entitle them to later possession thereof.

Where a tender of the mortgage debt is accompanied with the condition that the mortgage be released, this does not invalidate the tender, since the condition is one which the mortgagee is bound by law to perform. *Saunders v. Frost*, 5 Pick. (Mass.) 259; 16 Am. Dec. 394; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Salinas v. Ellis*, 26 S. Car. 337. Compare *Loring v. Cooke*, 3 Pick. (Mass.) 48.

A tender of the amount due and secured by a pledge, is not invalidated because accompanied with the condition that the property pledged be returned to the pledgor. *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435.

In *Indiana*, it is held that if the tender of the amount due upon a mortgage note is conditioned upon the re-

lease of the mortgage, it is not a good tender. The court, by Biddle, J., says: "When one party is to perform an act, whose right does not depend upon any act to be performed by the other party, the tender must be without condition, as when money is to be paid without condition. The current of authorities—indeed, we believe it to be quite uniform—holds that the party bound to pay the money cannot make a good tender upon the condition that the party to whom the money is to be paid shall give him a written receipt therefor; and in the case of a non-commercial promissory note, the authorities are in conflict, whether a good tender can be made upon the condition that the note shall be surrendered; but in the case of commercial paper, the authorities seem to be uniform, that a tender upon condition that the paper shall be surrendered, is good, because such paper might be put in circulation after payment, and innocent parties become liable; not so, however, with non-commercial paper; after payment by the maker, it becomes harmless, as against him, wherever it may go. A tender, to be good, must not be upon any condition prejudicial to the party to whom it is made. The mortgage is merely the incident to the note. The payment or satisfaction of a note secured by a mortgage is a full and complete discharge of the mortgage. According to the rules above expressed—and we believe they are correct and well sustained by authority—the answer we are considering is insufficient as to the averment of tender. The acceptance of the money, as alleged, and the surrender of the note, operated as a complete legal discharge of the mortgage by which the payment of the note was secured, as much so as if it had been surrendered with the note, released upon the record, or actually canceled. The appellees had no right to demand a cancellation of the mortgage as a condition to the tender—it would in no way have strengthened their right nor placed them in any better legal status—for the surrender of the note, upon its payment, worked the destruction of all legal vitality in the mortgage. *Armstrong v. Murphy*, 2 Ind. 601; *Sherman v. Sherman*, 3 Ind. 337; *Ledyard v. Chapin*, 6 Ind. 320; *Francis v. Porter*, 7 Ind. 213; *Bickle v. Beske*, 23 Ind. 18; *Lynch v. Jennings*, 43 Ind. 276; *Rose v. Duncan*, 49 Ind. 269; *Roosevelt v. Bull's*

*Head Bank*, 45 Barb. (N. Y.) 579. We think a demand to cancel the mortgage as a condition of the tender, is not different in principle from demanding a receipt as a condition to the payment of money." *Storey v. Krewson*, 55 Ind. 397; 23 Am. Rep. 668.

An offer to pay the amount of a legacy, is not good, if it reserves for decision the question of a right to interest. *In re Wallace's Estate* (Surr. Ct.), 5 N. Y. Supp. 31.

Where the tender is coupled with an offer to pay an additional sum in settlement of another controversy, it is not good. *Shack v. Chicago, etc., R. Co.*, 73 Iowa 333.

A tender of the balance due on an account, less certain claims for damages, accompanied with a demand for a receipt in full, is not a good tender. *L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926.

A mortgagor, while riding with the mortgagee on the public highway, made repeated offers of money to the mortgagee by way of tender, but all were involved with other matters of dealing between them, and the settlement was interrupted by a quarrel. Before any costs were incurred, the mortgagee offered to accept the amount due. It was held that no tender had been made which would discharge the mortgage lien. *Parks v. Allen*, 42 Mich. 482.

Where the purchaser of land tenders the purchase price, on condition that the vendor's wife will sign the deed, such tender is not good as the basis for a bill to compel specific performance. *Kelsey v. Crowther*, 7 Utah 519.

Where a tenant had the option of purchase during the term, and tendered to the landlord, a deed to be executed by him, accompanied by the purchase-money, but the deed embraced more than the premises, the deed so qualifies the tender as to wholly invalidate it. *Plummer v. Barnett* (Pa. 1888), 13 Atl. Rep. 953.

So, too, the tender is invalidated by a demand that the party to whom it is made, make a title. *Cotheran v. Scanlan*, 34 Ga. 556.

An interesting question in this connection was raised in *Louisiana*, in which the supreme court of that state, by Ilsley, J., says: "We will, therefore, proceed to examine the very important question, whether the qualified tender of other lands, with a concurrent reservation of all legal rights, and

**8. Mere Readiness and Willingness to Pay, not Sufficient.**—The mere readiness and willingness of a debtor to pay the debt when due, amounts to nothing, without an offer or tender of payment by him and a refusal by the creditor.<sup>1</sup>

**9. Waiver of Objections.**—Where the refusal is placed upon a specific ground, all other objections to the sufficiency of the tender are thereby waived.<sup>2</sup>

the special plea that he, Millaudon, was not legally liable for the deficiency, because the sale to Davis was one *per aversionem*, precluded him from availing himself afterwards of that defense. The tender of a thing claimed in a suit, when made in the course of judicial proceedings and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession; but when such tender is made, not of the thing claimed, but of something else, with a special reservation (if the tender is not accepted as made) of all legal rights, and with the special defense that the thing actually claimed is not due, we cannot give to a tender so made the conclusive effect claimed for it by Davis. It was virtually an offer on the part of Millaudon to buy his peace, and to put a stop to litigation. If it amounted to anything at all, as an admission, it did not go to the extent that the thing claimed was due, but simply admitted that there was a deficiency in the measurement of the land sold; but it did not preclude the party from using the defense on which he relied, if his specific offer was not accepted." *Davis v. Millaudon*, 17 La. Ann. 97; 87 Am. Dec. 517.

A conditional tender will not stop the running of interest. *Nantz v. Lober*, 1 Duv. (Ky.) 304; *Flake v. Nuse*, 51 Tex. 98.

If the tender is made upon a condition, either expressly stated or necessarily implied, and the tender is accepted, this constitutes an acceptance of the condition. *Lee v. Dodd*, 20 Mo. App. 271. And if the condition be assented to, the tender is binding. *Bickle v. Beseke*, 23 Ind. 18. See *Wheelock v. Tanner*, 39 N. Y. 481.

**1.** *Martindale v. Waas*, 3 McCrary (U. S.) 108; *Camp v. Simon*, 34 Ala. 126; *Liebbrandt v. Myron Lodge*, 61 Ill. 81; *Eastman v. District Township*, 21 Iowa 590; *Jones v. Mullinix*, 25 Iowa 198; *De Wolfe v. Taylor*, 71 Iowa 648; *Bacon v. Smith*, 2 La. Ann. 441; 46 Am. Dec. 549; *Fridge v. State*, 3 Gill

& J. (Md.) 103; 20 Am. Dec. 463; *Chase v. Welsh*, 45 Mich. 345; *Harmon v. Magee*, 57 Miss. 410; *Berthold v. Reyburn*, 37 Mo. 586; *Hornby v. Cramer*, 12 How. Pr. (N. Y.) 490; *Strong v. Blake*, 46 Barb. (N. Y.) 227; *Fuller v. Little*, 7 N. H. 535; *Smith v. Foster*, 5 Oregon 44; *Sheredine v. Gaul*, 2 Dall. (Pa.) 190; *Hunter v. Warner*, 1 Wis. 141.

A mere offer to pay whatever shall be ascertained to be necessary to discharge a litigated demand, without any steps being taken to ascertain that amount, and the preparation of a receipt in blank, purporting to discharge a judgment which had not in fact been entered, is not a good tender. *Chase v. Welsh*, 45 Mich. 345.

But where an administrator seeks to enforce a contract for the sale of land made by his intestate, it is not essential that he should actually tender a deed to the purchaser, if he shows that he is able and willing to make the deed upon payment of the purchase-money. *Faulkner v. Williman* (Ky. 1891), 16 S. W. Rep. 352.

Where a purchaser from a mortgagor seeks to set aside a sale under the mortgage, on the ground of fraud, and to be allowed to redeem, it is sufficient if the bill of complaint contains an averment that the complainant is ready to pay the amount admitted to be due on the mortgage debt, and hereby tenders that amount or any other sum that may be found to be due, and submits himself to the court for its decree in that behalf. *Cain v. Girnon*, 36 Ala. 168.

Mere proof that the party was able to perform, would be no evidence of his intention to fulfill; he must make a tender on the day and place. *McConnell v. Hall*, Brayt. (Vt.) 223.

**2. Waiver of Objections.**—*Wood v. Babb*, 16 S. Car. 427; *Conway v. Case*, 22 Ill. 127; *Thayer v. Meeker*, 86 Ill. 470; *Whelan v. Reilley*, 61 Mo. 565; *Adams v. Helm*, 55 Mo. 468; *Koon v. Snodgrass*, 18 W. Va. 320; *Haskell v. Brewer*, 11 Me. 258; *Gilbert v. Moseer*, 11 Iowa 498. Compare *Perry v. Mount*

Hope Iron Co., 16 R. I. 318. Especially if the ground not stated is a trivial one, and one which could easily have been remedied at the time. *Stokes v. Recknagel*, 38 N. Y. Super. Ct. 368; *Decamp v. Feay*, 5 S. & R. (Pa.) 323; 9 Am. Dec. 372.

If the objection made to the tender is a legal one, it would seem to make no difference how trivial it might be, and the jury would have no right to take into consideration the fact that the real object of the refusal was to get rid of the contract, and that the party in fact did not entertain the objection which he put forward. This question arose in *Pennsylvania*, at an early day. In that case there was evidence that Decamp, the plaintiff, specifically and continually objected to the tender, because it was in bank notes and not in coin. There was also evidence tending to show that his real motive for declining the bank notes was that he desired to get rid of the effect of the tender. The jury were instructed that "the great question was whether the refusal to take the money offered arose from a determination to dissolve the contract and keep the money received." The supreme court held that this instruction was erroneous, because it contained a plain intimation that if the real motive was different from the avowed one, and if the party had in truth no objection to the kind of money tendered, but merely used it as a pretext for an objection with a view of getting rid of the bargain, it amounted to a waiver, notwithstanding his express declarations that he would waive nothing. The court, by Gibson, J., uses the following language: "The right of a person to have a tender of imperfect performance considered as valid, arises from his having been, by the silence of the opposite party, deceived into the belief that nothing further was required; but where there is no allegation of misapprehension, by what right can the person making the tender enter into the motive of a party objecting, and say, 'Your dislike to the mode of performance is all affectionation, and you are therefore bound to withdraw your objection'? To this, no matter what or how unconscionable the motive may be, he might openly reply, 'I only exercise a right I reserved by contract, and although your notes would answer my ends as well as specie, yet for the purpose of defeating the contract altogether, I require payment in coin be-

cause you cannot procure it.'" *Decamp v. Feay*, 5 S. & R. (Pa.) 323; 9 Am. Dec. 372.

Some cases hold that not only must the objections be made at the time of the tender, but that all objections must be made then; and those then made preclude the making of others subsequently. *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468; *Fosdick v. Van Huse*, 21 Mich. 570.

There can be no waiver of an objection, unless it appears that the party had knowledge of the facts which would warrant the objection. *Waldron v. Murphy*, 40 Mich. 668; *Dunham v. Pettee*, 4 E. D. Smith (N. Y.) 500.

The objection that the tender was made by a party who was not duly authorized is waived, unless made at the time. *Lamplsey v. Weed*, 27 Ala. 621.

Where tender is made by check, and is refused, not because of the form of the tender, but on the ground that the contract has not been complied with, this constitutes a waiver of a tender in specie. *Walsh v. St. Louis Exposition, etc., Assoc.*, 101 Mo. 534; *Henderson v. Cass County*, 107 Mo. 50; *Collier v. White*, 67 Miss. 133.

It is too late, after the final decree, to object that a tender was made by check. *Bradford v. Foster*, 87 Tenn. 4.

Tender was made in a check and was objected to on the ground that it was not certified. The debtor, with the creditor's consent, thereupon withdrew it to get it certified. In about two hours he returned with the check certified, when the creditor objected to receiving it on the ground that the hour for performing the contract had passed. It was held that this objection could not avail. *Duffy v. O'Donovan*, 46 N. Y. 223.

Where a larger amount of goods than that contracted for is tendered, the objection to the amount is not waived by failing to make it at the time. *Levy v. Green*, 1 E. & E. 969; 102 E. C. L. 966; *Perry v. Mount Hope Iron Co.*, 16 R. I. 318.

But if the objection is to the amount of the tender, and not to its medium, it is a good tender. *Jennings v. Men-denhall*, 7 Ohio St. 257.

Where tender is made at a place other than that stipulated in the contract as the place of payment, and is refused except upon certain conditions, this constitutes a waiver of the right to have the tender at the place agreed on. *Union Mut. L. Ins. Co. v. Union Mills*

**IV. PARTIES; PLACE—1. By Whom to be Made.**—The tender must be made by the debtor, or the person who is bound to pay over the money or deliver the property, or by his legal representative.<sup>1</sup>

**2. To Whom Made.**—The tender must be made to the party to whom the money is due, or who is entitled to the possession of the property, or to his authorized agent.<sup>2</sup>

**3. Tender of Specific Property.**—An obligation to deliver specific articles of personal property may be discharged by a tender of the

Plaster Co., 37 Fed. Rep. 286; 3 L. R. A. 90.

Where certain wheat placed in an elevator was to be delivered on payment of charges, and plaintiff demanded the wheat without tendering the charges, and its delivery was refused exclusively on another ground, it was held that tender of the charges was waived. *Farbell v. Farmers' Mut. El. Co.*, 44 Minn. 471.

If a purchaser of real estate denies that anything is due the vendor, and does not offer to pay anything, he waives all objection to the tender of a deed by the vendor, accompanied with a demand of payment of the whole purchase-money. *Hannan v. McNickle*, 82 Cal. 122.

A subsequent acceptance of property is a waiver of the objection that it was not tendered in time. *Emery v. Langley*, 1 Idaho N. S. 694.

1. 2 Pars. Cont. 639, 648; *McDougald v. Dougherty*, 11 Ga. 570.

It is not good if made by a stranger, *McDougald v. Dougherty*, 11 Ga. 570; unless subsequently ratified by the debtor, *Harding v. Davies*, 2 C. & P. 78; 12 E. C. L. 35; *Mahler v. Newbaur*, 32 Cal. 168; *Kincaid v. School Dist. No. 4*, 11 Me. 188; *Read v. Goldring*, 2 M. & S. 86; and the creditor is not bound to accept a tender made by a stranger. *Gibson v. Lyon*, 115 U. S. 439.

A tender may be made by an agent and to an agent, if the latter is authorized to receive the money. But a demand, in order to avoid the tender, should be made of the debtor personally. *Berthold v. Reyburn*, 37 Mo. 586.

A person who has no interest in mortgaged premises, nor in the tender made, cannot make a valid tender of the mortgage debt on his own behalf. *Mahler v. Newbaur*, 32 Cal. 168; *Sinclair v. Learned*, 51 Mich. 335. But a person having an interest in the consequences of a tender, may make an

effectual tender. *Kincaid v. School District*, 11 Me. 188. It may be made by a surety. *Hampshire Mfg. Bank v. Billings*, 17 Pick. (Mass.) 87.

Where a mortgage debt is payable on demand, a tender made by a purchaser of the property, who did not assume the debt, is not good, if made before demand of payment by the mortgagee, or a tender by the mortgagee. *Noyes v. Wyckoff*, 114 N. Y. 204.

So a lessor may refuse a tender of the rent, by one to whom the premises have been subleased in violation of the contract. *Prieur v. Depouilly*, 8 La. Ann. 399.

But want of authority, in an agent, to make a tender, cannot be alleged in the answer, unless objected to when the tender was made. *Lampley v. Weed*, 27 Ala. 621.

It would seem that a tender made in behalf of an idiot, by any person, is good, and so is one made in behalf of an infant, by a relative, though not his guardian. 2 Pars. Cont. 639; Co. Litt. 206. b; *Brown v. Dysinger*, 1 Rawle (Pa.) 408.

Where one who is entitled to make a tender, makes it jointly with one who is not entitled to make it, the tender is bad. *Bender v. Bean*, 52 Ark. 146.

But it was held that where one of two co-tenants of land, tenders his *pro rata* share of the amount necessary to redeem the land from a sale for taxes, this is sufficient. *Winter v. Atkinson*, 28 La. Ann. 650.

A tender by either one of three agents appointed for that purpose, is valid. *Sons of Temperance v. Brown*, 11 Minn. 356.

**2. To Whom Made.**—*Hoyt v. Hall*, 3 Bosw. (N. Y.) 42; *Fletcher v. Daugherty*, 13 Neb. 224; *King v. Finch*, 60 Ind. 420; *Morton v. Wells*, 1 Tyler (Vt.) 384; *Strong v. Blake*, 46 Barb. (N. Y.) 227. Compare *Thurston v. Blaisdell*, 8 N. H. 367.

articles at the proper time and place. The articles must be set apart and designated, so as to enable the creditor to distinguish them from others, and if this be done it is good as a tender, though the creditor be absent.<sup>1</sup>

A tender to one of two persons jointly entitled, is sufficient. *Prescott v. Everts*, 4 Wis. 314; *Flanigan v. Seelye* (Minn. 1893), 55 N. W. Rep. 115; *Dawson v. Ewing*, 16 S. & R. (Pa.) 371; *Carman v. Pultz*, 21 N. Y. 547. But see *Dodge v. Deal*, 28 Ill. 303.

If the person is the duly authorized agent to receive the money, the tender is good, though the agent deny his authority. *Billiot v. Robinson*, 13 La. Ann. 529; *McIniffe v. Wheelock*, 1 Gray (Mass.) 600.

A tender to a clerk in the store where the goods were purchased, is sufficient. *Hoyt v. Byrnes*, 11 Me. 475.

A tender by the purchaser, to a son of the vendor, was held to be sufficient to stop the running of interest upon a sum decreed to be paid by the purchaser before the delivery of a deed by the vendor, where it appeared that the purchaser had made an unsuccessful attempt to find the vendor before tendering to the son, who had been authorized to state that the vendor would not execute the deed until a receipt in full of all demands should be given. *Crawford v. Osmun*, 94 Mich. 533.

Tender of money due a beneficiary, should be made to the trustee. *Chahoon v. Hollenback*, 16 S. & R. (Pa.) 425; 16 Am. Dec. 587; *Hayward v. Munger*, 14 Iowa 516.

Where the creditor sent his son to the debtor to demand a specific sum, an offer of a less sum, by the debtor, to the son, cannot be deemed a legal tender to the father. *Chipman v. Bates*, 5 Vt. 143.

If a party is required to pay an attorney's fee to the attorney of the opposite party, as a condition of opening default, it would seem that a tender of the amount to the attorney is sufficient. *Wolff v. Canadian Pac. R. Co.*, 89 Cal. 332.

Whether a tender to the assignor after assignment, is good, see *Camp v. Simon*, 34 Ala. 126.

1. **Tender of Specific Property.**—*Smith v. Loomis*, 7 Conn. 110.

Where the time and place are fixed, a tender at such time and place is good, though there is no one there to receive the articles. *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Southworth v. Smith*, 7

Cush. (Mass.) 391; *Barney v. Bliss*, 1 D. Chip. (Vt.) 399; 12 Am. Dec. 696.

That the property must be set apart and distinguished from other articles of a like kind, or must be selected from a larger bulk by the party making the tender, is held in 2 *Parsons Cont.* 646; *Clark v. Baker*, 11 Met. (Mass.) 186; 45 Am. Dec. 199; *Croninger v. Crocker*, 62 N. Y. 151; *Gilman v. Moore*, 14 Vt. 457; *Veazy v. Harmony*, 7 Me. 91; *Wyman v. Winslow*, 11 Me. 398; 26 Am. Dec. 542; *Leballister v. Nash*, 24 Me. 316; *Bates v. Churchill*, 32 Me. 31; *Deweese v. Lockhart*, 1 Tex. 535; *Bates v. Bates*, Walk. (Miss.) 401; 12 Am. Dec. 572.

The case from *Mississippi* (*Bates v. Bates*, Walk. (Miss.) 401; 12 Am. Dec. 572) was an action on a promissory note given for ten cows and calves. A witness testified that sometime before the note matured, both plaintiff and defendant were at her house, and she heard the defendant, the maker of the note, say to the plaintiff that he was then ready to deliver the cows and calves named in the note, but plaintiff replied that the note was not due, and that he would not receive them until it was due. It was further shown that the defendant had in the place, cows and calves enough to discharge the obligation. Another witness testified that on the day the note fell due he was called on by the maker to walk to his lot; he was informed by defendant that the cows and calves which witness saw in his lot, being eleven in number, had been driven up to discharge the note that plaintiff held. The court held that the cows and calves were not sufficiently identified to make it a good tender.

In a case arising in *Rhode Island*, the plaintiff offered to sell the defendant 30 or 40 tons of scrap iron, which the defendant agreed to buy if plaintiff would deliver it on the defendant's wharf. Plaintiff carried to the wharf a cargo of 53 $\frac{1}{2}$  tons and tendered it to defendant, which was refused on the ground that it was not the kind contracted for. Afterwards at the trial, defendant made the further objection that a tender of 53 $\frac{1}{2}$  tons was not a tender in fulfillment of a contract to deliver 30 or 40

4. **Place of Tender.**—If the contract fixes the place, the tender must be made at that place, and the party to whom the tender is to be made must attend there for the purpose of receiving the money or thing to be tendered.<sup>1</sup>

tons. It was held that the objection was well taken, and that it was not waived by a failure to make it, when the goods were tendered. *Perry v. Mount Hope Iron Co.*, 16 R. I. 318. See also *Benj. on Sales* (2d Am. Ed.), § 689; *Rommel v. Wingate*, 103 Mass. 327; *Croninger v. Crocker*, 62 N. Y. 151; *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; *Cunliffe v. Harrison*, 6 Exch. 903; *Levy v. Green*, 1 E. & E. 969; 102 E. C. L. 966; *Rylands v. Kreitman*, 19 C. B. N. S. 351; 115 E. C. L. 351.

But where the article sold in bulk is all of a given quality, as grain, separation or identification is not necessary. *Armstrong v. Tait*, 8 Ala. 635; *Hughes v. Prewitt*, 5 Tex. 264. This rule has been applied to a reaping machine of a particular pattern, where there was a number of such machines. *Ganson v. Madigan*, 9 Wis. 146.

And where an article is uniform in bulk, and it is no burden to the purchaser of a portion, to separate such portion from the mass, a tender of too much, from which the purchaser is to take the amount of his purchase, is good. Thus, where a ship's hold contained 582 hectolitres of nuts of uniform quality, and the nuts were shipped as ordered, except as to the additional quantity, and it was a part of the contract of sale that the purchaser was to furnish bags, a tender of 400 hectolitres, to be taken from the ship's hold, is good. *Brownfield v. Johnson*, 128 Pa. St. 254; 6 L. R. A. 48. But in that case it appeared that it was common to ship small orders of nuts in common bulk, in this manner.

1. **Place of Tender.**—*Startop v. McDonald*, 6 M. & G. 593; 46 E. C. L. 623; *Co. Litt.* 210b; *Roberts v. Beatty*, 2 P. & W. (Pa.) 63; 21 Am. Dec. 410; *Wiggin v. Wiggin*, 43 N. H. 567; 80 Am. Dec. 192; *Lobdell v. Hopkins*, 7 Cow. (N. Y.) 516; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 380; *Aldrich v. Albee*, 1 Me. 120; 10 Am. Dec. 45; *Bixby v. Whitney*, 5 Me. 192; *Bean v. Simpson*, 16 Me. 49; *White v. Perley*, 15 Me. 470; *Smith v. Loomis*, 7 Conn. 110; *Bates v. Bates*, Walk. (Miss.) 401; 12 Am. Dec. 572; *Deel v. Berry*, 21 Tex. 463; 73 Am. Dec. 236.

It is sufficient, as a general rule, that personal property which has been sold, be offered to the purchaser at the place where it was at the time of making the sale. 2 Kent's Com. 505; 2 Story on Contracts, § 1410; *Barr v. Myers*, 3 W. & S. (Pa.) 295.

But if the contract is to pay a debt by the delivery of certain articles, the property should, if it is portable, be taken to the creditor's residence or place of business, and tendered there. *Hall v. Whittier*, 10 R. I. 535; *Miles v. Roberts*, 34 N. H. 254; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 380; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Roberts v. Beatty*, 2 P. & W. (Pa.) 63; 21 Am. Dec. 410; *Barr v. Myers*, 3 W. & S. (Pa.) 295. Provided that the creditor is within the state. *Santee v. Santee*, 64 Pa. St. 473; *Howard v. Miner*, 20 Me. 330; *Harris v. Mulock*, 9 How. Pr. (N. Y.) 402; *Grussy v. Schneider*, 55 How. Pr. (N. Y.) 188; *Houbie v. Volkening*, 49 How. Pr. (N. Y.) 169; *King v. Finch*, 60 Ind. 420; *Littell v. Nichols*, Hard. (Ky.) 66. But not if he is out of the state. *Trimble v. Williamson*, 49 Ala. 525; *Gill v. Bradley*, 21 Minn. 15.

It is held in *Kentucky*, that the usual place of the obligor's residence, is the place of payment, where no place is named and the payment is to be made in personal property. *Galloway v. Smith*, Litt. Sel. Cas. (Ky.) 133; *Wilmouth v. Patton*, 2 Bibb (Ky.) 280; *Chambers v. Winn*, Sneed (Ky.) 166; 2 Am. Dec. 713; *Grant v. Groshon*, Hard. (Ky.) 85; 3 Am. Dec. 725.

But where the debt is to be paid in money, the debtor must seek the creditor, if he is within the state and no particular place of payment is named. *Galloway v. Smith*, Litt. Sel. Cas. (Ky.) 133; *Judd v. Ensign*, 6 Barb. (N. Y.) 258. A tender of the purchase price of land, however, is good if made at the vendor's residence, though he is absent. *Smith v. Smith*, 25 Wend. (N. Y.) 405; 2 Hill (N. Y.) 351.

But if a place is named, a tender at that place is sufficient, though the one who is to receive it is not present at the time. *Judd v. Ensign*, 6 Barb. (N. Y.) 258.

If a note is payable in personal prop-



**5. Time of Tender.**—Where the act to be performed may, under the terms of the contract, be done anywhere, a tender made at a convenient time before midnight is sufficient ; but if the act is to be done at a particular place, so that the duty rests upon the other party to attend at that place, the tender must be made by daylight, and a convenient time before sunset.<sup>1</sup> The property, when thus

erty, to a party living out of the *United States*, and the place of payment is not named therein, it would seem that the debtor must ascertain from the creditor where he will receive the goods, or else must designate to the creditor where he will deliver the goods, and must make the tender accordingly. *Bixby v. Whitney*, 5 Me. 192.

It is held in *Illinois*, that where a note is given for money, but may be paid by the delivery of specific personal property, the maker must, in order to discharge the note by delivery of the property, tender it at the place which was the residence of the payee at the time the note was given. *Borah v. Curry*, 12 Ill. 66.

The courts of some of the states have adopted the doctrine of Lord Coke, that where there is to be a delivery of ponderous articles, and no place is designated for their delivery, the obligor must seek the obligee before the day, and ascertain what place he will appoint at which to receive them, and he must deliver them there, provided the place selected by the obligee is not an unreasonable place. (Co. Lit. 210 b; Cro. Eliz. 48.) *Slingerland v. Morse*, 8 Johns. (N. Y.) 477; *Barns v. Graham*, 4 Cow. (N. Y.) 452; 15 Am. Dec. 394; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525; 21 Am. Dec. 161; *La Farge v. Rickert*, 5 Wend. (N. Y.) 187; 21 Am. Dec. 209; *Currier v. Currier*, 2 N. H. 75; 9 Am. Dec. 43; *Flanders v. Lamphear*, 9 N. H. 201; *Mason v. Briggs*, 16 Mass. 453; *Aldrich v. Albee*, 1 Me. 120; 10 Am. Dec. 45; *Bean v. Simpson*, 16 Me. 49; 2 Kent's Com. 507; *Story on Contr.* 319. See *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243.

The provision of the *Louisiana* code, that where the obligation refers to real property, the debtor must give notice to the creditor to be present at a fixed hour, at the office of a notary, to receive the conveyance, does not apply to a case where the purchaser has been evicted from a portion of the land sold to him. *Robbins v. Martin*, 43 La. Ann. 488.

**1. Time of Tender.**—*Startup v. Mc-*

*Donald*, 6 M. & G. 593; 46 E. C. L. 623.

Where a person has a whole day in which to perform his contract, a refusal by the other person to wait at the appointed place until the time, within the day, that such first person agrees to make a tender, amounts to a direct waiver of further effort to perform. *Karker v. Haverly*, 50 Barb. (N. Y.) 79.

It is immaterial that a tender was not made within the required time, if, when made, it was accepted. *Emery v. Langley*, 1 Idaho N. S. 694.

Allowing a tender of damages and costs to be made in certain cases, at any time "until three days before the commencement of the term" to which the action is returnable, excludes from the period mentioned, both the day on which the tender is made, and the first day of the term. *Willey v. Laraway*, 64 Vt. 566.

In an interpleader issue between a vendor of goods seeking to rescind the sale for fraud of the purchaser, and creditors holding executions against the latter, a tender on the part of the former, of unpaid notes received from the purchaser at the time of trial, will be treated as if made at the date of rescission, where the rights and liabilities of the parties have been in no way changed by the delay. *Sloane v. Shiffer*, 156 Pa. St. 59. See *Morse v. Woodworth*, 155 Mass. 233.

If no time is limited in the contract, the property is deliverable on demand. *Story on Contracts*, § 1411; *Vance v. Bloomer*, 20 Wend. (N. Y.) 196; *Rice v. Churchill*, 2 Den. (N. Y.) 145; *Russell v. Ormsbel*, 10 Vt. 274.

Where a deed is placed in escrow, to be delivered to the grantee upon payment of the purchase-money, a tender within a reasonable time is good; and if the party holding the deed, refuse to deliver it upon such tender, the grantee is not bound to keep the tender good by payment of the money into court or otherwise. *Cannon v. Handley*, 72 Cal. 133; *McDaniel v. Kimbrell*, 3 Greene (Iowa) 335; *Washburn v. Dewey*, 17 Vt. 92; *White v. Dobson*, 17 Gratt.

tendered, vests in the party to whom the tender is made, and is at his risk.<sup>1</sup>

**6. Equity Will not Supply Defects.**—A court of equity will not supply a defect in a tender made to a wrong party or in a wrong place.<sup>2</sup>

**V. KEEPING TENDER GOOD.**—The tender must be kept good to the time of trial.<sup>3</sup>

(Va.) 262. See *infra*, this title, *Keeping Tender Good*; *Acceptance or Refusal of Tender—Effect on Lien of Mortgage, etc.*

Where the contract does not fix the time for payment of a debt secured by a pledge, a tender of the amount due, including interest, within a reasonable time after a demand of payment had been refused by the pledgor, is good. *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 345.

A tender of a deed, after a verdict has been rendered for a sum of money claimed as alternative relief, is made too late. *Houston v. Sledge*, 101 N. Car. 640; 2 L. R. A. 487.

As to the time of day when a tender of goods is to be made, the rule is, that if they are bulky, the tender must be seasonably made, so that the party to whom they are offered may have an opportunity to examine them, and see that they are such as are required by the contract, before the close of the day on which the delivery is to be made. *Croninger v. Crocker*, 62 N. Y. 158; *Hall v. Whittier*, 10 R. I. 530; *Tiernan v. Napier*, 5 Yerg. (Tenn.) 410; *Aldrich v. Albee*, 1 Me. 120; 10 Am. Dec. 45; *Savary v. Goe*, 3 Wash. (U. S.) 140; *Acocks v. Phillips*, 5 H. & N. 183; *Doe v. Paul*, 3 C. & P. 613; 14 E. C. L. 483; *Tinckler v. Prentice*, 4 Taunt. 549.

In *Croninger v. Crocker*, 62 N. Y. 158, a tender of wool, made after 10 o'clock at night, was held insufficient. But it has been held that a tender after sunset will be sufficient, if the party is present to receive it. *Startup v. McDonovan*, 6 M. & G. 593; 46 E. C. L. 591; *Sweet v. Harding*, 19 Vt. 587; *McClartey v. Gokey*, 31 Iowa 505.

The tender may, of course, be made at any hour of the day at which both the parties actually meet at the appointed place. *Startup v. McDonald*, 6 M. & G. 593; 46 E. C. L. 623.

Where a tender of chattels is to be made, and the party who is to receive them is absent, the tender must be made on the appointed day and at the latest convenient hour in that day, but

before evening. *Duckham v. Smith*, 5 T. B. Mon. (Ky.) 372; *Huston v. Noble*, 4 J. J. Marsh. (Ky.) 130; *Kendal v. Talbot*, 1 A. K. Marsh. (Ky.) 321; *Powe v. Powe*, 42 Ala. 113; *Day v. Laferty*, 4 Ark. 450; *Sweet v. Harding*, 19 Vt. 587.

1. *Smith v. Loomis*, 7 Conn. 110.

A tender is not good, unless it is so made as to vest the property in the creditor. *Hughes v. Eschback*, 7 D. C. 66; *Schrader v. Wolfen*, 21 Ind. 238.

Where it is not necessary to a valid transfer of stocks, that they should be transferred on the books of the corporation, an offer by the holder to deliver certificates which are indorsed in blank, is a sufficient tender. *Wilson v. Hill*, 88 Cal. 92.

2. *King v. Finch*, 60 Ind. 420. "If a tender is not legal, a court of equity will not support it; nor supply a defect of a tender against a rule of law, unless perhaps where fraud is used to prevent it." *Gammon v. Stone*, 1 Ves. 339.

In *Clark v. Drake*, 63 Mo. 354, it was held that if one tendered all admitted by him to be due, the chancellor should not deny him relief on the ground of the insufficiency of the tender, but should grant relief only on his doing that which equity required. The court in this case cited *Whelan v. Reilly*, 61 Mo. 565; *Irwin v. Brittain*, 1 Hoff. Ch. (N. Y.) 353; *Bishop of Winchester v. Payne*, 11 Ves. 194. See also *Hoyt v. Hall*, 3 Bosw. (N. Y.) 42.

3. **Keeping Tender Good.**—*Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316; *Bissell v. Heyward*, 96 U. S. 587; *Park v. Wiley*, 67 Ala. 310; *Frank v. Pickens*, 69 Ala. 369; *Woodruff v. Trapnall*, 12 Ark. 640; *Hamlett v. Tallman*, 30 Ark. 505; *Wolff v. Canadian Pac. R. Co.*, 89 Cal. 332; *Mattheews v. Lindsay*, 20 Fla. 962; *Mason v. Croom*, 24 Ga. 211; *Gray v. Angier*, 62 Ga. 596; *Webster v. Pierce*, 35 Ill. 158; *Pulsifer v. Shepard*, 36 Ill. 513; *Thayer v. Meeker*, 86 Ill. 474; *Aulger v. Clay*, 109 Ill. 487; *Blain v. Foster*, 33 Ill. App. 297; *King v. Finch*, 60 Ind. 420; *Wilson v. McVey*, 83 Ind. 108; *Martin*

*v. Whisler*, 62 Iowa 416; *Rainwater v. Hummell*, 79 Iowa 571; *King v. Harrison*, 32 Kan. 215; *Nantz v. Lober*, 1 Duv. (Ky.) 304; *De Goer v. Kellar*, 2 La. Ann. 496; *Call v. Lothrop*, 39 Me. 434; *Norton v. Baxter*, 41 Minn. 146; 16 Am. St. Rep. 679; *Miller v. McGehee*, 60 Miss. 903; *Berthold v. Reyburn*, 37 Mo. 586; *Henderson v. Cass Co.* (Mo. 1891), 18 S. W. Rep. 992; *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361; *Stowell v. Read*, 16 N. H. 20; 41 Am. Rep. 714; *Werner v. Tuch*, 127 N. Y. 217; *Warburg v. Wilcox*, 2 Hilt. (N. Y.) 121; 7 Abb. Pr. (N. Y.) 337; *Hill v. Place*, 7 Robt. (N. Y.) 389; *Roosevelt v. Bull's Head Bank*, 45 Barb. (N. Y.) 579; *Dodge v. Fearey*, 19 Hun (N. Y.) 278; *Nelson v. Loder*, 55 Hun (N. Y.) 173; *Tuthill v. Morris*, 81 N. Y. 94; *Tate v. Smith*, 70 N. Car. 685; *McDowell v. Glass*, 4 Watts (Pa.) 389; *Cornell v. Green*, 10 S. & R. (Pa.) 14; *Summerson v. Hicks*, 134 Pa. St. 566; 26 W. N. C. (Pa.) 332; *Fishburn v. Sanders*, 1 Nott & M. (S. Car.) 243; *Black v. Rose*, 14 S. Car. 278; *Deweese v. Lockhart*, 1 Tex. 539; *Brook v. Jones*, 16 Tex. 461.

The obligation to keep it good, is as essential to its legal efficacy as the tender. *Burlock v. Cross*, 16 Colo. 162.

It is not necessary to keep the identical coin or notes, or the precise pieces of money which have been tendered, but the debtor must have money of a like kind ready at all times, so that he can produce it when required. *Park v. Wiley*, 67 Ala. 310; *McCalley v. Otey*, 90 Ala. 302; *Aulger v. Clay*, 109 Ill. 487; *Shields v. Lozeau*, 22 N. J. Eq. 447.

Using money after it is tendered, invalidates the tender. *Gray v. Angier*, 62 Ga. 596; *Stow v. Russell*, 36 Ill. 18; *Nantz v. Lober*, 1 Duv. (Ky.) 304.

Tender of the amount of a coupon falling due upon a mortgage bond, must be shown to have been made in due time and maintained, in order to prevent the whole amount of the debt from becoming due, under a clause providing therefor, in case of default in any installment. *Lantry v. French*, 33 Neb. 524.

Under section 2839 of the *California* Code, where the landlord refuses to accept rent from the tenant, the offer of the tenant, though not continued by deposit of the amount, is a sufficient tender of performance to release the tenant's surety. *Randol v. Tatum*, 98 Cal. 390.

In *Vermont*, it has been held that where the thing tendered is money, the party making the tender may use it as his own, if he holds himself at all times in readiness to pay the debt in current money, whenever requested; but if specific articles of personal property are tendered, the articles cannot be retaken, nor disposed of in any way by the one making the tender. *Curtiss v. Grubanks*, 24 Vt. 536.

But under the *New York* decisions, the party would not be allowed to use the money. *Nelson v. Loder*, 55 Hun (N. Y.) 173.

It is immaterial that the master does not find that the tender has been kept good, where the bill alleges the tender, and the money tendered has been paid to the clerk of the court. *Anderson v. Moore*, 145 Ill. 61.

In one *Illinois* case, it was held that where a party, after making a tender, deposited the money to his own use, and a part was drawn out, in place of which no other money was shown to have been held ready, the tender was not kept good. *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37. But compare *Thayer v. Meeker*, 86 Ill. 470.

In *Sharp v. Todd*, 38 N. J. Eq. 329, the facts were as follows: On March 29th, a mortgagor paid the mortgagee the interest of the mortgage debt up to April 1st, and then offered to pay the principal, but said that he had not all the money in cash, part being in bank checks. The tender was refused because it was not in money. On the 31st of March, the mortgagor returned to the house of the mortgagee with the amount of the mortgage debt in gold and legal-tender currency, and attempted to enter the house, saying that he had the money to pay the mortgagee, and that he wanted the mortgage. The mortgagee thrust him out, and locked the door against him. The mortgagor then deposited the money in a bank, where it remained until he filed his answer to a bill filed by the mortgagee to foreclose, and then paid it into court. After the foreclosure suit was begun, the solicitor of the mortgagee, made a demand on the mortgagor for the principal of the mortgage debt, to which the mortgagor replied that he would pay him the money as soon as he could get it from the bank where he had deposited it, which bank was a few miles distant. It was held that the tender was good, and had been kept good.

If it be shown that the party making

**VI. EFFECT OF TENDER—1. Of Money.**—A tender of money which is unaccepted is not equivalent to performance, and

the tender, borrowed the money to be used for that express purpose, and immediately returned it to the lender, this will avoid the tender. *Park v. Wiley*, 67 Ala. 310.

Where a tender is declined, but the creditor subsequently demands payment of the amount tendered, and it is refused, the benefit of the tender is lost. *Rose v. Brown*, Kirby (Conn.) 293; 1 Am. Dec. 22; *Manny v. Harris*, 2 Johns. (N. Y.) 24; 3 Am. Dec. 386; *Sloan v. Petrie*, 16 Ill. 262; *Stow v. Russell*, 36 Ill. 18; *Carr v. Miner*, 92 Ill. 604.

If a debtor, after tender, refuses to pay, he loses the benefit of tender. *Stow v. Russell*, 36 Ill. 18; *Woolner v. Levy*, 48 Mo. App. 469; *Call v. Scott*, 4 Call (Va.) 402. See *Tucker v. Bufum*, 16 Pick. (Mass.) 46.

Where a purchaser of real estate deposited the price in a bank, but did not inform the vendor of such fact, nor place the amount at his disposal, such deposit will not prevent the running of interest, though before such deposit was made, the purchaser had demanded a conveyance and tendered the amount due. Especially is this the case where the purchaser subsequently draws the money out of the bank, and uses it in his business, and is, at the same time, in possession of the premises, receiving the rents and profits without paying rent. It is not sufficient that he is at all times prepared to pay the amount on demand. *Sanders v. Bryer*, 152 Mass. 141; 9 L. R. A. 255. Compare *McCalley v. Otey*, 90 Ala. 302.

Where a party has obtained a decree for specific performance of a contract for the sale of land, upon the deposit of the amount due from him at a bank, as provided in the contract, he loses the benefits of the decree by a subsequent withdrawal of the deposit, although the bank may be liable to the vendor for the money. *Cheney v. Wagner*, 33 Neb. 310.

Under the *Louisiana Code*, a tender will not avail, unless followed by a consignment or deposit of the money or bank notes. (C. C. 2163, 2165; C. P. 405, 407, 412); *Benton v. Roberts*, 2 La. Ann. 243; *Breen v. Schmidt*, 6 La. Ann. 13; *Walker v. Brown*, 12 La. Ann. 266.

If too much has been tendered,

there is no obligation to keep the tender good as to the whole amount, or to pay the whole amount into court. *Abel v. Opel*, 24 Ind. 250.

A party tendering bonds, must keep them where he can deliver them within a reasonable time, or the tender will not avail him. *Sanders v. Peck*, 131 Ill. 407 (*reversing* same case, 30 Ill. App. 238).

Where a pledgor makes a good tender of the amount due the pledgee, and the same is refused without sufficient reason, the pledgee cannot retain the pledge as against one whose rights have accrued subsequent to the making of the pledge, though the pledgor did not keep his tender good. *Norton v. Baxter*, 41 Minn. 146; 4 L. R. A. 305.

Where a vendor tenders a deed to the purchaser, and upon the latter's stating that he cannot close the matter up at that time, says it will be satisfactory if it is closed in a few days, this does not work a withdrawal of the tender. *Hogan v. Burton*, 54 Hun (N. Y.) 638.

Failure to complete a tender made to stop interest and charge defendant with costs, by payment of the money into court, will not affect plaintiff's right to recover, where the tender was not essential to the maintenance of the action. *Lewis v. Wilson*, 17 N. Y. Supp. 128; 62 Hun (N. Y.) 622.

Where a defendant was required to pay an attorney's fee, as a condition of opening a default, a tender of the same to plaintiff's attorney, is a sufficient performance of the condition to preserve defendant's rights under the order, until the question of its validity shall be determined; but to constitute a payment, it must be kept good. *Wolff v. Canadian Pac. R. Co.*, 89 Cal. 332.

**As to the Tender of Proof.**—As to whether it is the duty of the creditor to show that the debtor has used the money tendered, or whether it is the duty of the debtor to show that he has not used it, but has set it completely aside, there is some difference of opinion. *Sanders v. Bryer*, 152 Mass. 141; 9 L. R. A. 255. As to the effect on the lien of a mortgage of keeping tender good, see *infra*, this title, *Acceptance or Refusal of Tender—Effect on Lien of Mortgage, etc.; Payment of Money Into Court.*

does not satisfy or extinguish the obligation, nor bar an action upon it.<sup>1</sup>

**2. Of Property.**—But the same rule does not apply to a tender of specific personal property, in which case a tender and refusal, or what is equivalent thereto, vests the property in the creditor, and puts an end to his right to sue on the contract.<sup>2</sup>

1. *McCalley v. Otey*, 90 Ala. 302; *Redington v. Chase*, 34 Cal. 666; *Mohn v. Stoner*, 11 Iowa 30; *Fridge v. State*, 3 Gill & J. (Md.) 103; 20 Am. Dec. 463; *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106; *Chase v. Welch*, 45 Mich. 345; *Snyder v. Quarton*, 47 Mich. 211; *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Baker v. 4th Turnpike*, 8 N. H. 509; *Stowell v. Read*, 16 N. H. 20; 41 Am. Dec. 714; *Haynes v. Thom*, 28 N. H. 386; *Manny v. Harris*, 2 Johns. (N. Y.) 25; 3 Am. Dec. 386; *Hill v. Place*, 7 Robt. (N. Y.) 389; *Kelly v. West*, 36 N. Y. Super Ct. 304; *Elliott v. Bass*, 4 Baxt. (Tenn.) 354; *Downer v. Sinclair*, 15 Vt. 495; *Preston v. Grant*, 34 Vt. 201.

The court, by Hammond, J., in *The Reuben Dowd*, 46 Fed. Rep. 800, says, that the only effect of a tender which is not followed by payment into court, is to relieve the one making a proper tender of the costs of litigation that may ensue upon its refusal; but that it does not in any sense change the rights of the parties under the contract, nor does it bind him who makes the tender, to acknowledge that that sum, or any sum, is due.

Though a vendor of land refuses a tender of the purchase price, this will not release the vendee from payment, if he retains possession of the land. *Rhorer v. Bila*, 83 Cal. 51.

Whenever a party authorized to redeem land, makes a sufficient tender of the purchase-money with ten per cent. per annum, and all other lawful charges as prescribed by the *Alabama Code*, section 1881, such tender has the effect to reinvest him with the title. *Steele v. Hanna*, 91 Ala. 190.

An accord will constitute no bar to an action, unless there has been a performance, or a tender of performance; and the tender must be kept good. In an early case in *New York*, the court, by Nelson, C. J., says: "Tender of performance was proved, but this has never been held equivalent to an execution for the purpose of this defense." And the judge cites the following *New York* cases: *Watkinson v. Inglesby*,

5 Johns. (N. Y.) 386; *Russell v. Lytle*, 6 Wend. (N. Y.) 390; 22 Am. Dec. 537; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408. The court goes on to say: "But in point of fact, no definite agreement between the parties was proved; or, if otherwise, the tender did not come up to it. The proposition of DeGrauw was acceded to with a qualification; but whether he ever assented to it or not, nowhere appears. His assent would have been affirmatively shown before the agreement could be regarded as complete. The evidence is positive that the old securities were not to be given up, and there is nothing to contradict it. Did DeGrauw assent? If he did not, the minds of the parties never met in the alleged arrangement. If he did, then the tender was defective, as he there insisted upon the surrender of the old notes." *Brooklyn Bank v. DeGrauw*, 23 Wend. (N. Y.) 342; 35 Am. Dec. 569.

2. 2 Kent's Com. 400; *Tracy v. Strong*, 2 Conn. 659; *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87; 18 Am. Dec. 128; *DeLong v. Wilson*, 80 Iowa 216; *Wyman v. Winslow*, 11 Me. 398; 26 Am. Dec. 542; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525; 21 Am. Dec. 161; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 95; 27 Am. Dec. 174; *Shannon v. Comstock*, 21 Wend. (N. Y.) 457; 34 Am. Dec. 262; *Miles v. Huggins*, 3 Dev. (N. Car.) 58; *Kramer v. Stock*, 10 Watts (Pa.) 115; *Foote v. Palmer*, *Wright (Ohio)* 336; *Appleton v. Donaldson*, 3 Pa. St. 381; *Barney v. Bliss*, 1 D. Chip. (Vt.) 399; 12 Am. Dec. 696; *Gilkeson v. Smith*, 15 W. Va. 44. *Compare* *McJilton v. Smizer*, 18 Mo. 111.

By the refusal, the obligor is converted into a bailee for the obligee, and must take care of the property at the latter's expense and risk. *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525; 21 Am. Dec. 161; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 95; 27 Am. Dec. 174; *McJilton v. Smizer*, 18 Mo. 111; *Fisk v. Holden*, 17 Tex. 408.

Where property is loaned, demand of return thereof must be made before an action may be maintained; and ten-

**3. Effect on Interest and Costs.**—The effect of a tender made and kept good is also to stop the running of interest, and to free the debtor from the payment of costs.<sup>1</sup>

der of the property is a good defense. *American Bag Loaning Co. v. Steidleman* (Can.), Mont. L. Rep., 5 Super. Ct. 398.

1. *Peugh v. Davis*, 113 U. S. 542; *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316; *The Reuben Dowd*, 46 Fed. Rep. 800; *Woodruff v. Trapnall*, 12 Ark. 640; *Rudolph v. Wagner*, 36 Ala. 668; *Berthold v. Reyburn*, 37 Mo. 586; *Tuthill v. Morris*, 81 N. Y. 94; *Gracy v. Potts*, 4 Baxt. (Tenn.) 395; *Riley v. McNamara* (Tex. 1892), 18 S. W. Rep. 141; *Dale v. Richards* (D. C.), 21 Wash. L. Rep. 86.

The tender must be of such sum as will cover the claim admitted, with interest to date of tender, and costs accrued to that time. *The Enos B. Phillips*, 53 Fed. Rep. 153.

Refusal of a tender by an executor, bars a claim for interest by the legatee, whether the proceeding is in the surrogate's court or in a court of law. *Morgan v. Valentine*, 6 Dem. (N. Y.) 18.

A mortgagee who refuses a tender made after forfeiture, loses all interest accruing after the date of the tender. *Loomis v. Knox*, 60 Conn. 343.

Where the plaintiff has not realized any interest since the making of the tender, the money having been left in a bank for the benefit of defendant, the latter is not entitled to interest. *Cheney v. Libby*, 134 U. S. 68.

A purchaser depositing in a bank the purchase price of real estate, after demanding a conveyance and tendering the amount due, will not be relieved from the obligation of paying interest thereon, if, instead of placing the deposit at the disposal of the vendor, he deals with it as his own. *Sanders v. Bryer*, 152 Mass. 141.

But if the party to whom the tender is made, recovers more than the amount tendered, he is entitled to costs. *Elder v. Elder*, 43 Kan. 514; *Collier v. White*, 67 Miss. 133; *Elsanger v. Grovjohn*, 29 Neb. 139; *Pollock v. Warwick*, 104 N. Car. 638; *Griffiths v. School Board of Ystradyfodwg*, L. R., 24 Q. B. Div. 307.

Where a purchaser at a tax sale refuses the tender by the owner, of an amount greater than that actually paid by the purchaser, and a reference is ordered, the costs of the reference

should be taxed against the purchaser. *Gage v. DuPuy*, 134 Ill. 132.

Where the master of a vessel made full delivery of cotton ties to the consignee, the count being verified by the custom officers, and upon complaint of shortage being made, tendered to the consignee certain bundles of ties which were left over after delivery of all the consignments, costs should not be decreed against the vessel, though a decree is rendered in favor of the libellant for the surplus bundles. *The Cassius*, 41 Fed. Rep. 367.

Where plaintiff recovered a less sum than defendant had tendered him, the latter is not entitled to costs, if it is not shown that the tender was brought to the knowledge of the court, or was kept good, or that defendant offered to confess judgment for that or any other sum. *Saum v. La Shell*, 45 Kan. 205.

Where the only issue was as to the amount due, and defendant tendered less than the sum claimed by plaintiff, and the jury found that less was due than the sum tendered, the court properly allowed costs to defendant under the provisions of sections 992 and 993 of the General Statutes of *Missouri*. *Redman v. Thomas*, 39 Mo. App. 143.

In an action commenced before a justice in *Ohio*, for the recovery of money, defendant offered to confess judgment for a given amount, with interest from the date on which the debt accrued. The offer was not accepted. The case went by appeal to the common pleas, and it was held that the offer followed the case to that court, and that, under the statute (Rev. Stat. *Ohio*, § 5141), if the plaintiff, at the trial in the common pleas, did not recover more than the amount specified in the offer, he was liable for defendant's costs accruing after the offer was made. *Cohon v. Kineon*, 46 Ohio St. 590. Compare the *New York* case of *Mock v. Saile*, 52 Hun (N. Y.) 198.

Where, in an action in a justice's court, the defendant offered to allow judgment to go against him for a certain sum, which offer the plaintiff refused and afterwards recovered a less sum and the defendant paid the amount

**VII. ACCEPTANCE OR REFUSAL OF TENDER—1. Reasonable Time for Decision.**—The creditor is entitled to a reasonable time to determine whether he will accept or refuse the tender.<sup>1</sup>

**2. Acceptance Must be Absolute.**—A tender must be accepted on the terms on which it is offered, or it must be refused.<sup>2</sup>

**3. Effect on Lien of Mortgage, etc.**—A tender of the full amount of a debt secured by a mortgage or pledge discharges the lien of the mortgage or pledge.<sup>3</sup>

recovered into court, this fact did not deprive the plaintiff of his right to appeal, though he had paid the costs in the justice's court. *Scott v. Superior Court*, 73 Cal. 11. To same effect, *Grantham v. Payne*, 77 Ala. 584.

1. *Moore v. Norman*, 43 Minn. 428; 9 L. R. A. 55; 19 Am. St. Rep. 247.

He should have time and opportunity to satisfy himself whether a correct amount has been tendered, and what his rights are in the premises. *Root v. Bradley*, 49 Mich. 27.

An offer of judgment may not be accepted after the case has been tried, although the time allowed by statute for acceptance has not expired. *Gutroff v. Wallach (City Ct.)*, 22 N. Y. Supp. 745.

So, if a creditor prevents payment by wrongfully refusing to accept it when tendered, and afterwards demands the money, the debtor is entitled to a reasonable opportunity to comply with the demand. *Stafford v. Welch*, 59 N. H. 46.

There is no way of compelling the acceptance of the tender. *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316.

If a creditor refuses a tender properly made by a principal, the effect will be to discharge the surety. *Fisher v. Stockebrand*, 26 Kan. 565; *Wilson v. McVey*, 83 Ind. 110.

Where an employé, who is hired for a month, is discharged for negligence, after working less than half a month, and refuses a tender of half a month's wages, he cannot recover on a *quantum meruit* for time, he actually worked. *Leacock v. Striker (C. Pl.)*, 10 N. Y. Supp. 540.

Where a party, who is ordered to convey certain property, on the payment, within a given time, of a sum found due him, is entitled to an appeal and takes it, he is not barred of his right to the payment by rejecting a tender made within the time. *Ward v. Matthews*, 80 Cal. 343.

Moneys tendered as the amount ad-

mitted to be due for tax otherwise claimed to be illegal, and to restrain the collection of which an appeal has been filed, will be directed to be deposited in court and paid over to the treasurer who refused them, upon his reconsideration of the refusal and application for a second tender, but no formal retender thereof will be required. *Richmond, etc., R. Co. v. Blake*, 49 Fed. Rep. 904.

2. *Adams v. Helm*, 55 Mo. 468; *Haeussler v. Duross*, 14 Mo. App. 103; *Odum v. Rutledge, etc., R. Co.*, 94 Ala. 488.

The creditor has no right to prescribe the terms upon which it shall be received. *Adams v. Helm*, 55 Mo. 468; *Hoyt v. Sprague*, 61 Barb. (N. Y.) 497; *Raines v. Jones*, 4 Humph. (Tenn.) 490.

But where a debtor tenders a sum of money in full, for all claims which the creditor may have against him, and the creditor receives the money, but protests that more is due him, saying he will take the money and credit it upon account, and the debtor does not dissent from this course, the creditor is not precluded from recovering any sum he may show to be due him in excess of the amount tendered. *Gassett v. Andover*, 21 Vt. 342. See *Berthold v. Reyburn*, 37 Mo. 586.

3. 2 Jones Mort., § 891; *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Shiver v. Johnston*, 62 Ala. 37; *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468; *Parks v. Allen*, 42 Mich. 482; *Stewart v. Brown*, 48 Mich. 383; *Norton v. Baxter*, 41 Minn. 146; 16 Am. St. Rep. 679; *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361; *Kortright v. Cady*, 21 N. Y. 343; 78 Am. Dec. 145; *Tuthill v. Morris*, 81 N. Y. 94; *Cass v. Higenbotam*, 100 N. Y. 248; *Ratcliff v. Vance*, 2 Mills (S. Car.)

239; *Wood v. Babb*, 16 S. Car. 427; *Ball v. Stanley*, 5 Yerg. (Tenn.) 199; 26 Am. Dec. 263; *Coggs v. Bernard*, 2 Ld. Raym. 917; *Ratcliff v. Davies*, Cro. Jac. 244.

In *California*, it has been held that under the code, the offer to pay must be made with intent to extinguish the obligation. *Chielovich v. Krauss* (Cal. 1886), 11 Pac. Rep. 781. See also *Magnusson v. Williams*, 111 Ill. 450; *Moore v. Norman*, 43 Minn. 428; 19 Am. St. Rep. 247; 9 L. R. A. 55.

Where a tender of the whole amount due on a mortgage, is refused because the mortgagee asserted a claim of right, which he *bona fide* believed in, and which was not wantonly put forward as a cover for a wrong purpose, it would seem that the mortgage is not extinguished. *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. Rep. 286; 3 L. R. A. 90. But it has been held that the fact that a mortgagee in refusing a tender, acts in good faith, believing the debt not to be due, will not relieve him from the statutory penalty for failing to release the mortgage. *Campbell v. Seeley*, 43 Mo. App. 23.

**Tender Must Cover Entire Debt.**—The sum tendered must be sufficient to cover the entire amount accrued at the time of tender, including all costs, and it must be absolutely and unconditionally tendered. *Marshall v. Wing*, 50 Me. 62; *Eslow v. Mitchell*, 26 Mich. 500; *Potts v. Plaisted*, 30 Mich. 149; *Proctor v. Robinson*, 35 Mich. 284; *Day v. Strong*, 29 Hun (N. Y.) 505; *Tuthill v. Morris*, 81 N. Y. 94.

Where a mortgage provided that in case a settlement should be made after the institution of a suit to foreclose, \$250 should be allowed for attorneys' fees, and plaintiff brought suit to foreclose, the defendants not answering, but paying into court the principal and interest due and settling the ordinary costs, it was held that the plaintiff, by his acceptance of the amount deposited, was not estopped from claiming the \$250 attorneys' fees. *Hoyt v. Smith*, 4 Wash. 640.

A bill may not be maintained to restrain a sub-contractor from selling realty to satisfy a mechanic's lien, on the ground that a tender of the amount was refused by defendant. For, if the amount was due when tendered, the tender should have been pleaded in defense of defendant's action to establish his lien; and if not due, he was not

obliged to accept it. *Patch v. Collins*, 158 Mass. 468.

A party claiming that the mortgage has been discharged by a tender, will be held to strict proof, that the whole amount due, with costs, was absolutely and unconditionally tendered. *Bank of Benson v. Hove*, 45 Minn. 40; 4 Bank. Law J. 264.

And the proof must be clear, that the tender was fairly made, and deliberately and intentionally refused; that sufficient opportunity was given the mortgagee to ascertain the amount due; and that a sufficient sum to cover the whole amount of the debt and interest, was absolutely and unconditionally tendered. *Moore v. Norman*, 43 Minn. 428; 9 L. R. A. 55; 19 Am. St. Rep. 247.

Where the owner of mortgaged property tenders the amount due to the holder of the mortgage, who refuses to accept it, action to cancel the mortgage at the instance of the property owner, may not be maintained unless, at the commencement of the action, he pays the amount of his tender into court. *Foster v. Mayer* (Supreme Ct.), 24 N. Y. Supp. 46.

In order to discharge a mortgage which provides that, in case of a default in interest, the whole debt shall become due, a tender of the amount in default is not sufficient, the whole debt must be tendered. *Cupples v. Galligan*, 6 Mo. App. 62; *Detweiler v. Breckenkamp*, 83 Mo. 45.

The tender of the amount of a coupon falling due upon a bond secured by mortgage, which was not made in due time and was not kept good, will not prevent the whole amount of the debt becoming due, under a clause providing for such result in case of default in the payment of any installment of interest. *Lantry v. French* (Neb. 1891), 50 N. W. Rep. 679.

**By Whom to be Made.**—The effect is the same, whether the tender is made by the mortgagor, or by his grantee of the equity of redemption, *Yeager v. Groves*, 78 Ky. 278; or by a subsequent incumbrancer. *Proctor v. Robinson*, 35 Mich. 284; *Brown v. Simons*, 45 N. H. 211. Compare *Noyes v. Wyckoff*, 30 Hun (N. Y.) 466.

A judgment creditor of a mortgagor of chattels, may redeem the mortgage, and may enjoin the mortgagee from selling the chattels under the mortgage, on tendering the principal and interest due on the mortgage debt, and



According to the current of authority the lien is extinguished, though the tender is not made until after default.<sup>1</sup>

It is not necessary, in order to effect a release, that the tender should be kept good, or that the money should be paid into court.<sup>2</sup> Upon such tender being made and refused, the pledgor

such reasonable and lawful expenses as have been incurred in and about the sale, if such are known to him. *Lambert v. Miller*, 38 N. J. Eq. 117.

It is held in *New York*, that where a debt secured by mortgage is payable on demand, a tender by the purchaser of the property, who has not assumed payment of the debt, will not be effectual to release the mortgage, unless demand has been made by the creditor, or a tender has been made by the original debtor. *Noyes v. Wyckoff*, 114 N. Y. 204.

The mortgagee is not bound to accept a tender from a stranger. *Gibson v. Lyon*, 115 U. S. 439.

1. At common law, the tender must have been made on the law day. 2 *Jones Mortg.*, § 891. But in those states where the mortgage is held to be only a security, a tender after the day, and at any time before foreclosure, will discharge the lien. 2 *Jones Mortg.*, § 893; *Kortright v. Cady*, 21 N. Y. 343; 78 Am. Dec. 145; *Caruthers v. Humphrey*, 12 Mich. 270; *Van Husan v. Kanouse*, 13 Mich. 303; *Eslow v. Mitchell*, 26 Mich. 500; *Potts v. Plaisted*, 30 Mich. 149; *Proctor v. Robinson*, 35 Mich. 284.

In some states it is held that if tender is made after the day, it must be kept good, in order to operate as a discharge of the mortgage lien. *Frank v. Pickens*, 69 Ala. 369; *Matthews v. Lindsay*, 20 Fla. 972; *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37; *Tuthill v. Morris*, 81 N. Y. 94.

As to the question whether the tender must be made at the time the debt matures, or can be made afterwards with like effect, a distinction is sometimes drawn between mortgages on real property, and chattel mortgages. It has been held with reference to the former, that inasmuch as the legal title vests in the mortgagee upon default, a tender after default will not satisfy the mortgage. If such is the general rule with reference to mortgages of real property (and it is doubtful whether such rule would obtain in states where the mortgage is held to be merely a security), it is certain that no such dis-

inction can be made in cases of chattel mortgages, or of pledges of personal property. There the relations and rights of the parties are unchanged by the occurrence of the default. Neither the title of the pledgee, nor the character of the bailment, is changed. Therefore, a tender, after default of the amount due, with interest, will extinguish the lien of the mortgagee or pledgee. This is so held in *Norton v. Baxter*, 41 Minn. 146; 16 Am. St. Rep. 679. The same principle is asserted in a later case in *Minnesota*. *Moore v. Norman*, 43 Minn. 428; 19 Am. St. Rep. 247.

In *Missouri*, if the mortgagee in a chattel mortgage has taken possession of the mortgaged property, after forfeiture, a mere tender without acceptance will not discharge the forfeiture. The legal title will remain in the mortgagee, notwithstanding the tender. *Jackson v. Cunningham*, 28 Mo. App. 354.

But where possession has not been taken, the general rule is, that a tender will discharge the lien, though made after default, *Weeks v. Baker*, 152 Mass. 20; *Moore v. Norman*, 43 Minn. 428; 9 L. R. A. 55; 19 Am. St. Rep. 247; though the *Massachusetts* case was made to turn somewhat upon the statute of that state.

If a sale has been made, a tender, even though made within the time allowed for redemption, will not divest the purchaser of the title. *Scobee v. Jones*, 1 Dana (Ky.) 13.

2. *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468; *Kline v. Vogel*, 90 Mo. 239.

But it would seem that at common law, the tender of the mortgage debt, if made after default, must be kept good, or it will not avail. *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361; *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37; *Frank v. Pickens*, 69 Ala. 369; *Matthews v. Lindsay*, 20 Fla. 962.

Where a pledgor makes a good tender of the amount due the pledgee, and the same is refused without sufficient reason, the pledgee cannot retain the pledge as against one whose

rights have accrued subsequent to the making of the pledge, though the pledgor did not keep his tender good. *Norton v. Baxter*, 41 Minn. 146; 4 L. R. A. 305; 16 Am. St. Rep. 679.

In the *Michigan* case cited above, the court, by Martin, C. J., says: "It is claimed that the want of the money in court obviates the effect of the tender. Were this an action by Moore to recover compensation for the repairs, the want of the money in court would render the tender nugatory; as the effect of tender in such cases is to stay interest and relieve from costs, and therefore the party making the tender must always have the money within reach of his creditor. But in this case, the tender having once operated to discharge the lien, it was gone forever, and nothing could revive it. The reasons which require the money to be brought into court, do not apply in such a case. By refusing to receive the money tendered, the defendant lost his lien, and can only rely upon the personal liability of the plaintiff." *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468.

Where a mortgagor has made tender of the amount due on a chattel mortgage, and the tender is refused by the mortgagee, who commences an action to obtain possession of the chattels, it is not necessary that the money should be brought into court. *Weeks v. Baker*, 152 Mass. 20; *Moore v. Norman*, 43 Minn. 428; 9 L. R. A. 55; 19 Am. St. Rep. 247.

It is held in *Illinois*, that a tender made after default in payment of a chattel mortgage, must be kept good, in order to give the mortgagor a right to maintain trover. *Blain v. Foster*, 33 Ill. App. 297.

Where a proper tender was made under the terms of the mortgage, of an amount sufficient to secure the release of a portion of the mortgaged premises, such tender will not effect a release, unless the tender is kept good and the amount paid into court. *Werner v. Tuch*, 127 N. Y. 217, *aff'd* 52 Hun (N. Y.) 269.

In a recent case in *Alabama* (*McCalley v. Otey*, 90 Ala. 302), a bill was filed by the mortgagor, seeking to redeem from the mortgage, and to enjoin a sale under the power of sale contained therein. The mortgagor had made repeated tenders to the mortgagee of the amount of the mortgage debt, which were refused. After these refusals, the mortgagee filed a bill for

foreclosure, which he dismissed without prejudice when the cause came on for a hearing. He then proceeded to advertise the property for sale under the power. All this was done with a design to coerce payment of another claim which the mortgagee held against the mortgagor, and when the second tender was made, he expressed a determination not to accept it, unless the other claim was paid. The bill contained an allegation that a tender had been several times made and refused, "which complainants are now ready and willing to pay him, and have been willing and ready to pay him ever since." In delivering the opinion of the court, Clopton, J., holding that a payment into court is not essential, says: "It may be conceded, that in equity no less strictness is observed in keeping good and pleading a tender, than in courts of law, and that at law the tender must be kept good, and, under the statute, the plea must be accompanied with the money brought into court. What is the consequence, if the tender is not kept good, and the money is not brought into court on plea? A tender refused does not operate to discharge the debtor from the debt, but only releases him from the payment of the interest subsequently accruing; and to have this effect, the amount tendered must be in readiness to be paid at any time called for, and on plea must be followed by the payment of the money into court. It is not meant, however, that the identical money tendered must be kept. It is sufficient if the party holds himself ready to pay at all times (*Shields v. Lozeau*, 22 N. J. Eq. 447). The averment of the bill is equivalent to an averment, that from the time of the first tender, to the filing of the bill, complainants held themselves ready to pay the amount tendered, whenever the mortgagee would accept it; and on the facts alleged, the payment of the money into court was not essential to the equity of the bill, as a bill for redemption, or to restrain the execution of the power of sale. It is material only as bearing on the question of costs and payment of the interest during the time intervening between the filing of the bill and the amendment."

The mere tender of payment of the mortgage debt, without a deposit of the money in court, will not, under the *Missouri* statute (Rev. Stat. 1879, § 1008; Id. 1889, § 2938), release the mortgage, but will only stop the running

or mortgagor is entitled to possession of the property pledged or mortgaged.<sup>1</sup>

The doctrine is extended to liens of every kind.<sup>2</sup>

of interest. *Landis v. Saxton*, 89 Mo. 375.

But in *Minnesota*, it is not necessary to keep the tender good by bringing the money into court, where the debt is secured by chattel mortgage. *Moore v. Norman*, 43 Minn. 428; 9 L. R. A. 55; 19 Am. St. Rep. 247.

Under the *Massachusetts* statute which authorizes a mortgagor in a chattel mortgage to maintain replevin in case the property is not immediately restored on payment or tender of the debt, the plaintiff need not make *profert* of the money nor renew the tender at the trial. *Weeks v. Baker*, 152 Mass. 20.

Under the territorial law of *Dakota*, which provided that an obligation for the payment of money is extinguished by an offer of payment, if the amount offered is immediately deposited in the name of the creditor, with some bank of good repute in the territory, and notice given to the creditor, such tender, deposit, and notice is a satisfaction of a mortgage given to secure the debt. *Kronebusch v. Ranmin*, 6 Dak. 243.

To discharge the lien of a mortgage, without the tender being kept good, it must be clearly shown that the tender was fairly made and deliberately refused by the holder of the mortgage, or some one duly authorized by him, and that the absolute tender was sufficient to cover the whole amount due. But to relieve the mortgagor from the payment of interest and costs, the tender must be kept good. *Eslow v. Mitchell*, 26 Mich. 500; *Proctor v. Robinson*, 35 Mich. 284; *Moore v. Norman*, 43 Minn. 428; 9 L. R. A. 55; 19 Am. St. Rep. 247; *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361; *Day v. Strong*, 29 Hun (N. Y.) 505; *Tuthill v. Morris*, 81 N. Y. 94.

1. *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435.

If, after such tender to the pledgee, a demand is made for the return of the property pledged, and is refused, the pledgee is guilty of a conversion, *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435; *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69; and trover or replevin will lie. *Flanders v. Chamberlain*, 24 Mich. 310.

A tender not only extinguishes the

lien on the land or pledge, but the creditor loses the right to any collateral securities he may hold. But it does not, unless accepted, extinguish the debt, or release the personal liability of the debtor. *Caruthers v. Humphrey*, 12 Mich. 278; *Flanders v. Chamberlain*, 24 Mich. 310; *Potts v. Plaisted*, 30 Mich. 150; *Stewart v. Brown*, 48 Mich. 387.

2. Thus the rule is equally applicable to a mechanic's lien. *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468. See *Burton v. Ringrose* (Supreme Ct.), 17 N. Y. Supp. 665.

This rule is extended to the lien of an execution, so that if the tender is made after levy of the amount due, the lien is discharged, and a subsequent sale under it is unlawful. *Tiffany v. St. John*, 65 N. Y. 314; 22 Am. Rep. 612; *Perry v. Ward*, 20 Vt. 92. The opinion in the *New York* case contains such a clear discussion of the general doctrine, and shows so clearly its application to liens arising by operation of law, that the following somewhat extended extract from it will be of value: "It is a general rule of law," says *Dwight, C.*, "that where a person holds a lien upon property, a tender by the owner of the property, of the amount of the lien, will discharge it. In fact, the detention of the goods upon a different and inconsistent ground, will be a waiver of the lien. *Boardman v. Sill*, 1 Camp. 410, n; *Winter v. Coit*, 7 N. Y. 288; 57 Am. Dec. 522; *Weeks v. Goode*, 6 C. B. N. S. 367; 95 E. C. L. 365. It is a well-settled rule in the law of pledges that if the money for which the goods are pawned, be tendered to the pawnee, and he refuses to receive it, he becomes thereby a wrong-doer, and his special property in the chattel is determined. *Coggs v. Bernard*, 2 Ld. Raym. 909. It is said by *Comyn*, 'that by tender of the money, the property in the goods is determined, and the pledge ought to be returned; but if the pawnee refuse to restore the pledge upon tender, trover lies against him.' *Com. Dig. tit. 'Mortgage'*, A, and cases cited. The principle governing the subject is, that tender is equivalent to payment as to all things which are incidental and accessory to the debt. The creditor, by refusing to accept,

**VIII. PLEADING TENDER.**—The tender must be pleaded, and the plea must be accompanied by the payment of the money into court.<sup>1</sup>

does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or a right of distress. Per Comstock, J., in *Kortright v. Cady*, 21 N. Y. 343; 78 Am. Dec. 145. Upon these principles it has been held that if the debtor tender the debt to the pledgee, and he refuse to deliver up the pledge, he is liable, though it be subsequently lost, or even forcibly taken from him. *Chitty on Cont.* (11th ed.) 670; *Ratcliffe v. Davies*, Yelv. 179; *Bull's N. P.* 72. This principle was applied to mortgages of real estate in *Kortright v. Cady*, *supra*, where it was held that a tender of the debt, either upon or after the law day, extinguishes the mortgage, and leaves the mortgagee only a creditor of the mortgagor. "It is, however, claimed that this doctrine does not apply to the lien of an execution, as that is created by operation of law. This case, however, cannot be distinguished in principle from that of a pledge. In each case, the lien exists as a collateral advantage to the creditor. It is incidental to the debt. In each case, if the lien is not satisfied, there is a power to sell. Payment will extinguish the one as well as the other. If the theory propounded by Comstock, J., in the case above cited, be correct, and it is believed to be sound, the tender is equivalent to payment, and is as effectual in destroying the lien as in the case of a pledge. A tender will discharge the lien of an attorney. *Stokes on the Lien of Attorneys*, 81, 172; *Jones v. Tarleton*, 9 M. & W. 675; *Scarfe v. Morgan*, 4 M. & W. 280; *Irving v. Viana*, 2 Y. & J. 416. There is, undoubtedly, a stage in a proceeding in an action where property is in the custody of the law, that a tender will not destroy the lien, as that might interfere with the proper disposition of the case. After the action is over, and judgment obtained and execution levied, the case becomes clearly assimilated to that of an ordinary lien, and if tender is made and not accepted, the lien will be extinguished. This distinction was well settled as far back as the time of Lord Coke, and is clearly stated in the *Six*

*Carpenters' Case*, 8 Coke 290. The point there discussed was the effect of a tender in the case of a distress for rent or of cattle doing damage—an instance of a lien created by the act of the law. Coke considers the distinction between a tender made upon the land before distress, after the distress, and before impounding, after impounding, and before the termination of the litigation, and contrasts these with a tender made after the law has determined the rights of the parties. He says: 'Note, reader, this difference, that tender upon the land before the distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for it then comes too late, because then the case is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *detinue* for the detainer after, or he may, upon satisfaction made in court, have a writ for the redelivery of his goods.' He adds: 'And therewith agree all the books, and *Pilking-ton's Case*, in the fifth part of my reports (fol. 76), and so all the books which, *prima facie*, seem to disagree are, upon full and pregnant reason, well reconciled and agreed.' There is here a clear statement of the principle applicable to the case at bar."

A lawful tender, within the time prescribed by law, of the amount necessary to redeem from an execution sale, revests the property in the owner, without a deed of conveyance from the purchaser. *Legro v. Lord*, 10 Me. 161.

A lawful tender of the amount of taxes due upon property, is equivalent to actual payment, and deprives the collecting officer of all authority for further action, and makes every subsequent step illegal and void. *Poin-dexter v. Greenhow*, 114 U. S. 270.

1. *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316; *Hughes v. Esh-back*, 7 D. C. 66; *Park v. Wiley*, 67 Ala. 310; *Frank v. Pickens*, 69 Ala. 369; *Hamlett v. Tallman*, 30 Ark. 505; *Hegler v. Eddy*, 53 Cal. 597; *Howard*

*v. Glenn*, 85 Ga. 238; *Nelson v. Oren*, 41 Ill. 18; *Livingston Co. v. Henneberry*, 41 Ill. 179; *O'Riley v. Suver*, 70 Ill. 85; *Aulger v. Clay*, 109 Ill. 487; *Ruckle v. Barbour*, 48 Ind. 274; *Melton v. Coffelt*, 59 Ind. 310; *Barker v. Brink*, 5 Iowa 481; *Mohn v. Stoner*, 14 Iowa 115; *Hayward v. Munger*, 14 Iowa 517; *Shugart v. Pattee*, 37 Iowa 422; *Pierce v. Early*, 79 Iowa 199; *Jarboe v. McAtee*, 7 B. Mon. (Ky.) 279; *Reed v. Woodman*, 17 Me. 43; *Potter v. Cummings*, 18 Me. 55; *Lyon v. Williamson*, 27 Me. 149; *Marshall v. Wing*, 50 Me. 62; *Pillsbury v. Willoughby*, 61 Me. 274; *Fernald v. Young*, 76 Me. 356; *Soper v. Jones*, 56 Md. 503; *Warren v. Nichols*, 6 Met. (Mass.) 261; *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468; *Lanier v. Trigg*, 16 Smed. & M. (Miss.) 641; 45 Am. Dec. 293; *Whelan v. Reilley*, 61 Mo. 565; *Jeter v. Littlejohn*, 3 Murph. (N. Car.) 186; *State v. Briggs*, 65 N. Car. 159; *Tate v. Smith*, 70 N. Car. 685; *Allen v. Cheever*, 61 N. H. 32; *Kortright v. Cady*, 23 Barb. (N. Y.) 490; 5 Abb. Pr. (N. Y.) 358; 21 N. Y. 343; 78 Am. Dec. 145; *Livingston v. Harrison*, 2 E. D. Smith (N. Y.) 197; *Halsey v. Flint*, 15 Abb. Pr. (N. Y.) 367; *Bronson v. Chicago, etc., R. Co.*, 40 How. Pr. (N. Y.) 48; *Brooklyn Bank v. DeGrauw*, 23 Wend. (N. Y.) 342; 35 Am. Dec. 569; *Dodge v. Fearey*, 19 Hun. (N. Y.) 278; *Brown v. Ferguson*, 2 Den. (N. Y.) 196; *Sheredine v. Gaul*, 2 Dall. (Pa.) 190; *Harvey v. Hackley*, 6 Watts (Pa.) 264; *Besancon v. Shirley*, 9 S. & R. (Pa.) 457; *Seibert v. Kline*, 1 Pa. St. 38; *Miller v. McClain*, 10 Yerg. (Tenn.) 245; *Polk v. Mitchell*, 85 Tenn. 634; *Wing v. Hurlburt*, 15 Vt. 607; 40 Am. Dec. 695; *Gilkeson v. Smith*, 15 W. Va. 44; *Newton v. Allis*, 16 Wis. 197; *Breitenbach v. Turner*, 18 Wis. 140; *Hoffman v. Van Diemen*, 62 Wis. 362. See *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435.

To make a tender, made before suit brought, available, the defendant must pay the money into court, and allege that fact in his answer. *Beeker v. Boon*, 61 N. Y. 317; *Jarboe v. McAtee*, 7 B. Mon. (Ky.) 279; *Clark v. Mul-lenix*, 11 Ind. 532; *Cullen v. Green*, 5 Harr. (Del.) 17.

A failure to pay the money into court, after a tender, will not stop the interest, and will leave defendant still liable for the costs, and will not affect plaintiff's right to recover. *Lewis v.*

*Wilson* (Supreme Ct.), 17 N. Y. Supp. 128.

And where the defendant by his plea, admits an indebtedness in a certain sum, and tenders it to the plaintiff, but does not pay it into court, judgment must go for the plaintiff. *Ryerson v. Kitchell*, 2 N. J. L. 168.

Payment of money into court is necessary for the sufficiency of a tender made by bill. *Beebe v. Buxton* (Ala. 1892), 12 So. Rep. 567.

Where the purchaser has made a tender and demanded a deed, he must renew the tender and pay the money into court, when he brings suit to enforce the sale. *Foster v. Fraser*, *Montreal L. Rep.*, 6 Q. B. 405.

The plaintiff may not question the sufficiency of a plea of tender, after accepting the money paid into court under such plea. *Gardner v. Black* (Ala. 1893), 12 So. Rep. 813.

If the money is not brought into court, and the defendant refuses to comply with the order of the court directing the money to be brought in, the plea may be stricken from the files, or disregarded. *Knox v. Light*, 12 Ill. 86. Compare *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435.

The payment into court is equivalent to a plea of tender. *Summerson v. Hicks*, 142 Pa. St. 344. See also *Cain v. Gimon*, 36 Ala. 168.

A tender made in the pleadings, followed by the payment of the money into court, is a sufficient tender. *Spann v. Sterns*, 18 Tex. 562; *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792.

Where plaintiff seeks to set aside an execution sale, it is sufficient if in his petition he make tender of the money paid at the sale, and bring the money into court. *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792.

Where there is a tender of specific chattels, they need not be brought into court in order to keep the tender alive. It is sufficient that the party making the tender, pleads it, and avers a readiness and willingness at all times to perform. But where the tender is of money, or of things that may be brought into court, defendant must not only plead that he has always been, and still is, ready with the money or things tendered, but it must be brought into court. 2 Kent's Com. 508; 6 Bac. 465; 2 Roll. Abr. 524, 20 Vin. 312 E.; *Brooklyn Bank v. DeGrauw*, 23 Wend. (N. Y.) 342; 35 Am. Dec. 569.

Where one seeking specific perform-

The plea of tender of money, without paying it into court, is bad.<sup>1</sup>

ance of a contract for the purchase of land, alleges that he has tendered a good and sufficient warranty deed, the tender must be kept good by bringing the deed into court. *Goodwine v. Morey*, 111 Ind. 68.

An allegation that plaintiff has been, and is, ready to perform the covenants of his agreement, and to pay the amount due, or the performance by defendant of the dependent covenants, is not an averment of a tender of money. *Heine v. Treadwell*, 72 Cal. 217.

It is not sufficient to plead a tender in a supplemental answer filed after the case is called for trial, if the money is not actually in court. *Alexander v. Oneida Co.*, 76 Wis. 56.

If the plaintiff elects to take, and actually receives, the money paid into court on a plea of tender, the costs should be adjudged against him. *Hanson v. Todd*, 95 Ala. 328.

Where money is paid into court, the pleadings must show how much of the amount is to cover the tender made, and how much is for costs. *The Good Hope*, 40 Fed. Rep. 608.

Where a complainant brings money into court for the use of the defendant, and by an order of the court, the defendant is permitted to come in with an answer, by the terms of which order, leave is given the complainant to withdraw the money paid in, a withdrawal by the complainant will not affect the validity of the tender. *Wright v. Young*, 6 Wis. 127; 70 Am. Dec. 453.

Under the *Iowa Code* (section 2104), the fact that money tendered and refused was kept in possession of the party making the tender, until its payment into court, does not vitiate the tender. *Loughridge v. Iowa Life, etc., Assoc.*, 84 Iowa 141.

A defendant before a justice of the peace, after trial and judgment against him, but before appeal, paid part of the claim to the justice, who held it till the trial above took place, and then paid it to the clerk of the appellate court; and it was held that, under the pleas of "tender" and of "always ready," the measure was unavailable. *Cope v. Bryson*, 1 Winst. (N. Car.) 112.

Plaintiff's hogs having been taken up by defendant while trespassing on his cornfield, he offered defendant \$12.25 for the damages, which defendant re-

fused, demanding \$14. Plaintiff sued out a writ of replevin, having first deposited \$12.25 and the costs, with the justice before whom the action was brought. The constable told defendant of the deposit, and defendant said he would take it. The constable, supposing the deposit to have been \$10, offered that amount to defendant, which he refused. The constable afterward obtained the balance from the justice, and sought for the defendant to pay it to him, but could not find him. It was held by the appellate court of *Illinois*, that the tender was kept good. *Neilson v. Smith*, 26 Ill. App. 57.

1. *Gilpatrick v. Ricker*, 82 Me. 185; *Carley v. Vance*, 17 Mass. 389; *Sheridan v. Smith*, 2 Hill (S. Car.) 538.

And advantage may be taken of the failure by demurrer. *Carley v. Vance*, 17 Mass. 389.

It must be paid in at the time of filing the bill, *Franklin v. Ayer*, 22 Fla. 654; or at least by the first day of the term. *Reed v. Woodman*, 17 Me. 43; *Pillsbury v. Willoughby*, 61 Me. 274.

And the failure to pay it in may be shown, even after verdict for the defendant. *Clafin v. Hawes*, 8 Mass. 261.

But if the money be paid in before the plaintiff moves to take advantage of it, the irregularity is cured, *Storer v. McGaw*, 11 Allen (Mass.) 527. Compare *Reed v. Woodman*, 17 Me. 43; and plaintiff may waive the irregularity. *Strout v. Durham*, 23 Me. 483; *Gilpatrick v. Ricker*, 82 Me. 185.

Where plaintiff takes issue in an answer which does not aver that the money was paid into court, the irregularity is thereby waived, and the only issue is whether the tender was made before the action was begun. *Platner v. Lehman*, 26 Hun (N. Y.) 374.

A plea which sets up an agreement to compromise, part payment of the amount agreed upon and tender of the balance, though it does not state the time of the alleged payment or of the alleged tender, is good upon general demurrer, & not appearing that time was of the essence of the contract. *Schwartz v. B. C. Evans Co.*, 75 Tex. 198.

If a defendant, in answer to an action of contract in the police court, pleads a tender of the amount due, alleging a *profert* in court, but in fact without

**IX. PAYMENT OF MONEY INTO COURT—1. General Rule.**—In proper cases, money may be deposited with an official or banker of a court for the purposes of proceedings pending in such court.<sup>1</sup>

**2. In Satisfaction.**—Where the defendant admits that some part or all of the plaintiff's demand is just, he may pay the amount admitted into the hands of the proper officer of the court, and plead that the same is ready to be paid to the plaintiff, and that no larger sum is due him. Should the plaintiff then proceed with

placing the money in the custody of the court, and offers the same, in open court, to the plaintiff, who refuses to receive it, on the ground that he is entitled to a larger sum, and, after judgment for the plaintiff, the defendant appeals to the superior court, and there properly pleads the *profert*, and pays the money into the court, it is too late then for the plaintiff to object to the irregularities in the lower court. *Storer v. McGaw*, 11 Allen (Mass.) 527.

Where, after payment into court of the amount tendered, the plaintiff permitted the case to go to trial as on a plea of *non assumpsit* to the balance of his claim, he should not be allowed to make the point that the tender had not been kept good. *Gilpatrick v. Ricker*, 82 Me. 185.

**1. Payment into Court.**—*Rapalje & Lawrence* Law Dict. The authors specify three objects for which such payment into court may be made, viz. . First, in satisfaction; second, to abide the event; third, where a person wishes to relieve himself from the responsibility of distributing or administering a fund in his hands.

Payment into court will not avail, unless made upon an order of court. *Keith v. Smith*, 1 Swan (Tenn.) 92.

A court of chancery will not make an order for the payment of money into court, until it has been ascertained to be due, either by an accounting or decree in the cause, or by an admission in the pleadings or other proceedings. An affidavit to a parol admission, does not warrant an order. *McTighe v. Dean*, 22 N. J. Eq. 81.

The practice of paying money into court, through the clerk as the servant and agent of the court, where there is a fund under the control of the court, and no one designated to receive it, is established by long use, and cannot be overthrown because not specially authorized by act of Congress or a rule of court. *In re Finks*, 41 Fed. Rep. 383.

Defendant being plaintiff's surety for

the payment of money to a third party, plaintiff deposited with him the money due such third party. Under the *New York Code* (Code 1851, § 244), the court may properly order the defendant to pay the money to such third party, or to deposit it in court. *Burhans v. Cosey*, 4 Sandf. (N. Y.) 706.

A sued B to recover the possession of real estate. The answer alleged that the deed under which A claimed, was executed by B as a mortgage only, and that there was due on the debt secured thereby the sum of \$475, which was brought into court and paid to the clerk. Subsequently, the matters in controversy were compromised, and a written agreement was executed by the parties, by which A engaged to convey the land in controversy to B for the consideration of \$900, which B agreed to pay. The agreement provided that B "should obtain and pay down the amount tendered and paid into court." The money deposited with the clerk was lost. It was held by the supreme court of *Indiana*, that this was not a case where money could properly be brought into court, as the answer was not a confession of any part of the plaintiff's demand, and the tender could not have been accepted by the plaintiff without abandoning his whole cause of action. *Sowle v. Holdridge*, 25 Ind. 119.

In *Michigan*, it has been held that where, in a suit upon a note before a justice, the defendant paid money thereon in open court, the effect is the same as if paid into a court of record under the procedure in such courts. If the money is paid at the time of or prior to the plea, no rule or order is necessary; but if paid after the plea, leave should be obtained. *Phelps v. Town*, 14 Mich. 374.

Under the practice in *England*, payment into court of the money admitted to be due, was required before an injunction would be granted. But the practice in this country is to take an injunction bond. *Chester v. Apperson*,

the suit and fail to recover any greater sum than that so paid in, he cannot recover either interest or costs accrued subsequent to such payment into court. But if he accepts it, he is entitled to recover costs to that time.<sup>1</sup>

4 Heisk. (Tenn.) 639, 654. In an old case in *Michigan*, it is held, however, that it is proper to require the payment into court as a condition of granting the injunction. *Schwarz v. Sears*, Harr. (Mich.) 440.

When a plaintiff elects to take money brought into court upon a plea of tender, it is proper to order the money to be paid to him, and render judgment against him for costs. *Hanson v. Todd*, 95 Ala. 328.

Money is deposited in court, though it is paid to the judge instead of the clerk. *Arthur v. Arthur*, 38 Kan. 691.

A payment to a referee, upon a hearing before him, is not a payment into court. He does not represent the court for such purpose. *Becker v. Boon*, 61 N. Y. 317. And the same rule applies to an auditor. *Wing v. Hurlburt*, 15 Vt. 607; 40 Am. Dec. 695.

The money that is paid into court must be legal tender. *Shelby v. Boyd*, 3 Yeates (Pa.) 321. And must be paid to the clerk of the court in term time, and not in vacation. *Currie v. Thomas*, 8 Port. (Ala.) 293.

Upon payment of money into court, the clerk takes it as the private agent of the party paying, unless such payment is made upon tender pleaded, or the party has obtained leave of the court to make the deposit. *Mazyck v. M'Ewen*, 2 Bailey (S. Car.) 28.

The payment into court of a less sum than that justly due in a suit to redeem mortgaged premises, if not made under any rule or order of court, or with any averment or proof of a previous tender, cannot affect the rights of the parties in any manner. *Hart v. Goldsmith*, 1 Allen (Mass.) 145.

An action will not lie in favor of the plaintiff and against the clerk, for money deposited by the defendant in lieu of bail. *Anderson v. Tomkins*, 23 Abb. N. Cas. (N. Y.) 433; (Supreme Ct.) 10 N. Y. Supp. 39.

Where money paid into court is withdrawn under an order of the court, the party acting under that order can lose no right by the withdrawal. *Wright v. Young*, 6 Wis. 127; 70 Am. Dec. 453.

Where, under a rule of court, a party pays money into the hands of the

clerk of the court, and afterwards, by permission of the court to take it out, demands a repayment, he is entitled to the identical money deposited. *Mott v. Pettit*, 1 N. J. L. 298.

Where money is paid into court, to be invested by the clerk on bond and mortgage, under the new system in *New York*, the court will allow the parties in interest to agree upon what would be a proper investment, and direct the clerk to make the same. *Green v. Ward*, 1 Barb. (N. Y.) 21.

Money in custody of an officer of a court of law, is not within the reach of the court; and such officer cannot be made a party to a suit to reach property held by him as such officer. *Bowden v. Schatzell*, 1 Bailey Eq. (S. Car.) 366; 23 Am. Dec. 170.

A petition which alleges that defendants "took from one C. the sum of \$114.53, and the said C. gave to the plaintiffs an order therefor, for value received, and that the said C. assigned to the plaintiffs his cause of action against the defendants," and also alleges non-payment, and also that the district court after the taking, made an order directing one of the defendants to pay this money into court; that he did not pay the same as ordered, but took the order for review to the supreme court, giving an undertaking, signed by both defendants, conditioned to pay said sum of money into court if the order should be affirmed; that said order was affirmed, and still the money was not paid, is good as against an objection presented for the first time after trial and verdict. *Polster v. Rucker*, 16 Kan. 115.

1. *Hawkesley v. Bradshaw*, L. R., 5 Q. B. Div. 22, 302. See *Abbott's Law Dict.*

"The bringing of money into court is a practice adopted to relieve the defendant against an unexpected suit for money which he is willing to pay, but which he has not tendered to the plaintiff before the commencement of the suit. After the defendant has brought in as much money as he thinks proper, and the plaintiff has refused to receive it in satisfaction, the defendant is entitled to have the same considered as a payment made on the day on which it



was brought in, and he is answerable only for further damages." *Boyden v. Moore*, 5 Mass. 369.

It is held by the supreme court of *New York*, for the first department, that where the plaintiff recovers less than the amount of defendant's offer, the defendant is the prevailing party, and is not only entitled to costs, but to an extra allowance, if a proper case therefor be made out. *Landon v. Van Etten*, 57 Hun (N. Y.) 122. See also *Aikens v. Colton*, 3 Wend. (N. Y.) 326.

Where a bill is filed to set aside a tax deed as a cloud upon title, and plaintiff brings into court the amount due defendant, but it is neither alleged nor proved that such amount was tendered before suit, and the bill does not contain an offer to pay the amount, the defendant should not be required to pay the costs. *Gage v. Arndt*, 121 Ill. 491; *Mearney v. Morse* (Ill. 1891), 26 N. E. Rep. 376, reversing same case on rehearing (Ill. 1890), 24 N. E. Rep. 576.

Where the tender is made after a libel is filed, and a decree is rendered for the sum tendered, costs should be allowed the libellant up to the time of the tender, and the costs of the subsequent proceedings should be taxed against him. *The Carondelet*, 36 Fed. Rep. 714.

An offer in writing, whereby defendant "tenders" judgment in a certain sum, is within the statute of *Wisconsin* (R. S. §§ 3627-8) and plaintiff is not entitled to costs unless he recovers more than the amount specified in the tender. *Williams v. Ready*, 72 Wis. 408.

If the money is paid into court, but not in pursuance of a tender made before the suit was brought, it must include the costs which have accrued up to that time. *Goslin v. Hodson*, 24 Vt. 140; *Keith v. Smith*, 1 Swan (Tenn.) 92. And this is true whether the money is paid in upon the whole cause of action, or any single count in the declaration, and even though the plaintiff proceeds and recovers no more than the amount paid in. *State Bank v. Holcomb*, 7 N. J. L. 193.

The plaintiff is entitled to the costs which had accrued when the offer of judgment was made, whether or not he recovers more than the amount offered. *Douthitt v. Finch*, 84 Cal. 214.

Under the law of *Vermont*, which requires a payment into court (Rev. Laws, § 1450), an offer made in vacation to pay the damages in a preceding action with costs up to that time, is not

sufficient. The plaintiff is entitled to such costs as will enable him to discontinue the action at the succeeding term. *Strusguth v. Pollard*, 62 Vt. 157.

It is held by the *Virginia* courts, that a payment made to the plaintiff after action brought, is equivalent to bringing the money into court, in reference to the costs of the plaintiff. *Hudson v. Johnson*, 1 Wash. (Va.) 10.

In a suit by a carrier for the freight money, a tender of the amount due, not followed by a deposit in the registry in accordance with Admiralty Rule 72, has no effect on the question of costs, where the suit is subsequently dismissed. *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. Rep. 36.

In an action on a policy of insurance, the defendant may, after plea, bring what sum he pleases into court, with costs to the time, but not specifically as the premium on the policy. *Dunlap v. Commercial Ins. Co.*, 1 Johns. (N. Y.) 149.

Money may not be paid into court where the amount sought to be recovered is not a sum certain or capable of being ascertained by computation, as in an action for false imprisonment, *Bennett v. Smerdon*, 16 L. T. N. S. 296; nor can money be paid into court on part of an entire count. *Hodges v. Lichfield*, 3 M. & S. 201; 9 Bing. 713; 23 E. C. L. 134; 2 Dowl. Pr. Cas. 741.

The principal and interest due on a bond conditioned for the payment of money on installments, may be paid into court. *Bonafons v. Rybot*, 3 Barr. 1370.

Where plaintiff prevails in a suit to set aside a tax deed, he cannot recover the costs, unless he prove a tender and refusal of the price paid by the purchaser. *Gage v. Arndt*, 121 Ill. 491.

Where a portion of the plaintiff's claim is admitted by the answer, such portion may properly be ordered to be paid immediately, without waiting for the result of the litigation as to the residue of the claim. *Clarkson v. De Peyster*, Hopk. (N. Y.) 505.

Where money which was the subject of a suit, is brought into court, and the defendant admits that part of it is due the plaintiff, but denies his claim to the residue, the court may properly order the part admitted to be due to be paid to the plaintiff, without prejudicing his claim to the residue. *Merritt v. Thompson*, 3 E. D. Smith (N. Y.) 599.

If the plaintiff elects to take the amount alleged to have been tendered, and the money is brought into court,

Where full tender is made and the amount paid into court, it discharges the debt.<sup>1</sup>

the correct practice is to order it to be paid to the plaintiff, and render judgment against him for the costs; but if the money is not brought into court, the judgment should be against the defendant for the amount of the tender and costs. *Monroe v. Chaldeck*, 78 Ill. 429.

The amount is to be credited on plaintiff's judgment after it is valued, and not at the time of entering it. *Goldstein v. Stern* (City Ct.), 9 N. Y. Supp. 274.

Where the defendant pays money into court, but the sum thus paid is found by the jury to be less than was due at the time, the verdict and judgment should be for the whole amount of the plaintiff's demand, without any deduction on account of the payment. The defendant, however, is entitled to the benefit of the payment, by way of credit upon the execution. *Bennet v. Odom*, 30 Ga. 940; *Dakin v. Dunning*, 7 Hill (N. Y.) 30; 42 Am. Dec. 33; *Murphy v. Gold, etc.*, Tel. Co., 3 N. Y. Supp. 804.

If the sum paid into court is found by the jury to be the exact amount which was due, the verdict should be for the defendant. *Dakin v. Dunning*, 7 Hill (N. Y.) 30; 42 Am. Dec. 33.

Where the defendants, before the new counts, upon which alone the plaintiff recovered, were filed, paid into court a sum of money sufficient to satisfy all the damages the plaintiff could have recovered under the original declaration, and costs to the time of such payment, and the plaintiff took the same, the plaintiff, in the absence of proof that he took the money in satisfaction of his claim, was not thereby precluded from filing new counts, and recovering an additional sum thereon. *Hill v. Smith*, 34 Vt. 535.

1. *Shiver v. Johnston*, 62 Ala. 37.

Where the plaintiff withdraws the money paid into court, in discharge of the demand sued on, this is an acceptance of the tender, and is a full satisfaction of the demand. The plaintiff may not afterwards claim that it was accepted merely as a payment on account. *Haeussler v. Duross*, 14 Mo. App. 103.

Where money is paid into court, the sum paid in is considered as stricken out of the declaration; and, unless the

plaintiff proves a larger sum, the defendant must have a verdict. *Bank of Columbia v. Sutherland*, 3 Cow. (N. Y.) 336.

Where plaintiff sued upon an assigned cause of action, and failed to show that he had acquired title, but defendant had pleaded tender and had paid the amount into court, it was held that plaintiff was not entitled to recover more than the amount paid in, though the proof would have warranted a recovery of a greater amount, if the action had been brought by the right party. *Wilson v. Doran*, 110 N. Y. 101; 15 N. Y. Civ. Pro. Rep. 96.

The payment of money into court in accordance with the terms of a decree, relieves the party so paying from all obligation to pay interest not included in the decree. *Cobbey v. Knapp*, 28 Neb. 158.

The receipt by a plaintiff, without prejudice to his rights, of *United States* legal-tender notes, paid into court, does not operate as a discharge of the debt, but, on repayment of such legal-tender notes, he will be entitled to judgment for his debt. *Riley v. Sharp*, 1 Bush (Ky.) 348.

The deposit of the money in court, after the institution of a suit on a note, is not a payment of the note to the creditor, or to any one authorized to receive it for him. *Alexandrie v. Saloy*, 14 La. Ann. 327.

Where a complainant brings money into court, insisting that it is all that is due to the defendant, and the court makes an order that it be paid to the latter, upon executing a refunding bond, if the defendant execute the bond and receive the money, he will not be estopped from showing that a larger amount is due to him, and this although he does not bring into court the note which the money was intended to pay. *Byrd v. Odem*, 9 Ala. 755.

If, in an action on a policy of insurance, the defendant pays the amount of the premium into court, which the plaintiff's attorney takes out, after informing the defendant of the intention to go for a total loss, he will not be concluded from proceeding for a total loss. *Sleight v. Rhineland*, 1 Johns. (N. Y.) 192.

Where a railroad is seeking to condemn a right of way, the payment of

**3. To Abide the Event.**—Money may be paid into court by a defendant, upon the order of the court, to abide the event of the litigation, where a *prima facie* case is made against him, or where he is a mere trustee or stakeholder of a fund.<sup>1</sup>

the money into court does not, under the *Indiana* statute (R. S. 1881, § 3907), vest the title of the land in the company, but operates only to give it a license to take possession. *Terre Haute, etc., R. Co. v. Crawford*, 100 Ind. 550.

1. *Rapalje & Lawrence Law Dict.*

If the defendant admit a trust, or facts from which the existence of a trust would be clearly and unquestionably proved, plaintiff would be entitled to an order for the payment of the trust fund into court. *Bank of Turkey v. Ottoman Co., L. R., 2 Eq. 366.*

Pending a suit against a trustee for an account and distribution of the fund in his hands, he should ask leave to pay the balance into court, or to invest it under the direction of the court. If he invests the money without such direction, it will be at his own risk. *Hosack v. Rogers*, 9 Paige (N. Y.) 461.

Where several parties claim a sum of money, to which the party in possession of the money does not assert any right, the court may order the money to be deposited in the hands of the clerk of the court, until the respective rights of all the claimants are adjudicated upon. *Succession of Thompson*, 14 La. Ann. 810.

Where land which is incumbered is sold, the amount of the incumbrance may be paid into court to take the place of the incumbrance, and the land stand free. *Rapalje & Lawrence Law Dict.*

A vendor of goods replevied a portion, upon the ground that they had not been paid for. Defendant retained the property, sold it, and upon judgment being rendered against him in the replevin suit, paid the money into court, and then brought an action to recover the excess over the amount which he claimed to be due the plaintiff. It was held that the money so paid into court took the place of the goods, and was subject to the same rights and remedies. *Crawford v. Edgerton*, 39 Fed. Rep. 523.

Where there is a controversy as to where the money arising from condemnation proceedings belongs, it is proper to pay it into court. *Hilton v. St. Louis*, 99 Mo. 199.

Although money is wrongfully obtained, yet when it is produced in court,

it becomes a fund in court, if claimed by more than one party. *Davis v. Watkins*, 2 Bush (Ky.) 224.

Under a decree that the plaintiff is entitled to redeem from a mortgage, and to have a conveyance thereof with covenants against the grantor's acts, upon payment of a specified sum, the plaintiff is not bound to pay the redemption money unless the defendant complies with the directions of the decree respecting a conveyance. Hence, the inability of the defendant to convey or to give a covenant against his own acts, which will not be broken in its inception, is not a ground for granting plaintiff leave to pay the money into court, instead of tendering it to defendant. *Davis v. Duffie*, 8 Bosw. (N. Y.) 691.

The proprietor, to whom, under the *Louisiana* Act of March 18th, 1844, laborers have delivered attested accounts, exceeding the amount due the undertaker, may, by suit against the claimants, have such amount distributed among them, and may relieve himself from liability by depositing the amount in court. *Clarke v. Saloy*, 2 La. Ann. 987.

To authorize an order for a defendant to bring money into court, it must appear that the person applying has some interest at least in the final disposition of the fund, and that he who has it, has no equitable title thereto. And the facts from which this is to appear, must be found in the case, admitted or proved, so as not to be open to subsequent controversy. *McKim v. Thompson*, 1 Bland (Md.) 150.

The payment of money into court is most usually ordered on interlocutory application, in the case of personal representatives, or other persons filling the character of trustees, having money in their hands belonging either wholly or in part to the plaintiff. 3 *Dan. Chan. Practice* (Perkin's ed.), p. 1819.

While, under the *Indiana* code, the avowed holder of money claimed by separate parties, may be required to deposit with the court either the money itself or security, it does not require that a bond of indemnity be given by a plaintiff, as assignee of a deposit in a bank, where no certificate of deposit

4. **As Security for Costs.**—Payment of money into court is also one way of giving security for costs.<sup>1</sup>

5. **To Keep Tender Alive.**—Where a tender is made and refused, the usual way to keep such tender good is to pay the money into court.<sup>2</sup>

6. **Effect of—***a.* **ADMITS THE CONTRACT AND THE BREACH.**—By a voluntary payment of money into court the defendant

has been given, and the depositor cannot be found, after due notice, to answer as to his interest in the sum claimed by plaintiff. *Swingle v. Bank of Indiana*, 41 Ind. 423.

Where the court orders an administrator to pay money to the clerk, to be held subject to the further orders of the court, the effect of the order cannot be changed by any agreement between the administrator and the clerk, and such agreement will not release the clerk from responsibility for the money so paid in. *Sullivan v. State*, 121 Ind. 342.

Upon an application to the court for the payment of money under the control of its officers, the applicant must produce a certificate from the officer with whom the money was deposited, showing the amount of the fund, the mode of investment, and the claims, if any, which have been made thereon. *Hulbert v. McKay*, 8 Paige (N. Y.) 651.

1. *Rapalje & Lawrence Law Dict. Laws of Missouri* 1881, p. 96.

Costs paid into court are irrecoverable. *Clement v. Bixler*, 3 Watts (Pa.) 248.

2. *Cannon v. Handley*, 72 Cal. 142; *Cullen v. Green*, 5 Harr. (Del.) 17; *Mason v. Crook*, 24 Ga. 211; *DeWolf v. Long*, 7 Ill. 679; *Marine Bank v. Rushmore*, 28 Ill. 463; *Webster v. Pierce*, 35 Ill. 158; *Clark v. Mullenix*, 11 Ind. 532; *Mohn v. Stoner*, 11 Iowa 30; *Warrington v. Pollard*, 24 Iowa 281; 95 Am. Dec. 727; *Jarboe v. McAttee*, 7 B. Mon. (Ky.) 279; *Adams v. Rutherford*, 13 Oregon 78; *Holladay v. Holladay*, 13 Oregon 523; *Brock v. Jones*, 16 Tex. 461; *Gilkeson v. Smith*, 15 W. Va. 44. *Compare Whelan v. Reilly*, 61 Mo. 565.

The rule that the money must be paid into court, in order to keep the tender alive, applies as well where the tender is made by an offering in writing under a statute, as to actual production and offer of the money. *Shugart v. Pattee*, 37 Iowa 422.

It is not always necessary to pay the

money into court, in order to keep the tender alive. *Gardner v. Randell*, 70 Tex. 453.

But there must be an averment of a readiness and willingness to pay. *Walker v. Walker*, 17 S. Car. 329; *Park v. Wiley*, 67 Ala. 310.

An offer to do equity does not require the bringing of the money into court, as in the case of a plea of tender. And neither payment nor tender of the amount will be considered a condition precedent to the granting of a decree for relief. *Spann v. Sterns*, 18 Tex. 556.

Where a purchaser from a mortgagor, seeks to set aside a sale under the mortgage, on the ground of fraud, and to be allowed to redeem, it is sufficient if the bill of complaint contains an averment that the complainant is ready to pay the amount admitted to be due on the mortgage debt, and hereby tenders that amount or any other sum that may be found to be due, and submits himself to the court for its decree in that behalf. *Cain v. Gimon*, 36 Ala. 168.

In an equitable proceeding to set aside a sale under mortgage, and to be allowed to redeem, on payment of the balance due the mortgagee, it is not necessary that the petition should allege a tender of the amount due, nor that the money be paid into court. *Kline v. Vogel*, 90 Mo. 234.

Where the plaintiff makes *profert* of money in court, and the court decides that the money is not due, and the plaintiff appeals, but while the appeal is pending, withdraws the tender, such withdrawal is not a waiver of his claim. *Vail v. McMillan*, 17 Ohio St. 617.

So where a sale was made by an agent, who was personally interested, to a minor without means, and the principal, upon learning of the sale, tendered back the money paid and the notes given, repudiated the sale, and notified both the agent and the purchaser that the contract would not be complied with, it is not necessary, in a proceeding to set aside the sale, to bring the notes and money into court, if plaintiff be ready to do this on the

admits the contract declared on, and all the breaches alleged, the only question to be determined being the amount of damages.<sup>1</sup>

granting of final relief. *Miller v. Louisville, etc., R. Co.*, 83 Ala. 274.

Where a tender has simply the effect to extinguish a lien, and does not discharge the debt, it need not be followed up by a payment into court. *Cass v. Higenbotam*, 100 N. Y. 248.

This was so held in *California*, where the effect of the tender was to extinguish a pledge, the language of the court being as follows: "It is said the plea of tender by Drexler is insufficient for the reason that he did not bring the money into court. We think the plea is sufficient without bringing the money into court. This is so held in *Kortright v. Cady*, 21 N. Y. 343; 78 Am. Dec. 145. The authorities referred to in the cases just cited in the opinions of Davis, J., and Comstock, C. J., sustain this rule. The plea here is in accordance with section 1495, Civil Code, and it is expressly provided by section 1504, Civil Code, that an offer of payment duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof. One of these incidents is the discharge or extinction of the lien." *Loughborough v. McNevin*, 74 Cal. 256; 5 Am. St. Rep. 435.

If too much has been tendered, it is not necessary to bring the whole amount tendered into court, but only so much as is actually due. *Abel v. Opel*, 24 Ind. 250.

The courts of *Missouri* recognize a distinction between a tender made under the statute and one at common law. Thus in *Klein v. Keyes*, 17 Mo. 327, the supreme court, speaking through Scott, J., says: "Under this section (§ 23, ch. 35, Rev. Stats.), it was not necessary, after a tender, to bring the money into court, nor to show that the defendant had always been ready to pay; the tender before suit brought only affecting the matter of costs."

And this language is quoted with approval by the court of appeals in *Voss v. McGuire*, 26 Mo. App. 459. But that section has been amended and was amended at the time the court of appeals rendered the opinion in the case last cited. The statute now requires that the thing tendered shall be

deposited in court (Rev. Stats. 1889, § 2937).

1. Whart. Law Lexicon, title "Payment into Court;" 1 Phil. on Ev. 788; 3 Phil. on Ev. 248; 2 Greenl. on Ev. (10th ed.), § 600; *The Rossend Castle*, 30 Fed. Rep. 462; *Simpson v. Carson*, 11 Oregon 361; *Denver, etc., R. Co. v. McAllister*, 6 Colo. 420; *Supply Ditch Co. v. Elliott*, 10 Colo. 327; 3 Am. St. Rep. 586; *Sweetland v. Tuthill*, 54 Ill. 215; *Monroe v. Chaldeck*, 78 Ill. 429; *Abel v. Opel*, 24 Ind. 250; *Frink v. Coe*, 4 Greene (Iowa) 555; 61 Am. Dec. 141; *Fisher v. Moore*, 19 Iowa 84; *Martin v. Whisler*, 62 Iowa 416; *Latham v. Hartford*, 27 Kan. 249; *Davis v. Millaudon*, 17 La. Ann. 97; 87 Am. Dec. 517; *Bacon v. Charlton*, 7 Cush. (Mass.) 581; *Brown v. Pink*, 3 Jones (N. Car.) 378; *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587; *Eaton v. Wells*, 82 N. Y. 576; *Johnston v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 315; *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 393; *Goslin v. Hodson*, 24 Vt. 140; *Woodward v. Cutter*, 33 Vt. 49; *Schnur v. Hickcox*, 45 Wis. 200; *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468; *Boyfield v. Porter*, 13 East 202; *Le Crew v. Cooke*, 1 B. & P. 333; *Vaughan v. Barnes*, 2 B. & P. 392.

The legal effect of a plea of tender is an irrebuttable presumption of indebtedness to the extent of the tender; and when the tender is brought into court for the use of plaintiff, that amount is considered as stricken from the complaint, and if more is claimed by plaintiff, he proceeds for the excess of his demand above the tender only. *Bank of Columbia v. Sutherland*, 3 Cow. (N. Y.) 336; *Spalding v. Vandercook*, 2 Wend. (N. Y.) 431; *Johnston v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 315; *Hubbard v. Knous*, 7 Cush. (Mass.) 556.

After a plea of tender, a plaintiff may be nonsuited in a proceeding to recover beyond the tender. *Jenkins v. Cutchens*, 2 Miles (Pa.) 65; *McCredy v. Fey*, 7 Watts (Pa.) 496; *Supply Ditch Co. v. Elliott*, 10 Colo. 327; 3 Am. St. Rep. 586.

In *Davis v. Millaudon*, 17 La. Ann. 97; 87 Am. Dec. 517, the supreme court of *Louisiana* says: "A tender in open court, of the thing demanded, or its equivalent, is certainly an admission

*b.* ADMITS PLAINTIFF'S RIGHT TO SUE.—So such payment into court admits the plaintiff's right to sue, and the capacity in which he sues.<sup>1</sup>

that the thing itself is due, and is consequently inconsistent with an averment that the thing is not due. It has ever been held that the plea of payment is inconsistent with a general denial; and a plea of tender cannot be less so."

It is only an admission of a legal demand. *Ribbans v. Cricket*, 1 B. & P. 264.

Though the contract is one which the Statute of Frauds requires to be in writing, payment into court dispenses with the necessity of proving it. *Middleton v. Brewer, Peake* 15.

If the maker of a note pay into court the amount thereof, he cannot show a partial failure of consideration. *Mahan v. Waters*, 60 Mo. 167.

Though in an action for unliquidated damages, a plea of tender cannot be interposed, yet if such plea is made, it constitutes an admission that the damages amount at least to the sum tendered. *Cilley v. Hawkins*, 48 Ill. 308.

It is held by the supreme court of *Massachusetts*, in an opinion by Bigelow, J., that in an action for damages, where the declaration contains only one cause of action, specifically set forth, the tender is a conclusive admission of every fact which the plaintiff would otherwise be bound to prove in order to maintain his action, and precludes the defendant from introducing evidence of carelessness on the part of the plaintiff, either in bar on the merits or in mitigation of damages. *Bacon v. Charlton*, 7 Cush. (Mass.) 581.

Under the statute of *Illinois* a plea of tender admits liability for the injury complained of. *Miller v. Gable*, 30 Ill. App. 578.

A plea of set-off, accompanied by a deposit in court of the difference between the amount sued for and the set-off, is a conclusive admission of the justice of the plaintiff's demand, and will entitle him to recover the amount he sues for, less such sum, if any, as the jury may find due the defendant on the set-off. *Williamson v. Baley*, 78 Mo. 636.

A verdict may be rendered for more than the amount tendered, but cannot be for less. *Denver, etc., R. Co. v. Harp*, 6 Colo. 420.

But it admits only the cause of action as to the sum tendered. It does

not conclude the party making it as to any defense he may have against a further recovery consistent with the admission of the original contract or cause of action. *Simpson v. Carson*, 11 Oregon 361; *Davis v. Millaudon*, 17 La. Ann. 97; 87 Am. Dec. 517; *Griffin v. Harriman*, 74 Iowa 436; *Spalding v. Vandercook*, 2 Wend. (N. Y.) 431; *Eaton v. Wells*, 82 N. Y. 576; *Wilson v. Doran*, 110 N. Y. 105; *Cox v. Parry*, 1 T. R. 464; *Stevenson v. Berwick*, 1 A. & H. 265.

But while a tender constitutes an admission that the amount tendered is due, it does not necessarily admit the existence of the grounds upon which plaintiff bases his right of recovery, *Griffin v. Harriman*, 74 Iowa 436; *Hennell v. Davies*, 1 Q. B. 367; and it is competent for defendant to urge any objections to the plaintiff's right to recover further damages. *Lucy v. Walrond*, 5 Scott 52; *Lacy v. Walrond*, 3 Hodg. 215; *Johnston v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 315; *Spalding v. Vandercook*, 2 Wend. (N. Y.) 431.

If the defendant, in an action of *assumpsit* containing the common money counts, and also a count for the use and occupation of certain premises described, pays a part of the sum demanded into court, without specifying to which of the counts the payment is to be applied, such payment is an admission only that the defendant owes the plaintiff on some one or several of the counts, the sum so paid; but it is not an admission of any particular contract or debt under any one of the counts, nor of a liability on all of them. *Hubbard v. Knous*, 7 Cush. (Mass.) 556.

It does not preclude defendant from taking advantage of the Statute of Limitations, *Levy v. Greville*, 4 D. & Ry. 632; 16 E. C. L. 24; 3 B. & C. 10; 10 E. C. L. 5; and does not admit all the items contained in a bill of particulars. *Seaton v. Benedict*, 2 M. & P. 66.

Payment by the defendant to the plaintiff, pending an action of *assumpsit*, of part of the entire demand, to recover which the action is brought, is not equivalent, as an admission of the cause of action, to a payment of money into court. *Galloway v. Holmes*, 1 Dougl. (Mich.) 330.

1. *Broadhurst v. Baldwin*, 4 Price

c. MONEY BELONGS TO THE PLAINTIFF. — The payment of money into court is an admission of indebtedness to the extent of the amount paid in, and, whatever may be the result of the trial, the money so paid in belongs to the plaintiff, and the party bringing it into court loses all right to it.<sup>1</sup>

58; *Lipscombe v. Holmes*, 2 Camp. 441; *Walker v. Rawson*, 5 C. & P. 486; 1 M. & R. 250; 24 E. C. L. 4; *Miller v. Williams*, 5 Esp. 19; *Brown v. Fink*, 3 Jones (N. Car.) 378.

A tender in court admits that the amount tendered was due at the date of the suit, and estops the party making tender from claiming that the suit was prematurely brought. *Giboney v. German Ins. Co.*, 48 Mo. App. 185.

1. *Rhodes v. Andrews* (Ark. 1890), 13 S. W. Rep. 422; *Johnson v. Huling*, 127 Ill. 14; *Fisher v. Moore*, 19 Iowa 86; *Phelps v. Kathron*, 30 Iowa 231; *Voss v. McGuire*, 26 Mo. App. 452; *Kansas City Transfer Co. v. Neiswanger*, 27 Mo. App. 356; *Murray v. Bethune*, 1 Wend. (N. Y.) 191; *Slack v. Brown*, 13 Wend. (N. Y.) 390; *Logue v. Gillick*, 1 E. D. Smith (N. Y.) 398; *Wilson v. Doran*, 39 Hun (N. Y.) 88; *Dakin v. Dunning*, 7 Hill (N. Y.) 30; 42 Am. Dec. 33; *Becker v. Boon*, 61 N. Y. 317; *Taylor v. Brooklyn El. R. Co.*, 119 N. Y. 561; on second hearing, 18 Civ. Pro. Rep. (N. Y.) 72; *Clement v. Bixler*, 3 Watts (Pa.) 248; *Schnur v. Hickox*, 45 Wis. 200. Compare *Alexandrie v. Saloy*, 14 La. Ann. 327.

But the plaintiff may disregard a payment of money into court without a rule of court, as a substitute for tender. *Swan v. Sternfeld*, 55 N. J. L. 41.

Money deposited in a district court, as a tender, remains in that court pending an appeal, and the circuit court of appeals has no control over the money or over the district court in regard to it, except when the cause is reviewed, and is determined and remanded for further proceedings. *Mignano v. McAndrews*, 56 Fed. Rep. 300.

The money paid in is a payment upon the claim of plaintiff, and cannot be withdrawn by the defendant. *Call v. Lothrop*, 39 Me. 434; *Gilpatrick v. Ricker*, 82 Me. 185; *Reed v. Armstrong*, 18 Ind. 446. See also *Hopkins v. Stephenson*, 1 J. J. Marsh. (Ky.) 341; *Morrow v. Smith*, 4 B. Mon. (Ky.) 99; *Murray v. Bethune*, 1 Wend. (N. Y.) 191.

A plea of tender is an admission that the amount tendered is due plaintiff.

*Phoenix Ins. Co. v. Readinger*, 28 Neb. 587.

The plaintiff has a right to take the money out of court, and does not thereby waive his objection to the amount of the tender. *Murray v. Bethune*, 1 Wend. (N. Y.) 191; *Murphy v. Gold*, etc., Tel. Co. (City Ct.), 3 N. Y. Supp. 804.

The plaintiff is entitled to all money paid in, though the verdict is for a less amount. *Berkheimer v. Geise*, 82 Pa. St. 64.

Even in the case of a tender and refusal of specific chattels, which operate to discharge the debt and extinguish the further relation of debtor and creditor, the property of the articles is deemed to vest in the creditor, and the parties afterwards stand in the relation of bailor and bailee. *Singerland v. Morse*, 8 Johns. (N. Y.) 478; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525; 21 Am. Dec. 161; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 96; 27 Am. Dec. 174.

Under the *New York* statute, there is no difference in this respect, whether the action is one for a tort or on contract. *Taylor v. Brooklyn El. R. Co.*, 119 N. Y. 561; on second hearing, 18 Civ. Pro. Rep. (N. Y.) 72. Compare *Clement v. New York*, etc., R. Co., 56 Hun (N. Y.) 643.

Where money has been paid into court by the defendant, and the plaintiff dies, and his administrator is substituted, who does not appear and is nonsuited, the money will be impounded to answer the defendant's costs. *Jenkins v. Cutchens*, 2 Miles (Pa.) 65.

Where a defendant dies after the payment, the revival of the action against his executor, or even the commencement of a new suit, will not change the effect of the payment. *Murray v. Bethune*, 1 Wend. (N. Y.) 191.

*Voss v. McGuire*, 26 Mo. App. 452, was a case commenced in a justice's court. After the service of the summons, and before the trial, defendant paid to the constable, as a tender for plaintiff, a sum greater than the amount ultimately recovered by plaintiff, together with the costs then accrued.

**TENEMENT.**—(See also LODGINGS AND APPARTMENTS, vol. 13, p. 1003; REAL PROPERTY, vol. 19, p. 1033.)

Tenement is a word of wide meaning, and, "though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be holden, provided it be of a permanent nature."<sup>1</sup>

**TENENDUM.**—(See also DEEDS, vol. 5, p. 456).—In a deed or conveyance of land the *tenendum* is the clause which formerly indicated the tenure by which the grantee was to hold the lands of the

Plaintiff had judgment before the justice, and, upon defendant's appeal to the circuit court and a trial anew, plaintiff again recovered judgment. An appeal was then taken to the court of appeals and the judgment of the circuit court was reversed and the case remanded. On the retrial of the case, plaintiff again had judgment, but again for a sum less than that paid to the constable by the defendant. When the appeal was taken to the circuit court, the constable deposited with the clerk of the circuit court the money which had been delivered to him as a tender. While the case was pending in the appellate court, the circuit clerk, at defendant's request, delivered the money back to the defendant. But after the reversal and remanding of the case, defendant returned the money to the clerk. After the money was paid over by the defendant to the constable, the latter offered it, through his attorney, to the plaintiff, who refused to accept it. Plaintiff having recovered a sum less than the amount tendered, defendant moved the court to tax the costs against the plaintiff. This the court refused to do, and the question was brought by appeal before the Kansas City court of appeals. That court reversed the action of the circuit court.

It cannot affect the question that plaintiff did not know that the money had been paid into court. *Taylor v. Brooklyn El. R. Co.*, 18 Civ. Pro. Rep. (N. Y.) 72.

The *Indiana* courts have held that while a tender is an admission that the entire sum tendered is due and payable, it is not conclusive evidence. *Abel v. Opel*, 24 Ind. 250.

A clerk of court is not, by virtue of his office, a receiver of the court, and is not bound to receive money paid into court as a tender, except by order of the court; and money deposited with the clerk, without any order of the court, may be withdrawn at any time

by the depositor, before the court has recognized it as a fund in its control, or the other party has manifested a willingness to receive it. *Hammer v. Kaufman*, 39 Ill. 87.

Money paid into court for a party, to satisfy his lien upon drafts which he has been compelled to deliver up, cannot be subjected by a creditor of such party who is not a party to the action, to the payment of such creditor's debt. *Tuck v. Manning*, 150 Mass. 211; 5 L. R. A. 666.

Where the defendant pays into court, pending the suit, and to the credit thereof, the amount admitted due, which is invested under the direction of the court, the defendant will be entitled to any profit, and responsible for any loss, arising from the investment, before the termination of the suit. *Clarkson v. DePeyster*, Hopk. (N. Y.) 505; 2 Wend. (N. Y.) 77.

1. Com. v. Hersey, 144 Mass. 297, quoting 2 Bl. Com. 16.

"While frequently used in the sense of house or building, the enlarged meaning is land, or any corporeal inheritance, or anything of a permanent nature which may be holden." *Sacket v. Wheaton*, 17 Pick. (Mass.) 105. See also *Field v. Higgins*, 35 Me. 339; *Mitchell v. Warner*, 5 Conn. 518.

"With respect to the word 'tenements' or *tenementa*, in Co. Litt. 20, a, it is stated: 'This is the only word which the Stat. of Westm. 2, that created estates *taille*, useth; and it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to, or exerciseable within the same, though they lie not in tenure, therefore all these without question may be entailed.' That is a proper legal definition of 'tenement.' I think 'tenement,' when used at all in connection with a house or room, must mean something of the same kind, or of the same char-



acter, and a thing absolutely immovable from the land." *Fredericks v. Howie*, 1 H. & C. 381.

Tenement is a word of extensive signification. When used in a statute directing the proceedings to be taken, when goods and chattels cannot be found to discharge an execution, and the debtor has lands or tenements, it should be construed as referring to such interests in real estate as are connected with the freehold, and not included in the term chattels. *Barr v. Binford*, 6 Blackf. (Ind.) 335.

**A Wharf Has Been Held a "Tenement."**—A wharf or pier reclaimed from tide-water by an embankment, or by raising the bottom with stone, earth, or other material, was held to be a "tenement," within the meaning of a *New York* statute authorizing summary proceedings in favor of the landlord to recover the possession of "houses, lands, and tenements." *People v. Kelsey*, 14 Abb. Pr. (N. Y.) 372. In that case, the court, by Brown, J., said: "But few persons, I think, would entertain any doubt that a pier of ground reclaimed from tide-water by embankment, or by raising the bottom by filling with stone, or earth, or other material, in the manner in which piers and wharves are constructed above the surface of the water, would be regarded as land. Where the reclamation is permanent and durable, what is it, if it is not land? Be that as it may, the word tenement signifies everything which may be holden, if it be of a permanent nature, and a wharf or pier is so permanent that it becomes a part of the soil and freehold itself."

**In a Will**—(See also *WILLS*).—The word "tenements" has never been construed in a will, independently of other circumstances, to pass a fee. *Canning v. Canning*, *Moseley* 240; *Doe v. Richards*, 3 T. R. 356; *Den v. Miller*, 5 T. R. 558; *Wright v. Denn*, 10 Wheat. (U. S.) 238.

**Technical Sense**.—The word will include an advowson, *Westfaling v. Westfaling*, 3 Atk. 460; *Gully v. Bishop of Exeter*, 4 Bing. 290; 13 E. C. L. 439; so it has been held to include tithes, *Powell v. Bull*, 1 Comyn. 265; *R. v. Skingle*, 1 Stra. 100; *Rex v. Barker*, 6 Ad. & El. 388; 33 E. C. L. 91; and so a dignity, whether it be granted of a place or not, is a "tenement." *In re Rivett-Carnac's Will*, 30 Ch. Div. 136; *R. v. Knollys*, 2 Salk. 509; 1 Ld. Raym. 10; *Ferrer's Case*, 2 Eden 373.

A freehold rent charge is within the words "freehold lands or tenements." *Druitt v. Christchurch*, Colt. Reg. Ca. 328. And see for other cases illustrating the scope of the term in its strict legal sense, *REAL PROPERTY*, vol. 19, p. 1033.

**In its popular sense**, the term "tenement" frequently has the same meaning as "house." *Yorkshire F. & L. Ins. Co. v. Clayton*, 8 Q. B. Div. 423.

"The common people still use the word, as in the days of Blackstone, to mean house." *Cotton, L. J.*, in *Dashwood v. Ayles*, 55 L. J. Q. B. 10.

So the term has been held equivalent to "dwelling-house." *Minifie v. Banger*, 55 L. J. Q. B. 10.

**Tenement**.—Under the inhabited house duty act, a house let to different tenants, occupying rooms on the same floor, opening on a common hall staircase, is held not to be "divided into and let in different tenements." *Yorkshire, etc., Ins. Co. v. Clayton*, 6 Q. B. Div. 557; 8 Q. B. Div. 421. But if the tenements are complete in themselves, having each its independent hall and stairway, they are "different tenements," although all on the same floor, like "flats." The "difference" may be horizontal as well as vertical. *Atty. Gen'l v. Mutual, etc., Chambers Assoc., L. R.*, 10 Exch. 305.

**May Signify a Part in Contradistinction to the Whole House**.—"In modern use, the word often signifies rooms let in houses, or such part of a house as is separately occupied by a single family or person, in contradistinction from the whole house. *Young v. Boston*, 104 Mass. 95. Where also a part of a room is occupied by one, and a distinct portion by another, as where one occupies one side of the room, and another the opposite side, or one the front, and the other the rear, which is not infrequent in the smaller trades, the portion appropriated to either is properly called his tenement and himself its tenant, even if no partition separates their respective holdings, and a passageway between them is used in common." *Com. v. Hersey*, 144 Mass. 298; *Com. v. Clynes*, 150 Mass. 71.

A tenement may consist of a single room or contiguous rooms, or rooms upon different stories, if controlled by a single person and used in connection with each other. The fact that one of the rooms was occupied and used as a shop, and another for a living room

grantor; but since the conversion of all freehold tenures into free and common socage, the *tenendum* is of no further use even in *England*, and is therefore joined to the *habendum*—to have and to hold.<sup>1</sup>

**TENOR**—(See also EFFECT, vol. 6, p. 169; FORGERY, vol. 8, p. 510; INDICTMENT, vol. 10, p. 594; LIBEL AND SLANDER, vol. 13, p. 457; PURPORT, vol. 19, p. 590).—The word “tenor” imports an exact copy—that the instrument is set out in the words and figures.<sup>2</sup>

or kitchen, by the same person, would not make these rooms distinct tenements. *Com. v. Clynes*, 150 Mass. 72; *Com. v. Buckley*, 147 Mass. 581.

“**Building**” not identical with “**Tenement**.”—An indictment charged the illegal letting of a certain “tenement and building” for the illegal sale of intoxicating liquors. It was held that the indictment charged the letting of a building, and that there was a variance between the indictment and the evidence, which proved the letting of a single apartment in the building, the other apartments being occupied by other tenants. The court said: “A building is a tenement, but a tenement may be something different from a building. But in this indictment, it is clear that the words building and tenement are used as synonymous.” *Com. v. Bossidy*, 112 Mass. 278.

And so in *Com. v. McCaughey*, 9 Gray (Mass.) 296, it was held that a charge of keeping and maintaining a “building,” for the illegal sale of liquors, could not be supported by proof that defendant kept and maintained only a part of the building, or a “tenement” in it, the residue being occupied by other persons. But an indictment for keeping a “tenement” may be sustained by proof of keeping a “building.” *Com. v. Godley*, 11 Gray (Mass.) 454.

**Not Necessarily Part of a Dwelling-House.**—Thus, a complaint for keeping and maintaining a “tenement” for the illegal sale of liquors, may be supported by proof of keeping and maintaining for such a purpose, a shop consisting of one room, and not forming part of a dwelling-house. *Com. v. Cogan*, 107 Mass. 212.

**The Term Imports an Immovable Structure.**—In *Fredericks v. Howie*, 1 H. & C. 381, it was held that a portable booth used by strolling players was not a “tenement,” within the English act, which prohibits keeping “any house

or other tenement” as an unlicensed theatre.

**A Fishery Held Not to be a “Tenement.”**

—A several fishery is not within the popular meaning of the term. *Redington v. Millar*, 24 L. R. Ir. 65.

**Tenement Block.**—A building described in an insurance policy as a “ten tenement frame block” is not “unoccupied,” if two of the tenements are in actual use and occupation as residences. The court, by Lord, J., said: “The phrase ‘tenement block’ gives but slight indication of what portions of the block the tenements consist, whether a single room, a floor or flat, or suite of rooms. It imports only of necessity that the building is designed for the accommodation of various families.” *Harrington v. Fitchburg Ins. Co.*, 124 Mass. 129.

**Tenement House.**—See HOUSE, vol. 9, p. 780; LODGINGS AND APARTMENTS, vol. 13, p. 1015.

1. 2 Bl. Com. 298; Bouvier’s L. Dict. 2. *Com. v. Wright*, 1 Cush. (Mass.) 65; *State v. Atkins*, 5 Blackf. (Ind.) 458; *State v. Johnson*, 26 Iowa 407; 96 Am. Dec. 160.

The word “tenor” has a technical meaning, and requires an exact copy. *People v. Warner*, 5 Wend. (N. Y.) 273.

“While the misuse or omission of a letter, which works no such change in a word as to make of it a different one, will not be treated as a fatal variance, still, *tenor* imports *identity*, and whenever that is destroyed, either by the omission or adoption of any one word, however slightly the sense may be affected, it will be so regarded.” *State v. Townsend*, 86 N. Car. 679. And in that case the omission of the word “all” in an indictment purporting to set out the tenor of a card, though its effect upon the sense was of the slightest, if any, was held to be a fatal variance.

The word “tenor” binds the party to a strict recital; but the number of a

**TENT.**—A tent, in the ordinary acceptance of the word, is a pavilion, portable lodge, or canvas house, inclosed with walls of cloth and covered with the same material.<sup>1</sup>

bank bill and the words at the top of it expressing its amount, are not parts of the bill, and need not be set out in an indictment purporting to give the "tenor" of the bill. *Com. v. Stevens*, 1 Mass. 203. And in *Griffin v. State*, 14 Ohio St. 61, the indictment alleged that one of the counterfeit bank notes unlawfully sold by the defendant "was of the tenor and effect following, to-wit." The court, by Scott, J., said: "The word 'tenor' imports an exact copy. It was necessary therefore that the indictment should set forth truly and precisely all the words and figures of the bill which constitute its contract. It was not necessary to the validity of the indictment to go further, and set out the numbers of the bill, its vignettes, mottoes, and devices, or the words and figures in its margin, which constitute no part of the contract of the forged instrument. These are not properly any part of the bill. *Com. v. Bailey*, 1 Mass. 62; 2 Am. Dec. 3; *Com. v. Stevens*, 1 Mass. 204; *People v. Franklin*, 3 Johns. Cas. (N. Y.) 299; *Com. v. Searle*, 2 Binn. (Pa.) 332; 4 Am. Dec. 446; *State v. Carr*, 5 N. H. 367; *Wharton's Am. Crim. Law* 174, 588."

**In the Popular Sense.**—"Tenor," in its technical sense, means an exact copy; but, in popular use, may mean the substance and effect of an instrument. Where a statute prescribing the mode of entering judgment on an instrument, required the date and "tenor" to be entered, this was held satisfied by entering the substance of the instrument, for if an exact copy were intended, this would include the date, and calling for the date in addition, was superfluous. *Beeson v. Beeson*, 1 Harr. (Del.) 466.

**Tenor Distinguished from Purport.**—(See also **PURPORT**, vol. 19, p. 590; **FORGERY**, vol. 8, p. 510 *et seq.*)—"It has never been required, either at common law, or by any statute of this state, that the purport and tenor of an instrument, charged to have been forged, should both be set out in the indictment. Section 1814 of the Revised Statutes provides, that it shall be sufficient to describe the instrument forged, by the purport thereof. But neither this section, nor any other pro-

vision of our statute, forbids setting out the instrument forged according to its tenor; and an indictment setting out the instrument forged according to its tenor only, would undoubtedly be sufficient. 2 East's Pleas of the Crown 983. In the indictment before us, the pleader has attempted to set out the note forged according to its purport, as well as according to its tenor. Where the tenor is given, the purport must necessarily appear, as the tenor of an instrument means an exact copy of it, whereas, the purport means 'the substance of it, as it appeared on the face of the instrument to every eye which read it.' As said by Buller, J., in *Reading's Case*, 2 Leach 672, 'The indictment is repugnant in itself; for the name and description of one person or thing, could not purport to be another;' and in *Gilchrist's Case*, upon a conference of ten judges, it was held that, 'The word purport imports what appears on the face of the instrument. It means the apparent and not the legal import.' 2 Leach 753." *State v. Pullens*, 8 Mo. 391.

**Distinguished from "Manner and Form."**—The law attaches a technical meaning to the word "tenor," as signifying either an exact copy, or a statement of the libel verbatim. "Tenor" has so strict and technical a meaning as to make it necessary to recite verbatim; but the expression "manner and form" means nothing more than a substantial recital. *Wright v. Clements*, 3 B. & Ald. 503; 5 E. C. L. 358.

1. *Killman v. State*, 2 Tex. App. 222; 28 Am. Rep. 432. And in that case it was held that a canvas tent might be a "disorderly house." The court said: "The case of *Callahan v. State*, 41 Tex. 43, cited and relied upon by counsel, was a case of theft from a house, and in that case our learned chief justice says: 'Such a structure as that described by the witness would, in common language, be called, as it was called by the witness, a tent; never a house. . . . However difficult it might be to define in words the exact difference, in some possible cases, between a house and a tent, it can readily be conceived that there are houses that cannot be taken, called, or understood

**TENTERDEN'S (LORD) ACT**<sup>1</sup> is a supplement to the Statute of Frauds, and requires the following promises and engagements to be in writing: First, an acknowledgment of a debt barred by the Statute of Limitations. The act further provides that an acknowledgment by one joint contractor shall not affect the others.<sup>2</sup> Second, a promise to pay a debt incurred, or a ratification of a contract made, during infancy.<sup>3</sup> Third, a representation as to a person's character, ability, etc., made to enable him to obtain money or goods upon credit.<sup>4</sup> Fourth, executory contracts for the sale of goods.<sup>5</sup>

**TENURE**—(See also REAL PROPERTY, vol. 19, p. 1028; TITLE).—The word properly denotes the specific feudal relation subsisting between the lord and the tenant.<sup>6</sup> But since the decadence of the feudal system, which has deprived the true doctrine of tenures of nearly all of its practical importance, the word tenure has often been confused with terms referring to the *quantum* of the tenant's estate. This confusion is chiefly due to the fact that common-law tenure is found only in connection with estates having a certain conventional *quantum*.<sup>7</sup>

**TENURE OF OFFICE**—(See also PUBLIC OFFICERS, vol. 19, p. 562*k*).—The word tenure, in this connection, includes the duration or term of office, as well as the manner of holding.<sup>8</sup>

to be tents, and tents that cannot be called, taken, or understood to be houses; and this is one of them.' This language, we think, most clearly shows that the decision in that case was mainly made to depend upon the particular facts and circumstances of that particular case; that the structure therein described, from which the property was stolen, could in no manner be considered a house. The language quoted, however, does in our opinion equally as well convey the idea that there are tents which can be called, taken, and understood to be houses, and the tent described in this case, we think, is, if there ever was such a one, just one of those tents."

1. Statute of 9 Geo. IV., ch. 14.

2. LIMITATION OF ACTIONS, vol. 13, p. 759.

3. INFANTS, vol. 10, p. 649.

4. REPRESENTATIONS, vol. 21, p. 4.

5. FRAUDS, STATUTE OF, vol. 8, p. 709.

6. Atty. Gen'l of Ontario *v. Mercer*, 8 App. Cas. 767.

7. Challis on Real Property (Text-book Ser.) \*6. Thus in *Richman v. Lippencott*, 29 N. J. L. 59, it was said: "The word tenure is one of very extensive signification; it may import a

mere possession, and may include every holding of an inheritance."

8. *People v. Waite*, 9 Wend. (N. Y.) 58. That case was upon the term of office of a commissioner of deeds. The statute authorizing and regulating the appointment of commissioners, declared that they should hold their offices by the same tenure as justices of the peace. The court, by Nelson, J., said: "It was contended by the counsel for the defendant that the term 'tenure' designated only the manner of holding the office; that holding by the same tenure as justices of the peace, meant that the commissioners should hold their offices in the same manner and be displaced for the same reasons. I apprehend this as too restricted a definition of the term, and that it was intended to include the duration of a term of office, in addition to the manner of holding."

The *Indiana* constitution provides that "the general assembly shall not create any office, the tenure of which shall be longer than four years." In *State v. Harrison*, 113 Ind. 434, it was contended on behalf of the relator, that the right to hold over after the expiration of a four-year's term, to an officer of legislative creation, was the practical abrogation of that part of the

## TERM.

- I. In General, 949.  
 II. Term of Court, 949.

- III. Term of Years, 951.  
 IV. Terms of Agreement, 951.

**I. IN GENERAL.**—"Term," in a general sense, signifies boundary or limit; the extremity of anything, or that which limits its extent.<sup>1</sup> As applied to time, the word signifies a fixed period, a determined or prescribed duration.<sup>2</sup> As applied to language, it means a word, an expression, a phrase; as a term of art, a law term, etc.<sup>3</sup>

**II. TERM OF COURT.**—Terms of court are those stated periods during which courts sit for the dispatch of business.<sup>4</sup> The frequency

constitution. But the court refused to give the clause this interpretation, saying: "This contention rests upon a critical analysis of the word 'tenure,' which comes from the Latin 'tenere,' to hold. The argument assumes that the meaning to be attributed to the word 'tenure,' as used above, is substantially such as to render any person incapacitated or ineligible to hold an office of legislative creation for a longer period than four years, by any method in virtue of one selection or election. . . . We are not impressed with the view thus urged. . . . To sustain the view contended for would require us, upon the mere construction or definition of a word—and a definition which in our view does not lead to the conclusion claimed—to entirely read out of, or materially modify, all that part of § 3, art. 15, of the constitution which has reference to the holding over of officers who are incumbent in offices created by the general assembly."

"The word tenure in this connection means nothing more than the right to, or the manner of holding, the place." *Ex p. Herrick*, 78 Ky. 32.

1. Century Dict., *sub voce*, "Term."
2. Abb. L. Dict., *tit.* "Term."
3. And. L. Dict., *tit.* "Term."

*Terms de la Ley*, the name of an old lexicon of law—French and other technicalities of legal language.

**Under Terms.**—A party is said to be under terms when the court shows him some indulgence or makes some order in his favor, upon certain conditions. *Bouv. L. Dict.*, *tit.* "Terms, To Be Under."

**Term of Office.**—Refers to the tenure of office, and there may be different incumbents during a single term. *Baker v. Kirk*, 33 Ind. 517.

**In Criminal Law.**—When a statute provides that whenever any person who shall be convicted of any crime, the punishment whereof shall be confinement at hard labor "for any term of years," shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that prescribed by law for the offense of which he shall be convicted, the words "term of years," mean a period of time not less than two years. *Ex p. Seymour*, 14 Pick. (Mass.) 40, *per Shaw*, C. J.

**4. Term of Court.**—*Burr. L. Dict.*, *tit.* "Terms of Court;" 3 Bl. Com. 275.

In English practice, the courts of Westminster held four terms a year; viz., Hilary, Easter, Trinity and Michaelmas terms. "These terms are supposed by Mr. Selden (Jan. Angl. l. 2, § 9) to have been instituted by William the Conqueror, but Sir Henry Spelman hath clearly and learnedly shown that they were gradually formed from the canonical institutions of the church; being, indeed, no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business." 3 Bl. Com. 275.

Formerly, Hilary Term began on the 20th of January, and ended on the 12th of February; Easter Term began on the Wednesday fortnight after Easter day, and ended on the Monday next after Ascension day; Trinity Term began on the Friday following Trinity Sunday and ended the Wednesday fortnight thereafter; Michaelmas Term began on the 6th of November, and ended on the 28th of November. By Stats. 11 Geo. IV. and 1 Wm. IV., ch. 70, the terms were so rearranged

and duration of terms depend upon the constitution of the court.<sup>1</sup> The whole term is considered as but one day, so that the court has power to revise its own judgments and decrees at any time during the term at which they are rendered.<sup>2</sup> But it may not re-examine its final judgments or decrees at a term subsequent to that at which they were rendered.<sup>3</sup> It may, however, at such subsequent term, order the correction of clerical errors so as to

that Hilary Term began on the 11th, and ended on the 31st of January; Easter Term began on the 15th of April, and ended on the 8th of May; Trinity Term began on the 14th day after the ending of Easter Term and continued for twenty-one days; Michaelmas Term began on the 2d, and ended on the 25th of November. By the Judicature Act, the division of the legal year into terms is abolished, and the terms are superseded by the sittings of the court of appeal and of the high court of justice in London and Middlesex. Abb. L. Dict., *tit.* "Term of Court;" Bouv. L. Dict., *tit.* "Term;" 3 Steph. Com. 482-486.

**Term Fee.**—In English practice, the term fee is a sum which a solicitor is entitled to charge to his client, and the client to recover, if successful, from the unsuccessful party, paid for every term in which any proceedings subsequent to the summons shall take place. Bouv. L. Dict., *tit.* "Term Fee;" Abb. L. Dict., *tit.* "Term."

**Term probatory** is the period of time during which evidence may be taken in an ecclesiastical suit. Coote's Ecc. Pr. 240.

1. Bouv. L. Dict., *tit.* "Term."

In the *United States*, the word "term" is generally used in the sense of session. The time of the commencement of each term is fixed by statute; the end of it is not usually so fixed, but is determined by the final adjournment of the court for that term. Anderson's L. Dict., *tit.* "Term;" U. S. v. Guiteau, 1 Mackey (D. C.) 498; McNaughton v. Southern Pac. R. Co., 19 Fed. Rep. 881.

But the duration of the term, as well as the time for its commencement, is sometimes fixed by statute. Horton v. Miller, 38 Pa. St. 271. See also JURISDICTION, vol. 12, p. 296.

2. Bassett v. U. S., 9 Wall. (U. S.) 38; *Ex p.* Lange, 18 Wall. (U. S.) 163; Goddard v. Ordway, 101 U. S. 752; Memphis v. Brown, 94 U. S. 715; Bronson v. Schulten, 104 U. S. 410; Doss v. Tyack, 14 How. (U. S.) 297;

U. S. v. Harmison, 3 Sawy. (U. S.) 556; Tilton v. Barrell, 17 Fed. Rep. 59; Barrell v. Tilton, 119 U. S. 637; The Madgie, 31 Fed. Rep. 926. See also JUDGMENTS, vol. 12, p. 120.

3. Cameron v. McRoberts, 3 Wheat. (U. S.) 591; Sibbald v. U. S., 12 Pet. (U. S.) 488; Noonan v. Bradley, 12 Wall. (U. S.) 121; Brooks v. Railroad Co., 102 U. S. 107; McMicken v. Perin, 18 How. (U. S.) 507; Bank of U. S. v. Moss, 6 How. (U. S.) 31; Bronson v. Schulten, 104 U. S. 410; Schell v. Dodge, 107 U. S. 629; U. S. v. The Brig Glamorgan, 2 Curt. (U. S.) 236; The Avery, 2 Gall. (U. S.) 386; U. S. v. Malone, 9 Fed. Rep. 897; Allen v. Wilson, 21 Fed. Rep. 881; Scott v. Hore, 1 Hughes (U. S.) 163; Linder v. Lewis, 1 Fed. Rep. 378; Robinson v. Rudkins, 28 Fed. Rep. 8; Baptist v. Farwell Transp. Co., 29 Fed. Rep. 180; Wade v. U. S., 21 Ct. of Cl. 141; Whitwell v. Emory, 3 Mich. 84; 59 Am. Dec. 220, and historical note thereto in the annotated edition. See also JUDGMENTS, vol. 12, p. 120.

A judgment cannot be set aside at a subsequent term, unless it was entered by misprision of the clerk, by fraud, or the like. Medford v. Dorsey, 2 Wash. (U. S.) 433; Brush v. Robbins, 3 McLean (U. S.) 486; Wood v. Luse, 4 McLean (U. S.) 254.

The rule applies only to final judgments and decrees; interlocutory judgments and orders may be opened at a subsequent term. Kitchen v. Strawberry, 4 Wash. (U. S.) 84; Clark v. Blair, 14 Fed. Rep. 812; De Florez v. Reynolds, 8 Fed. Rep. 434; Reeves v. Keystone Bridge Co., 11 Phila. (U. S. C. C.) 498; Willimantic Linen Co. v. Clark Thread Co., 24 Fed. Rep. 799.

And a judgment which is void for want of jurisdiction may be vacated on motion at a subsequent term. Shuford v. Cain, 1 Abb. (U. S.) 302.

**Writ of Error Coram Vobis.**—For matters which may be examined upon a writ of error *coram vobis*, or *coram nobis*, constituting an apparent exception to the rule, see Bronson v. Schul-

make the record conform to the truth.<sup>1</sup> At common law, a judgment related back to the first day of the term at which it was rendered.<sup>2</sup> A term, may, in the discretion of the court, be adjourned to a day certain,<sup>3</sup> and the presumption is that an adjourned term of court was regularly called and held.<sup>4</sup>

**III. TERM OF YEARS.**—A term, in real-estate law, or estate for years, is one granted for a definite period of time by the owner of the freehold, called the lessor, to one called the lessee, or tennor, to hold for the time stipulated and under the conditions agreed upon.<sup>5</sup>

**IV. TERMS OF AGREEMENT.**—The conditions, stipulations, cove-

ten, 104 U. S. 410; Bank of U. S. v. Moss, 6 How. (U. S.) 31; ERROR, WRIT OF, vol. 6, p. 810.

1. Sheppard v. Wilson, 6 How. (U. S.) 260; Sibbald v. U. S., 12 Pet. (U. S.) 488; Russell v. U. S., 15 Ct. of Cl. 168; Sizer v. Many, 16 How. (U. S.) 98; Harris v. Hardeman, 14 How. (U. S.) 334. See also JUDGMENTS, vol. 12, p. 121.

2. 3 Bl. Com. 420.

The fiction of law that a term consists of but one day, cannot be invoked to antedate the judicial rejection of a claim to public lands, so as to render operative a grant otherwise of no effect. Newhall v. Sanger, 92 U. S. 761.

3. See JUDGE, vol. 12, p. 14; JURISDICTION, vol. 12, p. 298; Colt v. Vedder, 19 Minn. 539 (special term).

4. Dallas County v. McKenzie, 110 U. S. 686. See also JURISDICTION, vol. 12, p. 298.

5. Term of Years.—See ESTATES, vol. 6, p. 884; 1 Washb. Real Prop. (5th ed.) 465; Tiedeman Real Prop., § 172.

A term may be for several years, one year, or any fraction of a year, if the time is fixed. ESTATES, vol. 6, p. 884; 1 Washb. Real Prop. (5th ed.) 465; Tiedeman Real Prop., § 172, citing Brown v. Bragg, 22 Ind. 122; Gould v. Eagle Creek School Dist., 8 Minn. 427.

The word "term" is used to designate both an estate for years, and the time during which it is to be held. Bouv. L. Dict., *tit.* "Term of Years;" Abb. L. Dict., *tit.* "Term of Years;" 1 Washb. Real Prop. (5th ed.) 468.

While it is necessary that a term be for a fixed period, it is not essential that the period be fixed by the contract of the parties. It is sufficient, if, by the provisions of the contract, the duration of the term can be rendered certain. Say v. Smith, 1 Plowd. 269; Horner v. Den, 25 N. J. L. 106.

Thus, an agreement that a lessee may

continue to keep the premises after the expiration of his term, until he is reimbursed from the rents and profits for certain improvements stipulated to be made, entitles him to possession against one claiming under the lessor. Batchelder v. Dean, 16 N. H. 265.

A lease for a certain period, renewable at the lessee's option, for a further period named, is good for the aggregate of the two periods named, if the lessee elects to renew. Delashman v. Berry, 20 Mich. 292; 4 Am. Rep. 392; Doe v. Dixon, 9 East 15.

A lease determinable upon the abandonment of a certain enterprise upon the premises, is good. Horner v. Den, 25 N. J. L. 106.

A lease for such a period as a third person shall name, is good, as its duration may be rendered certain. Say v. Smith, 1 Plowd. 269.

When certainty of continuance depends upon matter *ex post facto*, that matter must occur in the lifetime of both the lessor and the lessee. Western Transp. Co. v. Lansing, 49 N. Y. 508, citing Rector of Chedington's Case, 1 Coke 380, 155b; Say v. Smith, 1 Plowd. 269. See also ESTATES, vol. 6, p. 884.

**Term in Gross.**—A "term in gross" is one which is not attached to the inheritance, but is held by some person, not interested in the inheritance, for his own use and benefit. Abb. L. Dict., *tit.* "Term;" Bouv. L. Dict., *tit.* "Term in Gross."

**Term Attendant upon Inheritance.**—A term which is held by a trustee in trust for the owner of the inheritance, is said to be attendant upon the inheritance in contradistinction to the term in gross, which is outstanding. Abb. L. Dict., *tit.* "Term;" 1 Wash. on Real Prop. (5th ed.), p. 494. See also Stat. 8 & 9 Vict., ch. 112, whereby such terms were abolished.

nants, and obligations of a contract are frequently called the terms thereof.<sup>1</sup>

**TERMINER.**—See note 2.

**TERMINATE.**—See note 3.

**TERRE-TENANT.**—Terre-tenant is defined by Bouvier as one who is in the actual possession of land; but, in a more technical sense, as he who is seised of land; and, in the latter sense, the owner of the land or person seised is the terre-tenant, and not the lessee.<sup>4</sup>

1. **Terms of Agreement.**—Walsh v. Mehrback, 5 Hun (N. Y.) 449.

In Hurd v. Whitsett, 4 Colo. 89, the court said: "We conclude, therefore, that the words 'term' and 'terms' cannot legitimately be used synonymously; that they are not generic in their relations to each other, but have each a technical and specifically distinct meaning as applied to estates in the nature of tenancies. True, the words are both derived from the Latin *terminus*, a limit or boundary, but their application is nevertheless technically distinct, 'term' meaning, in brief, a limited estate, and 'terms,' the limitations in the use of that estate arising out of the covenants and conditions thereto annexed."

An assignment for the benefit of creditors, which authorizes the assignee to sell on such "terms" as he shall deem advisable, invests him with a legal discretion only, and does not authorize him to sell on credit. Cribben v. Ellis, 69 Wis. 337, *overruling* Keep v. Sanderson, 2 Wis. 42; 60 Am. Dec. 404; Hutchinson v. Lord, 1 Wis. 286; 60 Am. Dec. 381, which held that such language in the assignment authorized the assignee to sell on credit, and, therefore, rendered the assignment void. Beus v. Shaughnessy, 2 Utah 492, is in harmony with the early *Wisconsin* decisions.

**Terms Cash.**—The words "terms cash" upon an unreceipted bill of goods sent by a wholesale to a retail dealer, cannot be held, as a matter of law, to imply that the goods were paid for before they were shipped. Wellauer v. Fellows, 48 Wis. 105.

2. **Oyer and Terminer.**—A phrase applied in *England* to the assizes, which were so called from the commission of oyer and terminer directed to the judges, empowering them to inquire, hear and determine all felonies, mis-

demeanors, treasons, etc. 4 Bl. Com. 269, 270. It is now used to denote a court of original jurisdiction for the trial of crimes.

3. **Termination of Voyage in Policy of Insurance.**—In Gracie v. Marine Ins. Co., 8 Cranch (U. S.) 82, Marshall, C. J., said: "The voyage is understood to be terminated when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours; but it will be conceded that the termination of the voyage as to the ship does not, nevertheless, terminate the risk on the goods; this risk may continue when the voyage as to the ship has ended."

4. Bouv. L. Dict.

In Hulett v. Mutual L. Ins. Co., 114 Pa. St. 146, Clark, J., said: "A terre-tenant, in a general sense, is one who is seised or actually possessed of lands as the owner thereof. In a *scire facias sur mortgage* or judgment, a terre-tenant is, in a more restricted sense, one, other than the debtor, who becomes seised or possessed of the debtor's lands, subject to the lien thereof. Those only are terre-tenants, therefore, in a technical sense, whose title is subsequent to the incumbrance. Chahoon v. Hollenback, 16 S. & R. (Pa.) 425; 16 Am. Dec. 587. 'Strictly speaking,' says Chief Justice Gibson, in Mitchell v. Hamilton, 8 Pa. St. 491, 'only the debtor's subsequent grantee of the fee simple is a terre-tenant.' So in Dengler v. Kiehner, 13 Pa. St. 41; 53 Am. Dec. 441, says the same learned judge, 'Who is a terre-tenant? Not every one who happens to be in possession of the land; there can be no terre-tenant who is not a purchaser of the estate, mediately or immediately from the debtor, while it is bound by the judgment.' To the same effect is Fox v. Hempfield R. Co., 79 Pa. St. 66, note, and many other cases."



**TERMINUS.**—In modern law, a limiting point, either of time or space, and either at the beginning or end of a period. The termini of a voyage, for instance, are the two local points at which it begins and ends. The *terminus a quo* (limit from which) is the point where it begins; the *terminus ad quem* (limit to which) is the point where it ends.<sup>1</sup>

**TERRIER.**—In the old English law, a register or survey of lands; a book or roll in which the several lands either of an individual or corporation, are described, containing the quantity of acres, boundaries, tenants' names, etc.<sup>2</sup>

**TERRITORIAL COURTS.**—See COURTS, vol. 4, p. 461; TERRITORIES, vol. 25; UNITED STATES COURTS.

**TERRITORIES.**—(See also STATES, vol. 23, p. 72; UNITED STATES.)

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| <p>I. Power of Congress Over, 953.</p> <p>II. Laws of Congress Applicable to, 955.</p> <p>III. Legislative Power of, 956.</p> <p>1. Power Stated, 956.</p> <p>2. Restraints upon, 957.</p> <p>    a. Due Process of Law, 957.</p> <p>    b. Trial by Jury, 957.</p> <p>    c. Criminal Prosecutions, 957.</p> <p>    d. The Public Domain, 958.</p> <p>    e. Taxation of Federal Property, 958.</p> <p>    f. Immunity from Taxation, 958.</p> <p>    g. Limitation of the Right of Acquisition by Corporations, 959.</p> <p>    h. Right of Suffrage, 959.</p> <p>    i. Delegation of Powers, 960.</p> <p>    j. Legislative Sessions: Records of, 960.</p> <p>    k. Attachés of: Compensation, 961.</p> <p>    l. Special Sessions, 961.</p> <p>3. Proper Subjects of, 961.</p> <p>    a. Scope of Power, 961.</p> <p>    b. Police Power, 962.</p> | <p>    c. Incorporation, 962.</p> <p>        (1) Municipal, 962.</p> <p>        (2) Private, 962.</p> <p>    d. Taxation (See also TAXATION, vol. 25, p. 5), 963.</p> <p>        (1) Public Lands, 963.</p> <p>        (2) Railroads, 963.</p> <p>        (3) National Banks (See also NATIONAL BANKS, vol. 16, p. 143), 964.</p> <p>IV. Executive Power of, 964.</p> <p>    1. How Vested, 964.</p> <p>    2. Power of Appointment, 964.</p> <p>    3. Power to fill Vacancies, 964.</p> <p>    4. Power of Removal, 965.</p> <p>    5. Judicial Control of, 965.</p> <p>V. Judicial Power of, 965.</p> <p>    1. Power Defined, 965.</p> <p>    2. Appointment and Removal of Territorial Judges, 966.</p> <p>    3. Kinds of Courts, 967.</p> <p>    4. Jurisdiction, 967.</p> <p>        a. Supreme, 967.</p> <p>        b. District, 967.</p> <p>        c. Inferior, 968.</p> <p>    5. Practice, 968.</p> <p>    6. Appellate Power of Federal Supreme Court Over, 969.</p> |
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**I. POWER OF CONGRESS OVER.**—That Congress has full and complete legislative authority over the people of the territories, and all the departments of the territorial governments, is no longer open to discussion. In the language of the Supreme Court of the *United States*, "it has passed beyond the stage of controversy into final judgment."<sup>3</sup> This power of Congress results, as a nec-

1. Burrill's Law. Dict., citing 3 Kent's Com. 185.

2. Burrill's Law Dict. In ecclesiastical law, a detailed statement or in-

ventory of the temporal possessions of a church.

3. *Murphy v. Ramsey*, 114 U.S. 15, 44. It was held in *Boyd v. Thayer*, 143

essary consequence, from the right of the *United States* to acquire and hold additional domain,<sup>1</sup> and may be exercised either by the creation of a local government with delegated authority to legislate for the territory, or by the passage of laws directly by Congress, without the intervention of such a government.<sup>2</sup>

The theory upon which Congress has proceeded is, that, in the exercise of its undoubted right to govern, it deems it unwise, and inconsistent with local self-government, to enact municipal laws for the territories, and has therefore erected temporary governments therein, and delegated to them authority to enact such laws as may be convenient or expedient.<sup>3</sup> The bodies politic thus created are not sovereignties, but creatures of federal power, authorized to exist for their own convenience, and subordinate to the authority of the federal government.<sup>4</sup> Their relation to the federal government is much the same as that which counties bear to their respective states, and Congress may legislate for them as a state does for its municipal organizations.<sup>5</sup>

U. S. 135, that it was within the power of Congress to effect a collective naturalization on the admission of a state into the Union, and that this was done in the case of *Nebraska*. In this case the decision of the supreme court of *Nebraska* in *State v. Boyd*, 31 Neb. 682, was reversed.

1. *Scott v. Sandford*, 19 How. (U. S.) 393; Paschal's Annotated Const. of the U. S. (3d ed.), p. 238, note 231 *et seq.*; *Nelson v. U. S.*, 30 Fed. Rep. 115; Essays and Speeches of Jeremiah S. Black, p. 607. The territories are not organized under the federal constitution, and derive no part of their legislative or judicial power from that fundamental charter, but are solely and exclusively the creatures of Congress. *Benner v. Porter*, 9 How. (U. S.) 242.

2. *The Panama, Deady* (U. S.) 31; 1 Oregon 423. See the government of the territories considered in the following authorities: Cooley's Prin. Const. Law, p. 166; Story on the Const. (4th ed. by Cooley), §§ 1322-1330; Paschal's Annotated Const. of the U. S. (3d ed.), p. 454, note, 473; 2 Cooley's Bl. Com. (3d ed.), pp. 473-476; Walker's Am. Law (9th ed.), p. 43; 1 Kent's Com. (11th ed.), p. 384; Anderson's L. Dict., p. 1024 *et seq.*; Von Holst's Const. Law 175, 184, note; *Clinton v. Englebrecht*, 13 Wall. (U. S.) 441; *Deitz v. Central City*, 1 Colo. 326; Bryce, The Am. Commonwealth, vol. 1, ch. 47, pp. 552-560.

3. *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434; *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648, 655. Such dele-

gated power must be exercised in strict conformity with the terms in which it is delegated. *Murrin v. Converse* (Wyoming, 1870), 2 Chic. Leg. N. 113.

4. *Territory v. Lee*, 2 Mont. 129-136; 13 Am. Law Reg. 487; 6 Mining Rep. (Morrison) 248; *Snow v. U. S.*, 18 Wall. (U. S.) 317; Bliss on Sovereignty, ch. 11, p. 167. None of the powers of sovereignty exist in the people of a territory. The powers conferred on them may at any time be withdrawn or modified by the federal government. *Murrin v. Converse* (Wyoming, 1870), 2 Chic. Leg. N. 113; *Howe v. Gallagher* (Wyoming, 1871), 3 Chic. Leg. N. 251; *U. S. v. Nelson*, 29 Fed. Rep. 205.

If, technically speaking, there is no sovereignty in a territory of the *United States*, but that of the *United States* itself, then crimes committed therein are, correctly speaking, committed against the government and dignity of the *United States*; hence, indictments for the same should be in the name of the *United States*, and the attorney for the *United States* would be the proper officer to prosecute them. But the practice is otherwise in all the organized territories, and for crimes committed therein against the territory, all indictments and writs run in the name of the territory and are prosecuted by the local prosecuting attorney and the territorial attorney-general, as crimes committed against the territorial laws. See this query raised by Mr. Justice Bradley in *Snow v. U. S.*, 18 Wall. (U. S.) 321.

5. *First National Bank v. Yankton*

**II. LAWS OF CONGRESS APPLICABLE TO.**—When the organic act of a territory provides that “the constitution and all laws of the *United States* which are not locally inapplicable, shall have the same force and effect”<sup>1</sup> within the territories as elsewhere within the *United States*, the duty is devolved upon the courts, when the question arises, to determine what laws are applicable and what are not.<sup>2</sup>

In determining this question, courts are not bound by any construction which the administrative department of the government, in the discharge of its duties, may have given to such provision.<sup>3</sup> Whenever Congress shall determine to enact municipal laws for the government of the territories, the intention that such laws shall operate therein, will be clearly expressed.<sup>4</sup>

Where the term “state” is used in an act of Congress, rather as a geographical expression than a political one, it is held that a territory, being not only a distinct political society, but also a defined and recognized division of the Republic, is within the meaning and intent of the act.<sup>5</sup>

A law of Congress, when applicable to the territories, has as full force and effect therein as if enacted by the territorial legislature; and it is beyond the power of the territorial legislature to annul or in any manner change, alter, repeal, or otherwise modify,

Co., 101 U. S. 133; *U. S. v. Church of Jesus Christ*, 3 Utah 361; *Territory v. Daniels* (Utah, 1889), 22 Pac. Rep. 160.

1. U. S. Rev. Stat., § 1891.

2. The following federal laws have been held “not locally inapplicable:” The provisions of the National Banking Act, *Silver Bow Co. v. Davis*, 6 Mont. 311; the admiralty and maritime laws of the *United States*, *Phelps v. Panama*, 1 Wash. Ter. 529; and the extradition laws of the *United States*, *Speer on Extradition*, p. 302. See also *Kingen v. Kelley*, 3 Wyoming 566; 28 Pac. Rep. 36.

The following laws have been held “locally inapplicable:” The act of Congress defining the jurisdiction of *United States* courts in cases of contempt, *Territory v. Murray*, 7 Mont. 251; the act of Congress relating to drawing jurors in courts of the *United States*, *U. S. v. Beebe*, 2 Dakota 298; the act of Congress providing for impaneling grand juries in *United States* courts, and prescribing the number of which they shall consist, *Reynolds v. U. S.*, 98 U. S. 153; the act of Congress providing that in the *United States* courts no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, *Good v. Martin*, 95 U. S. 98.

In short, all acts of Congress regulating the proceedings in the *United*

*States* courts are, in truth and in fact, “locally inapplicable” to the courts of a territory. *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 654. It has also been held that cl. 17, § 8, art. 1, of the constitution of the *United States*, providing that Congress shall exercise exclusive legislation over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, is inapplicable to the territories. *Reynolds v. People*, 1 Colo. 179. See 2 Story on the Const. (4th ed. by Cooley), § 1224.

It was said in *McKennon v. Winn* (Okl. 1893), 33 Pac. Rep. 582, that the common law obtained in Oklahoma at the time of its first settlement and until the adoption of the organic act.

3. *Lownsdale v. Portland*, *Deady* (U. S.) 11.

4. *Franklin v. U. S.*, 1 Colo. 35, 42.

5. *The Panama*, *Deady* (U. S.) 33; *In re Bryant*, *Deady* (U. S.) 121; *Watson v. Brooks*, 8 Sawy. (U. S.) 316, 321; 13 Fed. Rep. 540; *The Ullock*, 9 Sawy. (U. S.) 642; 19 Fed. Rep. 207. But see *contra*, *Smith v. U. S.*, 1 Wash. Ter. 268.

A territory is not a state in the sense that its citizens may sue in the federal courts. *Darst v. Peoria*, 13 Fed. Rep. 561, and cases cited p. 564.

a law of Congress. Such a law is supreme and becomes part of the organic law of the territory.<sup>1</sup>

**III. LEGISLATIVE POWER OF—1. Power Stated.**—The legislative power in each territory is vested in a governor and legislative assembly,<sup>2</sup> and “extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the *United States*.”<sup>3</sup> What are “rightful subjects of legislation,” must be determined by an examination of the subjects upon which legislatures are in the practice of acting, with the consent and approval of the people they represent.<sup>4</sup>

The organic act under which a territory is organized, takes, as to the territory, the place taken by a constitution, as the fundamental law of a state, and an act of the territorial legislative assembly derives its legal force and validity from such organic act.<sup>5</sup> All territorial enactments, inconsistent with the constitution of the *United States*, the organic act, or laws of Congress, are null and void.<sup>6</sup>

The express approval by Congress of every legislative act is not necessary to its legality, for, until disapproved or annulled, it is presumed to be acquiesced in by Congress, and therefore is operative.<sup>7</sup> “Action by Congress in annulling territorial statutes is rare. . . . The usual way of declaring a territorial statute which is inconsistent with the higher law of Congress, inoperative, is through the courts, just as in the states, similar enactments would be adjudged to be unconstitutional.”<sup>8</sup>

1. *Hill v. Territory*, 2 Wash. Ter. 150; *Ducheneau v. House* (Utah, 1886), 10 Pac. Rep. 839.

2. U. S. Rev. Stat., § 1846. The governor is a component branch of the legislative department, to the extent that he is empowered to approve or veto measures. U. S. Rev. Stat., § 1842.

In estimating the time allowed the governor to approve or veto a bill, the day on which it is presented to him for consideration should be excluded and the last day included. 9 Opinions Atty's Gen'l (Jeremiah S. Black), p. 131; *Beaudean v. Cape Girardeau*, 71 Mo. 393; *Price v. Whitman*, 8 Cal. 412; *Iron Mountain Co. v. Haight*, 39 Cal. 540.

3. U. S. Rev. Stat., § 1851.

4. *Maynard v. Hill*, 125 U. S. 204, *aff'd* 2 Wash. 326; *The Panama, Deady* (U. S.) 31; 1 Oregon 418.

The question in *Maynard v. Hill*, 125 U. S. 204; 2 Wash. 326, was as to the legality of a territorial legislative divorce, and it was upheld on the ground that it was a “rightful subject of legislation,” though see the same question decided *contra*, in *Re Higbee*, 4 Utah 19. Congress, however, has put

an end to this practice, by prohibiting territorial legislatures from granting divorces. U. S. Act July 30th, 1886.

It was held in *Alger v. Hill*, 2 Wash. 344, that the territorial legislature of Washington had power to grant a charter to the city of Seattle, this not being a private charter nor an especial privilege within the inhibition of the *United States Revised Statutes*, section 1889.

5. *National Bank v. Yankton Co.*, 101 U. S. 133; *Ferris v. Higley*, 20 Wall. (U. S.) 380; *In re Atty. Gen'l*, 2 N. Mex. 58; *Treadway v. Schnauber*, 1 Dakota 236.

6. *Ferris v. Higley*, 20 Wall. (U. S.) 380; *Godbe v. Salt Lake City*, 1 Utah 75.

7. *Miners' Bank v. Iowa*, 12 How. (U. S.) 8; *Atlantic, etc., R. Co. v. Lesueur* (Arizona, 1888), 37 Am. & Eng. R. Cas. 368; *Territory v. Doty*, 1 Pinn. (Wis.) 396; *Sperling v. Calfee*, 7 Mont. 526.

8. *In re Atty. Gen'l*, 2 N. Mex. 58; *People v. Clayton*, 4 Utah 221; *Williams v. Clayton* (Utah, 1889), 21 Pac. Rep. 398. But in passing upon the validity of laws, the courts cannot re-

**2. Restraints Upon.**—Usually, all restrictions upon the powers of territorial legislation, are found in the organic laws creating the territory, or in acts of Congress supplemental thereto.<sup>1</sup> While it is true that the constitution of the *United States* operates on the federal government alone, and not upon the states,<sup>2</sup> yet, as the territorial governments are agencies of the federal government, the constitution and bill of rights thereto apply to them. Congress, therefore, has rightfully prescribed the limitation upon territorial legislation in enacting that it must not be "inconsistent with the constitution" and laws of the *United States*.<sup>3</sup>

*a. DUE PROCESS OF LAW.*—A territorial legislature cannot deprive any person of life, liberty, or property, without due process of law.<sup>4</sup>

*b. TRIAL BY JURY.*—The right of trial by jury cannot be denied any person or corporation by a territorial legislature "in cases cognizable by the common law,"<sup>5</sup> or in "suits at common law," where the amount involved exceeds twenty dollars.<sup>6</sup>

*c. CRIMINAL PROSECUTIONS.*—A territorial legislature cannot provide for the prosecution of "capital or otherwise infamous crimes"<sup>7</sup> by information.<sup>8</sup> Neither can it confer upon justices of

view the action of the legislature with respect to its organization, or pass upon the election and qualification of its members. *Chavez v. Luna* (N. Mex. 1889), 21 Pac. Rep. 344; *Lyons v. Woods* (N. Mex. 1889), 21 Pac. Rep. 346.

Congress has neither the time nor inclination to study the different territorial enactments to ascertain their legality, and as there are territorial courts open and free to pronounce upon the legality of questionable laws, it has rarely exercised its power of annulling territorial statutes. See *Miners' Bank v. Iowa*, 12 How. (U. S.) 8. See remarks of Mr. Justice Miller on this point in *Clayton v. People*, 132 U. S. 632.

1. As in U. S. Act July 30th, 1886, forbidding territorial legislatures from passing certain local or special laws.

2. *Spies v. Illinois*, 123 U. S. 131, and cases cited p. 166.

3. U. S. Rev. Stat., § 1851.

4. As providing for the seizure and sale of property without notice to the owner thereof, see *Chauvin v. Valiton*, 8 Mont. 451; on imposing a liability upon all railroad corporations causing the death of any live stock, *Jensen v. Union Pac. R. Co.*, 6 Utah 253; *Cateril v. Union Pac. R. Co.*, 2 Idaho 540. See also *Bielenberg v. Montana Union R. Co.*, 8 Mont. 271; *Graves v. Northern Pac. R. Co.*, 5 Mont. 556; 51 Am. Rep. 81.

But a statute providing that "when a person shall be arrested for any criminal offense, his real estate and mining claims shall be liable for the payment of any judgment imposing any fine or costs upon such person" and that "such judgment shall be a lien upon such real estate or mining claim from the time of such arrest," is held not unconstitutional as incumbering the property without due process of law. *Silver Bow Co. v. Strumbaugh*, 9 Mont. 81.

5. Thus, where a statute of *Idaho* Territory provided that actions to try title to office should be heard and determined by a judge at chambers without a jury, it was held void. *People v. Havird*, 2 Idaho 498.

6. *Dacres v. Oregon R., etc., Co.*, 1 Wash. 525; *Thomas v. Hilton*, 3 Wash. 365; *Graves v. Northern Pac. R. Co.*, 5 Mont. 556; 51 Am. Rep. 81. But an attachment proceeding is in no sense a "suit at common law," and a jury trial cannot be demanded as matter of right. *Wearne v. France*, 3 Wyoming 273.

7. See the term "infamous crime" defined in *Ex p. Wilson*, 114 U. S. 422; and *Mackin v. U. S.*, 117 U. S. 348. That a territorial legislature may remit a sentence in a criminal case, see *People v. Stewart*, 1 Idaho 546.

8. *Territory v. Blomberg* (Arizona, 1886), 11 Pac. Rep. 671.

Selling by sample without a license,

the peace jurisdiction to try and punish such offenses.<sup>1</sup> In the trial of all "capital crimes," a jury of twelve men is not a privilege which can be waived, but a right which must be demanded, and a judgment pronounced upon any verdict rendered by a jury of less than twelve men is a nullity.<sup>2</sup>

d. THE PUBLIC DOMAIN.—Territorial legislatures are inhibited from passing any law "interfering with the primary disposal of the soil."<sup>3</sup> The government has a perfect title to the public land and an absolute and unqualified right of disposal; and a territory cannot in any manner modify or affect the right which the government has to the primary disposal of the public domain.<sup>4</sup>

e. TAXATION OF FEDERAL PROPERTY.—The acts of Congress prohibit the territories from "imposing any tax upon the property of the *United States*."<sup>5</sup> The reason for such a prohibition is apparent; if a territory possessed this authority, it could cripple and wholly defeat the operations of the federal government.<sup>6</sup>

f. IMMUNITY FROM TAXATION.—Again, "the lands or property of non-residents shall not be taxed higher than the lands or property of residents."<sup>7</sup> This is an application of the constitutional guaranty that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,"<sup>8</sup> and is the source of the doctrine announced by the federal Supreme Court, viz.: that a state cannot impose higher burdens by

is not an "infamous crime," and need not be prosecuted by indictment. *Territory v. Farnsworth*, 5 Mont. 303.

1. *People v. Sponsler*, 1 Dakota 289.

2. *Territory v. Ah Wah*, 4 Mont. 149; 47 Am. Rep. 341; 4 Am. Cr. Rep. 574. See further, article entitled "Waiver of Constitutional Rights in Criminal Cases," 6 *Crim. Law Magazine*, 182, 183 *et seq.*, and "Waiver of Full Jury in Criminal Cases," 12 *Crim. Law Magazine* 12.

3. U. S. Rev. Stat., § 1851.

4. *Cooley's Const. Lim.* (5th ed.) 650; *Lewis on Eminent Domain*, § 237; *Territory v. Lee*, 2 Mont. 130; 13 Am. L. Reg. 487; 6 *Morrison's Min. Rep.* 248. For this reason the Statute of Limitations cannot run against a mining claim until a patent thereto has been issued. *King v. Thomas*, 6 Mont. 409. Mining regulations do not interfere "with the primary disposal of the soil." *O'Donnell v. Glenn*, 8 Mont. 248. See *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, 99; *Vansickle v. Haines*, 7 Nev. 278; *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Spaulding on Public Lands*, ch. 1, pp. 1-8. Public lands, the property of the *United States*, are not taxable by the territory. 1 *Desty on Taxation*, p. 35.

But it is held in *Arizona*, that the territorial legislature may exercise the right of eminent domain. *Oury v. Goodwin* (*Arizona*, 1891), 26 *Pac. Rep.* 376.

5. U. S. Rev. Stat., § 1851.

6. *Cooley's Const. Lim.* (5th ed.) 595; *Cooley on Taxation* (2d ed.), p. 82, pl. 3, *et seq.*; *Tiedeman's Lim. Police Power*, p. 636; *Van Brocklin v. Tennessee*, 117 U. S. 151.

A post trader on an Indian reservation is an agent of the federal government, and a territorial legislature cannot tax his stock in trade. *Fremont County v. Moore*, 3 *Wyoming* 200; *Moore v. Sweetwater Co.*, 2 *Wyoming* 8.

But it is held by the supreme court of *Arizona*, that the taxation by a territory of the franchise of a corporation, incorporated by act of Congress, is not unconstitutional as the taxation of a federal agency, nor in conflict with the constitutional grant to Congress of the power to regulate commerce among the several states. *Atlantic, etc., R. Co. v. Lesueur* (*Arizona*, 1888), 37 *Am. & Eng. R. Cas.* 368.

7. U. S. Rev. Stat., § 1851.

8. See the Constitution of the *United States*, art. 4, § 2, cl. 1.

way of taxation upon the business or property of citizens of other states, than are imposed upon the corresponding business or property of its own citizens.<sup>1</sup>

g. LIMITATION OF THE RIGHT OF ACQUISITION BY CORPORATIONS.—The right of corporations or associations for religious and charitable purposes, to hold real estate in any territory, is limited by the act of Congress to fifty thousand dollars,<sup>2</sup> and all property acquired in excess is to be forfeited to the *United States* under proceedings authorized to be instituted for that purpose.<sup>3</sup>

h. RIGHT OF SUFFRAGE.—The right of suffrage in the territories is conferred by Congress on all citizens of the *United States*,<sup>4</sup> and those who have declared their intention to become such.<sup>5</sup> But the legislative assembly may regulate the exercise of the right, subject to the restrictions and limitations imposed by the constitution of the *United States*, the laws of Congress, and the organic act. The political rights of the inhabitants of the territories are their franchises which they hold as privileges, in the legislative discretion of Congress.<sup>6</sup> Congress may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient, as in the act of March 22d, 1882, Congress, in the exercise of its power, enacted what is commonly known as the "Edmunds Act," the eighth section of which is alike applicable to all the territories, disfranchising bigamists and polygamists.<sup>7</sup> In 1885, the legislative assembly of *Idaho Territory* enacted what is known in that territory as the "Test-oath" statute, imposing disqualifications additional to those prescribed by Congress. The supreme court of that territory held, and the federal Supreme Court affirmed, the territorial statute to be valid.<sup>8</sup>

Again, before Congress regulated the right of suffrage in the territories, there existed a concurrent power of Congress and the territorial legislature upon that subject. This concurrent power is similar in its nature to the concurrent powers of Con-

1. Cooley's Const. Lim. (5th ed.), p. 602; Cooley on Taxation (2d ed.), p. 99.

2. U. S. Rev. Stat., § 1890.

3. U. S. Act March 3, 1887; U. S. v. Church of Jesus Christ, 5 Utah 361.

4. U. S. Rev. Stat., § 1860. The question of who are "citizens of the *United States*" capable of exercising the right of suffrage in the territories has been judicially declared to be only male inhabitants. *Bloomer v. Todd*, 3 Wash. 599. See *Spencer v. Board of Registration*, 1 McArthur (D. C.) 169; 29 Am. Rep. 582, note on p. 586.

5. The law limits naturalization to persons of the white or African race; therefore, a native inhabitant of the *Hawaiian Islands* is incapable of being

naturalized as a citizen. *In re Kana-ka Nian*, 6 Utah 259.

6. The above clause of the text is taken from the opinion of the court in *Murphy v. Ramsey*, 114 U. S. 45, the court saying that the doctrine was fully and forcibly declared in *National Bank v. Yankton County*, 101 U. S. 129, and citing also *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511; *U. S. v. Gratiot*, 14 Pet. (U. S.) 526; *Cross v. Harrison*, 16 How. (U. S.) 164; *Dredscott v. Sandford*, 19 How. (U. S.) 393.

7. *Murphy v. Ramsey*, 114 U. S. 15.

8. *Innis v. Bolton*, 2 Idaho 407; *Hayward v. Bolton*, 2 Idaho 417; *Wooley v. Watkins*, 2 Idaho 555; *Davis v. Beason*, 133 U. S. 333. See note by the

gress and the states upon many subjects, and when Congress exercised a power in which for years it had concurrent jurisdiction, the concurrent power in the inferior legislature over that subject ceased.<sup>1</sup>

i. DELEGATION OF POWERS.—It is an elementary principle of constitutional law that the powers confided to one department of the government cannot be exercised by another.<sup>2</sup> When the organic law of a territory provides that the governor, "by and with the advice and consent of the legislative council,"<sup>3</sup> shall appoint territorial officers, that authority cannot be delegated by the legislature to another body, and the governor cannot be divested of his prerogative.<sup>4</sup> If the legislature could take from him this power, and provide for the selection of such officers by any other mode, it could take from him every prerogative he possessed. Congress having pointed out the manner of filling the territorial offices, the legislature has no power to provide another and different mode.<sup>5</sup>

The legislative assembly of each territory may, however, under the acts of Congress, regulate the manner of filling "all township, district, and county offices."<sup>6</sup> These offices are entirely the objects of legislative creation, and a legislative assembly may at any time abolish such an office, or it may increase or diminish the duties and compensation of the occupants of such offices, or it may declare any such office vacant. The exercise of any of these powers by a legislature, is not in violation of the constitutional prohibition impairing the obligation of contracts, nor within the meaning of the fifth amendment, providing that no one shall be "deprived of . . . property without due process of law."<sup>7</sup>

j. LEGISLATIVE SESSIONS: RECORDS OF.—The sessions of the several legislative assemblies of the territories are limited by act of Congress to sixty days.<sup>8</sup> After the expiration of this limita-

author of this article in 30 Cent. L. J. 365.

1. *Houston v. Moore*, 5 Wheat. (U. S.) 24; concurring opinion of Mr. Justice Story, p. 68. See observations of Chancellor Kent in 1 Kent's Com. 389, 391; Mr. Justice Story in *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 618; Chief Justice Taney in *Holmes v. Jenkinson*, 14 Pet. (U. S.) 578.

2. It is not a delegation of legislative power to provide for the selection of a county seat, by vote of the people of the county. *Territory v. Mohave Co.* (Arizona, 1887), 12 Pac. Rep. 730.

3. U. S. Rev. Stat., § 1857.

4. *Taylor v. Stevenson* (Idaho, 1886), 9 Pac. Rep. 644; *Territory v. Rodgers*, 1 Mont. 258; *Murrin v. Converse* (Wyoming, 1870), 2 Chic. Leg. N. 113. Nor can any authority conferred upon the governor by the organic act be

limited or restricted by the legislature, *e. g.*, the pardoning power. 16 Opinions Atty.'s Gen'l (Devens), p. 27. See *Winters v. Hughes*, 3 Utah 449; *Territory v. Scott*, 3 Dakota 357.

5. *People v. Clayton*, 4 Utah 449; *People v. Jack*, 4 Utah 438; *Duncan v. McAllister*, 1 Utah 81.

6. U. S. Rev. Stat., § 1857; *Territory v. Clayton* (Utah, 1888), 18 Pac. Rep. 632.

7. *People v. Van Gaskin*, 5 Mont. 365.

Upon the property in, abolition of, and diminishing the salaries attached to, offices, see the authorities collected in Bailey's *Conflict of Judicial Decisions*, pp. 189-192.

8. U. S. Act Dec. 23, 1880. That is, sixty legislative days—working days, exclusive of Sundays, holidays, and days of intermediate adjournment, and



tion, a legislature has no power to pass a bill, or the governor to approve one. The records kept by the legislative assembly are authorized by act of Congress to be deposited in the territorial secretary's office.<sup>1</sup> They are the highest evidence of the due passage and approval of all legislative enactments,<sup>2</sup> and parol evidence is inadmissible to vary or contradict them.<sup>3</sup>

*k. ATTACHÉS OF: COMPENSATION.*—The number of officers and *attachés* of a territorial legislative assembly is determined by the laws of the *United States*, and the appropriation for their payment is defrayed by Congress. A territorial legislature cannot "in any instance, or under any pretext, exceed the amount appropriated by Congress for its annual expenses."<sup>4</sup>

*l. SPECIAL SESSIONS.*—An extraordinary or special session of a territorial legislature cannot be convened "until the reasons for the same have been presented to the president of the *United States*, and his approval thereof has been duly given."<sup>5</sup>

**3. Proper Subjects of—***a. SCOPE OF POWER.*—A territorial legislature, in pursuance of its authority given by Congress to legislate upon all "rightful subjects of legislation," has the undoubted right, as occasions arise, to create new offenses,<sup>6</sup> new subjects for

not sixty consecutive days. *Cheyney v. Smith* (Arizona, 1890), 23 Pac. Rep. 680.

1. U. S. Rev. Stat., § 1844.

2. The secretary of the territory cannot change, modify, or expunge from the records which he has received from the proper source, anything therein contained. Neither has he the right to assume judicial functions, and decide upon evidence what should constitute the proceedings of the legislature. *Clough v. Curtis*, 2 Idaho 488; 22 Pac. Rep. 8; *aff'd* 134 U. S. 361.

3. *Territory v. Clayton* (Utah, 1888), 18 Pac. Rep. 629; *State v. Smith*, 44 Ohio St. 348; *Atty. Gen'l v. Rice*, 64 Mich. 385; 26 Am. L. Reg. 299, and note p. 304; *Clough v. Curtis*, 2 Idaho 488; *Burkhart v. Reed*, 2 Idaho 470; *aff'd* 134 U. S. 361. See 13 Cent. L. J. 181.

4. U. S. Rev. Stat., § 1888; *Stevenson v. Moody*, 2 Idaho 239; *Osborn v. Clark*, 1 Arizona 397; *Howe v. Gallagher* (Wyoming, 1871), 3 Chic. Leg. N. 251.

Salaried public officers are within the control of a territorial legislature, in the absence of anything to the contrary in the organic act or a law of Congress; and such control extends to the abolition of the office, the reduction of the term or salary, or the im-

position of new duties. *Lee v. Uinta County*, 3 Wyoming 52.

5. U. S. Act June 22, 1874. Prior to the passage of this act, the power of calling the legislature together in extra session was given to the governors of *Washington, Idaho, and Montana*. As to the other territories, special sessions of their legislatures could not be held, unless authorized by act of Congress. 13 Opinions Atty. Gen'l (Akerman), p. 408.

In *Treadway v. Schnauber*, 1 Dakota 247, it was held that Congress could not validate an act of the territorial legislature, authorizing municipal aid to railroads, passed at an extra session held without authority of law.

6. *Bray v. U. S.*, 1 N. Mex. 1; *Garcia v. Territory*, 1 N. Mex. 415, 417. The constitutional prohibition that cruel and unusual punishments shall not be inflicted, is applicable to territorial legislatures, in defining offenses and prescribing punishments therefor. *Cooley Prin. Const. Law* 36; 2 Story on the Const. (4th ed. by Cooley), §§ 1903-1904. See *Garcia v. Territory*, 1 N. Mex. 415, where it was held by the supreme court of *New Mexico* that whipping was not a "cruel and unusual punishment" within the meaning of the eighth amendment. See, to this point, *Tiedeman's Lim. Police Power*, pp. 23-24, note 3.

judicial investigation, and even ways and means to enforce the authority of the courts and officers.<sup>1</sup>

b. POLICE POWER.—In virtue of the same authority, a territorial legislature may rightfully regulate the general police power of the territory.<sup>2</sup>

c. INCORPORATION — (1) *Municipal*.—A territorial legislature may, by general incorporation acts, create municipal corporations and confer upon them the usual franchises.<sup>3</sup>

(2) *Private*.—The legislative assemblies of the several territories are forbidden by Congress from granting private charters or especial privileges,<sup>4</sup> but they may, by general incorporation laws, permit persons to associate together as bodies corporate, for the purpose of engaging in mining, manufacturing, and other industrial pursuits;<sup>5</sup> and also for conducting the business of insurance, banks of discount and deposit, though not of issue, trust and guarantee associations, and for the construction and operation of

1. *Wilkerson v. Utah*, 99 U. S. 130; *Beall v. New Mexico*, 16 Wall. (U. S.) 535; *Ducheneau v. House* (Utah, 1886), 10 Pac. Rep. 842; *Spear on the Federal Judiciary*, p. 689. Whenever the public convenience or necessity requires it, a territorial legislature, unless prohibited by the organic act, may diminish or enlarge the area of a county. *Laramie Co. v. Albany Co.*, 92 U. S. 307. Regulating the allowance of costs, or the refusal thereof in judicial proceedings, is a rightful subject of legislation. *St. Paul F. & M. Ins. Co. v. Coleman*, 6 Dakota 458. See further what are "rightful subjects of legislation," *Ex p. Larkins*, 1 Okl. 53; *Downes v. Parshall*, 3 Wyoming 425.

In *Oury v. Goodwin* (Arizona, 1891), 26 Pac. Rep. 376, it was held that under this power, the territory might exercise the right of eminent domain.

It was held in *Noble County v. Hamline University*, 46 Minn. 316, that the territorial legislature had the power to exempt from taxation the property of an educational institution, and to bind the future state thereby. The court based this decision upon *First Division, etc., R. Co. v. Parcher*, 14 Minn. 297.

2. As bylaws restricting and regulating "the sale of articles deemed injurious to the health or morals of the community," *Territory v. Guyott*, 9 Mont. 46; laws regulating the practice of medicine, *Fox v. Territory*, 2 Wash. Ter. 297; licensing and regulating the liquor traffic, *Territory v. Connell* (Arizona), 3 L. R. A. 355; 18 Am. & Eng. Corp. Cas. 611; *Territory v. O'Connor*, 5 Dakota 397; *Thornton v.*

*Territory*, 3 Wash. 482; regulation of pilots and pilotage, *The Panama, Deady* (U. S.) 31; regulating the killing of game, *Hayes v. Territory*, 2 Wash. Ter. 286.

3. *Rogers v. Burlington*, 3 Wall. (U. S.) 662; *Wagner v. Harris*, 1 Wyoming 197; *Deitz v. Central City*, 1 Colo. 323; *Elk Point v. Vaughn*, 1 Dakota 113; *People v. Butte*, 4 Mont. 207; 47 Am. Rep. 346; *Dillon on Municipal Corporations* (3d ed.), § 38, p. 54; *State v. Young*, 3 Kan. 445.

Taxes levied for municipal purposes upon lands or their occupants located beyond the range of municipal benefits, are void. *Territory v. Daniels* (Utah, 1889), 22 Pac. Rep. 161.

4. U. S. Rev. Stat., § 1889. An act of a territorial assembly, exempting the property of railway corporations from taxation, for a number of years, is not repugnant to the act of Congress prohibiting the granting of "especial privileges." *Santa Fe Co. v. New Mexico, etc., R. Co.*, 3 N. Mex. 116. Neither is a game law, forbidding all persons from hunting at certain seasons within specified counties, inconsistent with the inhibition that "especial privileges" shall not be granted. *Hayes v. Territory*, 2 Wash. Ter. 286.

5. U. S. Rev. Stat., § 1889. As the incorporation of mercantile corporations, *Carver Mercantile Co. v. Hulme*, 7 Mont. 566; 22 Am. & Eng. Corp. Cas. 580; corporations for carrying on the express business, *Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441; 23 Fed. Rep. 469; 18 Am. & Eng. R. Cas. 440; also corporations for the

railroads, wagon roads,<sup>1</sup> irrigating ditches, and the colonization and improvement of lands in connection therewith, and for colleges, seminaries, churches,<sup>2</sup> libraries, or any other benevolent, charitable, or scientific association.<sup>3</sup>

d. TAXATION.—(See also TAXATION, vol. 25, p. 5).—It is competent for a territorial legislature to levy taxes, for all local purposes, upon property subject to taxation within its jurisdiction.<sup>4</sup>

(1) *Public Lands*.—Public lands, the property of the federal government, are not taxable.<sup>5</sup> But they may become private property, and liable to taxation after they have been entered at the land office and a certificate of entry obtained therefor,<sup>6</sup> and if the taxes thereon remain unpaid, they may be sold like other lands, even though no patent may have issued thereto.<sup>7</sup> So a territorial legislature may tax equitable interests and improvements held or owned by individuals in government lands.<sup>8</sup> But a pretended sale of the lands for such taxes would be void.<sup>9</sup>

(2) *Railroads*.—Railroad land grants are not taxable by the territories until they are patented to the company, or until they are earned by making the required payment into the treasury.<sup>10</sup> But the property of the company is subject to territorial and county taxation.<sup>11</sup>

purpose of encouraging immigration, *Cowell v. Colorado Springs Co.*, 3 Colo. 82.

1. 16 Opinions Atty.'s Gen'l (Devens) 114.

2. A territorial legislature cannot incorporate a religious body with extraordinary rights and privileges, and the granting and acceptance of such a charter confers no vested rights. *U. S. v. Church of Jesus Christ*, 5 Utah 361.

3. *U. S. Rev. Stat.*, § 1889.

4. *Cooley on Taxation* (2d ed.), p. 61; *Cooley's Prin. Const. Law* 37. Where Congress has limited the exercise of this power by a provision that property shall be taxed without unjust discrimination, a tax imposed on personal property in an unorganized county, leaving the real property untaxed, for the benefit of an organized county contiguous thereto, is void. *Ferris v. Vannier*, 6 Dakota 186. Cattle on an Indian reservation belonging to white men, have been held subject to taxation. *Torrey v. Baldwin*, 3 Wyoming 430.

5. 1 *Desty on Taxation*, p. 35.

6. *Farnham v. Sherry*, 71 Wis. 568. See the relative value of the patent and "certificate of entry" discussed in *Tiedeman on Real Property*, §§ 745, 746.

7. *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210. But see *Tiedeman on Real Property*, § 746.

8. *Quivey v. Lawrence*, 1 Idaho 313;

*People v. Owyhee Min. Co.*, 1 Idaho 409. See *Cooley on Taxation* (2d ed.), p. 87, note 2; 1 *Desty on Taxation*, p. 39; *Black on Tax Titles*, § 129.

The ore from a mining claim is subject to taxation, even though the title to the mineral land may be in the *United States*. *Forbes v. Gracey*, 94 U. S. 762; 14 *Morrison's Min. Rep.* 183.

9. *Quivey v. Lawrence*, 1 Idaho 313; *Dixon v. Porter*, 23 Miss. 84; 2 *Blackwell on Tax Titles* (5th ed.), p. 764, § 816; *Black on Tax Titles*, § 129.

10. *Northern Pac. R. Co. v. Traill Co.*, 115 U. S. 600; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 17 *Am. & Eng. R. Cas.* 364.

11. *Oregon Short Line R. Co. v. Yeates* (Idaho, 1888), 33 *Am. & Eng. R. Cas.* 481; *Utah, etc., R. Co. v. Fisher*, 116 U. S. 28, *aff'd* (Idaho, 1884), 3 *Pac. Rep.* 3. See further, to the same point, *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5, *aff'd* *Union Pac. R. Co. v. Lincoln Co.*, 1 Dill. (U. S.) 314; *Santa Clara Co. v. Southern Pac. R. Co.*, 9 Sawy. (U. S.) 165; 18 *Fed. Rep.* 385; 13 *Am. & Eng. R. Cas.* 182; *aff'd* in 118 U. S. 394. A railroad track and right of way through an Indian reservation was held subject to territorial taxation, in *Persons, etc. v. Territory* (Arizona, 1891), 26 *Pac. Rep.* 310.

(3) *National Banks*—(See also NATIONAL BANKS, vol. 16, p. 143).—The capital stock of a national bank cannot, as such, be taxed by a territory. But the shares of stock in the bank, being the personal property of the individual stockholders, are liable to taxation.<sup>1</sup> The tax, however, must not be greater than that imposed on other "moneyed capital."<sup>2</sup> And where the assessment is required to be made "at the place where the bank is located," the domicile of the stockholders is immaterial.<sup>3</sup>

**IV. EXECUTIVE POWER OF—1. How Vested.**—The executive power in each territory is vested in a governor, appointed by the president, with the advice and consent of the Senate, who holds his office for four years, unless sooner removed.<sup>4</sup> In the absence or disability of the governor, the secretary of the territory executes all powers and performs all the duties of the governor.<sup>5</sup>

**2. Power of Appointment.**—Among the duties imposed upon the governor under the organic act of each territory, is that he shall nominate and commission<sup>6</sup> all "officers not otherwise provided for . . . by and with the advice and consent of the legislative council."<sup>7</sup> The act of Congress referred to, provides that all township, district, and county officers shall be elected or appointed in such manner as may be regulated by the legislative authority; and that the governor shall nominate, and, by and with the advice and consent of the legislative council, shall appoint all officers not therein otherwise provided for. The "officers not otherwise provided for" are, within the meaning of the act, territorial officers, and must be appointed by the governor as required,<sup>8</sup> and he cannot be divested of his prerogative by the legislature.<sup>9</sup> A person nominated by the governor to a territorial office, has no right thereto until the legislative council has confirmed the nomination.<sup>10</sup>

**3. Power to Fill Vacancies.**—If a vacancy is occasioned by "death or resignation," during the recess of the legislative council, the governor may fill the vacancy by granting a commission, "which shall expire at the end of the next session of the

1. *People v. Moore*, 1 Idaho 504; *Salt Lake City Bank v. Golding*, 2 Utah 1; *Cooley on Taxation* (2d ed.), 231; 1 *Desty on Taxation*, pp. 376, 377, 380; *Silver Bow Co. v. Davis*, 6 Mont. 306.

2. *Cook's Stock and Stockholders* (2d ed.), § 571.

3. 1 *Hare's Am. Const. Law* 330.

4. U. S. Rev. Stat., §§ 1841, 1877. Where an officer with a salary payable quarterly is appointed for four years "unless sooner removed," and a removal is made during a current quarter, he is not entitled to his salary to the end of the quarter. *U. S. v. Smith*, 5 Am. L. Reg. 269.

5. U. S. Rev. Stat., § 1843. The secretary of the territory, having a fixed

salary as such, is not entitled to claim in addition thereto, the salary of governor, during the absence of that officer. *U. S. v. Smith*, 5 Am. L. Reg. 269.

6. The governor cannot revoke a commission once regularly issued to an officer who is not removable at pleasure. *Ewing v. Thompson*, 43 Pa. St. 372.

7. U. S. Rev. Stat., §§ 1841-1857.

8. *Murrin v. Converse* (Wyoming, 1870), 2 Chic. Leg. N. 113.

9. *People v. Clayton*, 4 Utah 449; *aff'd* 132 U. S. 632; *Williams v. Clayton* (Utah, 1889), 21 Pac. Rep. 398; *Taylor v. Stevenson*, 2 Idaho 166; *Territory v. Rodgers*, 1 Mont. 258; *Duncan v. McAllister*, 1 Utah 81.

10. *Territory v. Rodgers*, 1 Mont. 258; *Duncan v. McAllister*, 1 Utah 81.

legislature."<sup>1</sup> The appointee, under such circumstances, continues in office until his term expires by limitation, and no longer; and if no person is commissioned to succeed him by "the end of the next session of the legislature," the incumbent does not "hold over," but the office becomes vacant.<sup>2</sup> There being no inherent power in the executive to fill a vacancy, except as provided by law, the governor in such case would be powerless to fill the vacancy.<sup>3</sup>

**4. Power of Removal.**—Another duty imposed upon a territorial executive under the acts of Congress is, that he "shall take care that the laws thereof be faithfully executed."<sup>4</sup> It has been contended that by virtue of this provision, the governor possesses, as a necessary legal adjunct and incident of the power of appointment, the power of removal.<sup>5</sup> But this principle is applicable only in those cases where the office is held at the pleasure of the appointing power, and the tenure is not fixed by law.<sup>6</sup>

In the other class of cases, where the law has attached to the office a tenure during which the incumbent may hold, the right to remove does not exist as an incident of the power to appoint.<sup>7</sup>

**5. Judicial Control of.**—It has been decided that the executive of a territory could be compelled by *mandamus* to perform ministerial acts.<sup>8</sup> "But the weight of authority is to the effect that courts have no jurisdiction to interfere with the official acts of the chief executive, no matter of what nature they may be."<sup>9</sup>

**V. JUDICIAL POWER OF—1. Power Defined.**—The judicial power in each territory is vested in a supreme court, which consists of a chief justice and generally two associate justices . . . appointed . . . "for four years, and until their successors are appointed and qualified."<sup>10</sup>

Each territory is divided into judicial districts, wherein district courts are authorized to be held by one of the justices of the supreme court, assigned to the district by order of the supreme court, and required by law to reside therein.<sup>11</sup>

1. U. S. Rev. Stat., § 1858.

2. *In re* Atty. Gen'l, 2 N. Mex. 62.

3. *In re* Atty. Gen'l, 2 N. Mex. 62; *Territory v. Rodgers*, 1 Mont. 252.

4. U. S. Rev. Stat., § 1841.

5. The power of removal does not include the power of suspension. *Gregory v. Mayor, etc.*, of N. Y., 113 N. Y. 416.

6. *Ex p. Hennen*, 13 Pet. (U. S.) 225; *Collins v. Tracy*, 36 Tex. 547; *In re Eaves*, 30 Fed. Rep. 23; *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672; *People v. Shear* (Cal. 1887), 15 Pac. Rep. 92. In such cases, the governor need not specify the causes of removal. *Keenan v. Perry*, 24 Tex. 253.

7. *People v. Jewett*, 6 Cal. 291; concurring opinion of Mr. Justice Rhodes

in *People v. Bissell*, 49 Cal. 412; *Territory v. Ashenfelter*, 4 N. Mex. 85.

8. *Chumasero v. Potts*, 2 Mont. 242.

9. See article entitled "Judicial Control of Public Officers," 24 Cent. Law Journal 172; *Bates v. Taylor*, 87 Tenn. 319; 3 L. R. A. 316; 28 Am. L. Reg. 341 and note; *Territorial Insane Asylum v. Wolfley* (Arizona, 1889), 22 Pac. Rep. 383. See also CONSTITUTIONAL LAW, vol. 3, p. 685. *Mandamus* will not lie against the secretary of a territory. *Clough v. Curtis*, 2 Idaho 488.

10. U. S. Rev. Stat., § 1864. Some territories, in virtue of a special act of Congress, have additional associate justices. See Gould and Tucker's notes to the *United States Revised Statutes*, pp. 465-466.

11. U. S. Rev. Stat., § 1865. Congress

The chambers of the district judge may be held while he is in attendance upon the bench of the supreme court, even though the place where the supreme court is in session is without the territorial limits of his district.<sup>1</sup>

The inferior courts of a territory are the probate courts and courts of justices of the peace.<sup>2</sup> Where Congress enumerates the courts in which the judicial power shall be vested, it is not competent for a territorial legislature to create any other judicial officers or vest judicial powers in any other tribunal.<sup>3</sup>

**2. Appointment and Removal of Territorial Judges.**—The justices of a territorial supreme court are appointed by the president, by and with the advice and consent of the Senate, and their tenure of office is "for four years, and until their successors are appointed and qualified."<sup>4</sup> This is understood to mean, "that the incumbent shall continue to hold the office after the expiration of his term, and until his successor is qualified."<sup>5</sup> But it is held by the court of claims, that territorial judges are subject to removal or suspension like other civil officers, a commission for a term of years giving no better legal right to the office than if it was at the pleasure of the appointing power.<sup>6</sup> The right of a person assuming to exercise the functions of a territorial supreme judge, should be tested by instituting a proceeding in the nature of a *quo warranto* in the name of the *United States*, and not in the name of the territory.<sup>7</sup> A territorial judge is not liable to impeachment

has the power to change districts or create new ones, but it cannot by such change divest the court of the jurisdiction which the territorial legislature has prescribed for territorial causes. *Murphy v. Murphy* (Dakota, 1885), 25 N. W. Rep. 806.

1. *Parker*, Petitioner, 131 U. S. 221. But he must not assume jurisdiction over matters concerning which, as a court, he would have no authority. *Pittsburgh, etc., R. Co. v. Hurd*, 17 Ohio St. 146, 147. See full explanation of the term "Judges' Chambers," in *Re Neagle*, 39 Fed. Rep. 855; 28 Am. L. Reg. 611.

2. U. S. Rev. Stat., § 1907. Where Congress provides that the inferior courts shall be such "as the legislative council may prescribe," a territorial statute creating "county courts" is valid. *Ex p. Lothrop*, 118 U. S. 113.

3. *Smith v. Odell*, 1 Pinn. (Wis.) 449. The legislature cannot confer judicial functions upon county commissioners. *Hedges v. Lewis Co.*, 4 Mont. 280; *Rupert v. Alturas County*, 2 Idaho 21; *Spencer v. Sully Co.* (Dakota, 1887), 33 N. W. Rep. 97.

But it has been held that a territorial legislature, in the incorporation of mu-

nicipal corporations, may create municipal courts for the enforcement of municipal regulations. *State v. Young*, 3 Kan. 445.

4. U. S. Rev. Stat., § 1864.

5. See 22 Cent. L. Jour. 73.

6. *Howard v. U. S.*, 22 Ct. of Cl. 305; *McAllister v. U. S.*, 22 Ct. of Cl. 318. The Supreme Court of the *United States* has sustained this holding. *McAllister v. U. S.*, 141 U. S. 174; *Wingard v. U. S.*, 141 U. S. 201; *Field, Gray and Brown, JJ., dissenting*. See the dissenting opinion, written by *Field, J.*, in *McAllister v. U. S.*, 141 U. S. 191; also the dissenting opinion of Mr. Justice *McLean* in *U. S. v. Guthrie*, 17 How. (U. S.) 284, and his observations therein, *approved* in *U. S. v. Avery*, *Deady* (U. S.) 208; also 22 Cent. L. J. 74; 21 Am. L. Rev. 148; 23 Am. L. Rev. 284; *Conkling's Treatise* (5th ed.), p. 292. For able arguments on the independent tenure of the judicial office and a denial of the right to remove a territorial judge, see 15 Am. L. Rec. 65; 23 Am. L. Rev. 781; 24 Am. L. Rev. 308; article by Judge *Brown* on "Judicial Independence."

7. *Nebraska v. Lockwood*, 3 Wall. (U. S.) 239. In this case, the court deny

and trial before the Senate of the *United States*, for such officer has repeatedly been declared to be merely a legislative officer, and not a civil officer, within the constitution of the *United States*.<sup>1</sup> It should be noticed, then, that these judges occupy an anomalous position, so far as being *legally amenable* to any authority is concerned.

**3. Kinds of Courts.**—Although the judges of the supreme court of a territory are appointed by the president under an act of Congress, yet the courts they are authorized to hold are not courts of the *United States*, within the meaning of the constitution.<sup>2</sup> They are legislative courts, and as the distinction between federal and state jurisdiction, under the constitution, has no foundation in territorial governments, no such distinction exists either in respect to the jurisdiction of their courts or the subjects committed to their cognizance.<sup>3</sup>

**4. Jurisdiction.**—*a. SUPREME.*—The supreme court of a territory is clothed with both original and appellate jurisdiction. Where its original jurisdiction is affirmatively conferred by the organic act,<sup>4</sup> such affirmative grant of original jurisdiction in particular cases, implies a negative upon its exercise in any other case. The supreme court of a territory, therefore, has no power to issue any writ as a court of original jurisdiction, except as such authority is conferred by Congress or is in aid of its appellate powers.<sup>5</sup> Moreover, the legislative assembly of a territory has no power to extend the affirmative grant of original jurisdiction beyond the limits of the organic act.<sup>6</sup>

*b. DISTRICT.*—The district court of each territory has two distinct jurisdictions. As a territorial court it administers the local law of the territorial government and is invested with plenary municipal jurisdiction. As invested with jurisdiction to administer the laws of the *United States*, it has all the authority of *United States* circuit and district courts, and a portion of each term is directed to be appropriated to the trial of such causes.<sup>7</sup> In cases

the authority of a territorial legislature to impeach a territorial judge; "for a conviction," the court say, "would be futile as to removal."

1. See 3 Opinions Atty's. Gen'l (Felix Grundy), p. 409.

2. *Clinton v. Englebrecht*, 13 Wall. (U. S.) 447; *Good v. Martin*, 95 U. S. 98; *Reynolds v. U. S.*, 98 U. S. 154; *U. S. v. Beebe*, 2 Dakota 292; *Houghtaling v. Ellis*, 1 Arizona 383; *U. S. v. Mays*, 1 Idaho 763; *U. S. v. Hailey*, 2 Idaho 26; *Territory v. Murray*, 7 Mont. 251. See *U. S. v. Haskins*, 3 Sawy. (U. S.) 272.

3. *Benner v. Porter*, 9 How. (U. S.) 242.

4. As in some territories Congress has conferred upon the supreme court

original power to grant writs of *habeas corpus*.

5. Where Congress provides that the jurisdiction, both original and appellate, "shall be limited by law," it has been held that in virtue of the organic act conferring upon the courts "chancery as well as common-law jurisdiction" (see U. S. Rev. Stat., §§ 1866, 1868), the grant of such "common-law jurisdiction" carries with it original jurisdiction in *mandamus*. *Chumasero v. Potts*, 2 Mont. 251.

6. *Territory v. Ortiz*, 1 N. Mex. 12; *Godbe v. Salt Lake City*, 1 Utah 68; *Shepperd v. Second Dist. Ct.*, 1 Utah 340.

7. U. S. Rev. Stat., § 1910; *Hornbuckle v. Toombs*, 18 Wall. (U. S.)

arising under the latter jurisdiction, the practice and method of proceeding is the same as in cases arising under the laws of the territory.<sup>1</sup>

District courts are also possessed of "chancery as well as common-law jurisdiction."<sup>2</sup> And they have the same jurisdiction in admiralty causes as is vested in the federal courts.<sup>3</sup>

c. INFERIOR.—The jurisdiction of the inferior courts of a territory is generally prescribed by Congress, and it is beyond the power of a territorial legislature to extend or modify it.<sup>4</sup>

5. Practice.—The practice, pleading, and forms and mode of proceeding in the territorial courts, subject to any regulations that Congress may deem expedient, are left to the action of the territorial legislatures,<sup>5</sup> and to regulations which may be adopted by the courts themselves.<sup>6</sup>

"Whenever Congress has proceeded to organize a government for any of the territories, it has merely instituted a system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation."<sup>7</sup>

656; *Ex p. Crow Dog*, 109 U. S. 560; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 17 Am. & Eng. R. Cas. 364; *U. S. v. Kuntze*, 2 Idaho 446; *U. S. v. Bisel*, 8 Mont. 20. Under U. S. Act March 3, 1885, an Indian is not subject to the criminal laws of the *United States*, but to the laws of the territory in which the offense is committed. *In re Gon-shay-ee*, 130 U. S. 343.

Where the act organizing a territory provides, in accordance with a treaty, that the lands in possession of an Indian tribe shall not be a part of such territory, the territory has no jurisdiction over them; but in the absence of a treaty stipulation to that effect, such lands are a part of the territory and subject to its jurisdiction, and process may run there. *Langford v. Monteith*, 102 U. S. 145. As to jurisdiction over offenses committed on military reservations, see *Territory v. Burgess*, 8 Mont. 57; 1 L. R. A. 808.

1. *Berry v. U. S.*, 2 Colo. 201; *U. S. v. Ensign*, 2 Mont. 402; *U. S. v. Williams*, 6 Mont. 386.

2. *U. S. Rev. Stat.*, § 1868; *Zimmerman v. Zimmerman*, 7 Mont. 114.

3. *The City of Panama*, 101 U. S. 461.

4. *Ferris v. Higley*, 20 Wall. (U. S.) 375; *McCray v. Baker*, 3 Wyoming 192; *Ducheneau v. House* (Utah, 1886), 10 Pac. Rep. 838; *People v. Sponsler*, 1 Dakota 289; *Moore v. Koubly*, 1 Idaho 55; *People v. Maxon*, 1 Idaho 330. See *People v. Douglass*, 5 Utah 283.

Justices of the peace have no jurisdiction in a litigation involving the title to land, or the boundary thereof. *U. S. Rev. Stat.*, § 1867; *Langford v. Monteith*, 102 U. S. 145.

5. The legislature in regulating the rules of pleading does not usurp judicial function. *Whiting v. Townsend*, 57 Cal. 515.

6. *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 656; *Sperling v. Calfee*, 7 Mont. 525; *Houtz v. Gisborn*, 1 Utah 173.

But the laws or practice of a territory cannot regulate the process by which the Supreme Court of the *United States* exercises its jurisdiction over territorial supreme courts. *Brewster v. Wakefield*, 22 How. (U. S.) 128.

In *Territory v. Baca* (N. Mex. 1892), 30 Pac. Rep. 864, it was held that a territorial statute relating to jurors contravened U. S. Act of July 30, 1866, prohibiting the enactment of local or special laws for summoning or impanelling jurors.

See *Finch v. U. S.* (Okla. 1893), 33 Pac. Rep. 638, in relation to the validity of an *Oklahoma* statute relating to jurisdiction and practice.

See *Belt v. Gulf, etc.*, R. Co., 4 Tex. App. 231, in relation to an act of Congress adopting the *Arkansas* statute relating to pleading and practice as the law of the Indian Territory.

7. *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648.



6. Appellate Power of Federal Supreme Court Over.—Writs of error and appeals from the final<sup>1</sup> decisions of the supreme court of any territory are allowed to the Supreme Court of the *United States*, "in the same manner and under the same regulations"<sup>2</sup> as from the circuit courts of the *United States*, provided the value of the property, or the amount in controversy, exclusive of costs, exceeds the sum of \$5,000.<sup>3</sup> So, appeals are allowed from the supreme or district courts of a territory upon writs of *habeas corpus* involving the question of personal freedom.<sup>4</sup> But the Supreme Court of the *United States* has no jurisdiction on *habeas corpus* in criminal cases, unless the sentence of the territorial court exceeds the jurisdiction of that court, or there is no authority to hold under the sentence.<sup>5</sup> The proceedings under a petition for *habeas corpus* are, in their nature, civil proceedings, even though instituted to arrest a criminal prosecution and secure personal freedom; and the appellate revisory jurisdiction of the supreme court is governed by the statutes regulating civil proceedings.<sup>6</sup>

All appeals to the Supreme Court of the *United States* from judgments or decrees of territorial courts, must, in jury trials, be by writ of error.<sup>7</sup> The form of proceeding depends on the single fact of whether or not there has been a trial by jury.<sup>8</sup> Upon a writ of error, the Supreme Court of the *United States* is confined to the bill of exceptions, or questions of law otherwise presented by the record; upon an appeal, to the statement of facts and rulings certified by the court below. The facts as thus set forth in the statement are conclusive upon the supreme court.<sup>9</sup> Congress has not conferred upon the Supreme Court of the *United States*, in plain and explicit language, jurisdiction in criminal cases from all the territories.<sup>10</sup>

1. As to what is not a "final decision," within the meaning of the statutes regulating writs of error and appeals, see *Harrington v. Holler*, 111 U. S. 796; *Smith v. Adams*, 130 U. S. 177; *Winters v. Ethell*, 132 U. S. 207.

2. As to the meaning of this phrase, see Gould and Tucker's Notes on the *United States Revised Statutes*, p. 329, § 1003.

3. U. S. Rev. Stat., § 1909; Amended Act March 3, 1885. But no appeal will lie from a judgment determining the title to an office. *People v. Clayton*, 4 Utah 442; *aff'd* 132 U. S. 632. See also *Smith v. Adams*, 130 U. S. 175.

4. U. S. Rev. Stat., § 1909; *In re Snow*, 120 U. S. 274.

5. *Ex p. Harding*, 120 U. S. 782.

6. *Ex p. Tom Tong*, 108 U. S. 556.

7. U. S. v. Hailey, 118 U. S. 233; *Wolf v. Hamilton*, 108 U. S. 15.

8. *Hecht v. Boughton*, 105 U. S. 236; *U. S. v. Union Pac. R. Co.*, 105 U. S. 263. Appeals do not lie to the Supreme Court of the *United States* in controversies concerning the right to hold office under territorial legislative enactments. *People v. Clayton*, 4 Utah 449.

9. *Hecht v. Boughton*, 105 U. S. 236.

10. *Farnsworth v. Montana*, 129 U. S. 104. A writ of error, however, is allowed from the Supreme Court of the *United States* to the supreme court of the Territory of *Utah*, by section three of the Act of Congress of June 23, 1874 (18 Statutes 254), in criminal cases where the accused has been sentenced to capital punishment for any crime, or has been convicted of bigamy or polygamy. *Wiggins v. People*, 93 U. S. 465.

## TESTAMENT—TESTAMENTARY CAPACITY.

**TESTAMENT**—(See also WILLS).—A testament is, strictly speaking, a will of personal property; a will of land not being called a testament.<sup>1</sup>

**TESTAMENTARY CAPACITY**.—(See also INFANTS, vol. 10, p. 618; INSANITY, vol. 11, p. 151; MARRIED WOMEN, vol. 14, p. 594; UNDUE INFLUENCE; WILLS.)

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| <p><b>I. Degree of Mental Capacity Required, 970.</b></p> <ol style="list-style-type: none"> <li>1. <i>General Rule</i>, 970.</li> <li>2. <i>Time to Which Question Relates</i>, 974.</li> </ol> <p><b>II. Persons Wanting Understanding, 974.</b></p> <ol style="list-style-type: none"> <li>1. <i>Idiots</i>, 974.</li> <li>2. <i>Persons Deaf and Dumb, and Blind Persons</i>, 975.</li> <li>3. <i>Lunatics</i>, 977.             <ol style="list-style-type: none"> <li>a. <i>In General</i>, 977.</li> <li>b. <i>Lucid Intervals</i>, 978.</li> </ol> </li> <li>4. <i>Persons Partially Insane; Monomaniacs</i>, 980.             <ol style="list-style-type: none"> <li>a. <i>In General</i>, 980.</li> <li>b. <i>Delusions</i>, 982.</li> <li>c. <i>Eccentricity</i>, 988.</li> <li>d. <i>Delirium</i>, 989.</li> <li>e. <i>Drunkenness</i>, 990.</li> </ol> </li> <li>5. <i>Feeble-minded Persons</i>, 992.</li> </ol> | <ol style="list-style-type: none"> <li>a. <i>In General</i>, 992.</li> <li>b. <i>Person in Extremis</i>, 994.</li> <li>c. <i>Old Age</i>, 994.</li> </ol> <p><b>III. Probate and Contest, 996.</b></p> <ol style="list-style-type: none"> <li>1. <i>Presumption and Burden of Proof</i>, 996.</li> <li>2. <i>Relevancy, Admissibility, and Weight of Testimony</i>, 1003.             <ol style="list-style-type: none"> <li>a. <i>In General</i>, 1003.</li> <li>b. <i>Declarations of Testator</i> (See also INSANITY, vol. 11, p. 158), 1005.</li> <li>c. <i>Declarations of Devisees and Legatees</i>, 1007.</li> <li>d. <i>Opinion Testimony</i>, 1010.                 <ol style="list-style-type: none"> <li>(1) <i>Non-professionals</i>, 1010.</li> <li>(2) <i>Experts</i>, 1014.</li> <li>(3) <i>Subscribing Witnesses</i>, 1016.</li> </ol> </li> </ol> </li> <li>3. <i>Province of Court and Jury</i>, 1017.</li> </ol> |
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**I. DEGREE OF MENTAL CAPACITY REQUIRED—1. General Rule.**—A person who at the time of making his will has an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who have a claim upon his bounty, and the manner in which it is to be distributed, has sufficient mental capacity to execute a will.<sup>2</sup>

1. Williams on Executors. See also Conklin v. Egerton, 21 Wend. (N. Y.) 447. The word "testament" is now seldom used, except in the heading of a formal will, which usually begins, "This is the last will and testament of me, A. B., etc."

2. 1 Redf. on Wills 129; Schouler on Wills (2d ed.), § 68; 1 Wms. on Exors. (6th Am. ed.) 57; 1 Jarm. on Wills (6th Am. ed.) 63, note; Whart. & Stillé's Med. Jur., § 29; Brown v. Bruce, 19 U.C. Q. B. 35; Harwood v. Baker, 3 Moore P. C. 282; Boyse v. Rossborough, 6 H. L. Cas. 45; Banks v. Goodfellow, L. R., 5 Q. B. 549; Murfett v. Smith, L. R., 12 P. D. 116; Marsh v. Tyrrell, 2 Hagg. 122; Constable v. Tufnell, 4 Hagg. 477; Ingram v. Wyatt, 1 Hagg. 401; Delafield v. Parish, 25 N. Y. 10; Clark v. Fisher, 1 Paige (N. Y.) 171; Van Guy-

sling v. Van Kuren, 35 N. Y. 70; Le Ban v. Vanderbilt, 3 Redf. (N. Y.) 384; Forman v. Smith, 7 Lans. (N. Y.) 443; Crolus v. Stark, 7 Lans. (N. Y.) 311; Pilling v. Pilling, 45 Barb. (N. Y.) 86; Kinne v. Johnson, 60 Barb. (N. Y.) 69; Blair's Will, 16 Daly (N. Y.) 540; Kudaisch's Will (Surr. Ct.), 13 N. Y. Supp. 255; Stewart's Will, 59 Hun (N. Y.) 618; Hathorn v. King, 8 Mass. 371; Whitney v. Twombly, 136 Mass. 145; Roe v. Taylor, 45 Ill. 485; Trish v. Newell, 62 Ill. 196; Yoe v. McCord, 74 Ill. 33; Rutherford v. Morris, 77 Ill. 409; Brown v. Riffin, 94 Ill. 560; Campbell v. Campbell, 130 Ill. 466; Rush v. Megee, 36 Ind. 69; Bundy v. McKnight, 48 Ind. 502; Todd v. Fenton, 66 Ind. 25; Leech v. Leech, 1 Phila. (Pa.) 244; Horbach v. Denniston, 3 Pittsb. (Pa.) 49; Wood v. Wood, 4 Brew. (Pa.) 75;

Daniel *v.* Daniel, 39 Pa. St. 192; Thompson *v.* Kyner, 65 Pa. St. 368; Wilson *v.* Mitchell, 101 Pa. St. 495; Shaver *v.* McCarthy, 110 Pa. St. 339; Tawney *v.* Long, 76 Pa. St. 106; Convey's Will, 52 Iowa 197; Delaney *v.* Salina, 34 Kan. 532; Coleman *v.* Robertson, 17 Ala. 84; Abraham *v.* Wilkins, 17 Ark. 292; Tobin *v.* Jenkins, 29 Ark. 151; Kinne *v.* Kinne, 9 Conn. 102; St. Leger's Appeal, 34 Conn. 434; Cordrey *v.* Cordrey, 1 Houst. (Del.) 269; Chandler *v.* Ferris, 1 Harr. (Del.) 454; Sutton *v.* Sutton, 5 Harr. (Del.) 450; Hall *v.* Hall, 18 Ga. 40; Stancell *v.* Kenan, 33 Ga. 56; Ragan *v.* Ragan, 33 Ga. Supp. 106; Gaither *v.* Gaither, 20 Ga. 709; Elliott's Will, 2 J. J. Marsh. (Ky.) 340; Patton *v.* Patton, 5 J. J. Marsh. (Ky.) 390; Wise *v.* Foote, 81 Ky. 10; Higgins *v.* Carlton, 28 Md. 113; Tyson *v.* Tyson, 37 Md. 567; Spratt *v.* Spratt, 76 Mich. 384; Aikin *v.* Weckerly, 19 Mich. 482; Hoban *v.* Campan, 52 Mich. 346; Harvey *v.* Sullins, 56 Mo. 372; Young *v.* Ridenbaugh, 67 Mo. 574; Thompson *v.* Ish, 99 Mo. 160; Den *v.* Johnson, 5 N. J. L. 454; Andress *v.* Weller, 3 N. J. Eq. 604; Sloan *v.* Maxwell, 3 N. J. Eq. 563; Lyons *v.* Van Riper, 26 N. J. Eq. 337; McCoon *v.* Allen, 45 N. J. Eq. 708; Cornelius *v.* Cornelius, 7 Jones (N. Car.) 593; Horne *v.* Horne, 9 Ired. (N. Car.) 99; Lawrence *v.* Steel, 66 N. Car. 584; Hubbard *v.* Hubbard, 7 Oregon 42; Chrisman *v.* Chrisman, 16 Oregon 127; Tomkins *v.* Tomkins, 1 Bailey (S. Car.) 92; Ford *v.* Ford, 7 Humph. (Tenn.) 92; Wisener *v.* Maupin, 2 Baxt. (Tenn.) 342; Trezevant *v.* Rains (Tex. 1892), 19 S. W. Rep. 567; Prather *v.* McClelland, 76 Tex. 574; Converse *v.* Converse, 21 Vt. 168; Holden *v.* Meadows, 31 Wis. 284; *In re* Blakely's Will, 48 Wis. 294; Lewis' Will, 51 Wis. 101; *In re* Farnsworth's Will, 62 Wis. 474; Greer *v.* Greers, 9 Gratt. (Va.) 330; Harrison *v.* Rowan, 3 Wash. (U. S.) 580; Greenwood *v.* Greenwood, 3 Curt. 2.

The law does not require that persons shall be able to dispose of property with sound judgment and discretion. It is sufficient if they understand what they are about. Paine *v.* Roberts, 82 N. Car. 451; Barnhardt *v.* Smith, 86 N. Car. 473; Bost *v.* Bost, 87 N. Car. 477. But one should be capable of exercising judgment, reason, and deliberation, in order to understand to a reasonable degree the effect of his will upon his family and estate, Bates

*v.* Bates, 27 Iowa 110; and to effect a settled purpose of his own with regard thereto. Shropshire *v.* Reno, 5 J. J. Marsh. (Ky.) 93.

The mere fact that a wealthy testator frequently complained of being very poor, is insufficient to show such a want of knowledge of his property as will invalidate his will. Knauss' Appeal, 114 Pa. St. 10.

Georgia Code, § 2409, fixes "the amount of intellect necessary to constitute testamentary capacity" as "that which is necessary to enable the party to have a decided and rational desire as to the disposition of his property; his desire must be decided in distinction from the wavering, vacillating fancies of a distempered intellect; it must be rational in distinction from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard."

In *Indiana*, the rule is thus stated: the testator must be able to know the extent and value of his property, the number and names of the natural objects of his bounty, their deserts with reference to their conduct towards him, and their wants and capacities, and possess memory sufficient to retain all these facts in his mind long enough to have his will prepared, and to execute it; but if this degree of capacity be slightly impaired, he may still be competent to make a will. Bundy *v.* McKnight, 48 Ind. 502. See also Dyer *v.* Dyer, 87 Ind. 13; Lowder *v.* Lowder, 58 Ind. 538; Leeper *v.* Taylor, 47 Ala. 221.

"Sound Mind" and "Disposing Memory."—The expression "sound mind," does not mean a perfectly balanced mind. The question of soundness is one of degree. Boughton *v.* Knight, 42 L. J. P. 25. "Sound and disposing mind" means a mind of natural capacity, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence. Smith *v.* Tebbetts, 36 L. J. 97; 16 W. R. 18. The term "unsound mind" includes every species of unsoundness. Willett *v.* Porter, 42 Ind. 250. A "sound mind" is one wholly free from delusion. Tittel's Estate, Myr. Prob. (Cal.) 12. A person may not be of "sound mind," but yet be of "disposing mind," and capable of making a will. Freeman *v.* Easley, 117 Ill. 317. "Sound and disposing mind" means the power of understanding the nature of the property, the family, and

But it is not necessary that he should have a recollection of all his estate and family, and of their condition in general, nor that he should have an appreciation of the probable effect of his will upon them and be able to collect all these matters in one view.<sup>1</sup> And, from the general rule, it follows that the same degree of capacity is not required for the disposition of a small estate as in the disposition of a larger and more complicated one.<sup>2</sup>

That a person has sufficient understanding to transact the ordinary business of life, is strong evidence of his testamentary capacity;<sup>3</sup> but the want of such an understanding does not neces-

the effect of the will. *Sefton v. Hopwood*, 1 F. & F. 578. Under a statute providing that persons of "sound mind and memory" may make a will, an instruction in those terms cannot be complained of because it makes no distinction between "sound mind" and "disposing mind." *Keithley v. Stafford*, 126 Ill. 507. The words "mind" and "memory," as used in the *New York* statute regarding testamentary capacity, are convertible terms. *Forman's Will*, 54 Barb. (N. Y.) 274.

The words "unsound mind" include every species of mental defect, and are not confined to idiots, *non compos*, lunatics, monomaniacs, or distracted persons, though so defined by statute. *Durham v. Smith*, 120 Ind. 463. A person may be of "sound mind and memory," though his recollection be impaired. *Yoe v. McCord*, 74 Ill. 33.

**What Law Governs.**—The validity of a will of real estate is to be determined, as respects the mental capacity of the testator, by the *lex rei sitæ*; that of a will of personalty by the *lex domicilii*. *Varner v. Revill*, 17 Ala. 286; *Succession of Robert*, 2 Rob. (La.) 427.

1. *McMasters v. Blair*, 29 Pa. St. 298; *Wilson v. Mitchell*, 101 Pa. St. 495; *Daniel v. Daniel*, 39 Pa. St. 191; *Tawney v. Long*, 76 Pa. St. 106; *Shaver v. McCarthy*, 110 Pa. St. 339; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Thompson v. Kyner*, 65 Pa. St. 368; *Brown v. Mitchell*, 75 Tex. 9.

He need not have the same perfect and complete understanding and appreciation of any of these matters in all their bearings, as a person in sound and vigorous health of body and mind would have. *Kempsey v. McGinniss*, 21 Mich. 141.

**The Same Capacity Is Required in Making a Will of Personalty as of Realty.**—One having sufficient capacity to make a will of personal estate is competent to make a will of lands; there is no differ-

ence in the measure of capacity required. *Schouler on Wills* (2d ed.), § 32. "If he were of sane memory at the time of making the testament of the goods, he could not be of non-sane memory at the time of making the will of the lands, both being made at one and the same instant." *Winchester's Case*, Co. Rep., pt. 6, p. 23; *Sloan v. Maxwell*, 3 N. J. Eq. 563. But probate of a will of personalty is not conclusive evidence of mental capacity to make a will of real estate, for the reason that in either case the question of capacity is tried by different jurisdictions. *Shelf. on Lunacy* 66, 67; *Doe v. Teage*, 5 B. & C. 335; 11 E. C. L. 248.

2. *Sheldon v. Dow*, 1 Dem. (N. Y.) 503; *Campbell v. Campbell*, 130 Ill. 467.

It is sufficient if there is capacity for the object attempted. *Hoban v. Campan*, 52 Mich. 346.

There can be no safer rule than that the competency of the mind should be judged of by the nature of the act to be done on a consideration of all the circumstances of the case. *Trish v. Newell*, 62 Ill. 196; *Marsh v. Tyrrell*, 2 Hagg. 122.

3. *Tomkins v. Tomkins*, 1 Bailey (S. Car.) 92; *Coleman v. Robertson*, 17 Ala. 84; *Comstock v. Hadlyme*, etc., Soc., 8 Conn. 254; *Meeker v. Meeker*, 75 Ill. 260; *Freeman v. Easley*, 117 Ill. 317; *Schneider v. Manning*, 121 Ill. 376; *Campbell v. Campbell*, 130 Ill. 466; *Lilly v. Waggoner*, 27 Ill. 395; *Benoist v. Murrin*, 58 Mo. 307; *Jackson v. Hardin*, 83 Mo. 175; *Myers v. Hauger*, 98 Mo. 433; *Stewart's Will*, 15 N. Y. Supp. 601; 60 Hun (N. Y.) 586; *Kiedaisch's Will* (Surr. Ct.), 13 N. Y. Supp. 255; *Jamison v. Jamison*, 3 Houst. (Del.) 108.

The precise point, however, is the testator's capacity to understand the nature of the testamentary act, and too much stress should not be laid on a comparison between his present and

sarily show incapacity.<sup>1</sup> So, one may not have sufficient capacity to execute a valid contract, and yet be capable of making a will.<sup>2</sup> This rule, although generally accepted, is denied by some authorities, which hold that the degree of capacity requisite is the same in both cases.<sup>3</sup>

The same degree of mental capacity is required for the revocation as for the execution of a will.<sup>4</sup> So, if a testator, who is competent at the time of executing his will, subsequently becomes insane or otherwise incapacitated and destroys it, the

past business habits. *Brown v. Riggin*, 94 Ill. 560.

In *Gass v. Gass*, 3 Humph. (Tenn.) 278, it was held that an instruction to the jury that the capacity to make money and to take care of it is evidence of testamentary capacity, was not exceptionable, but that such evidence was not conclusive.

Although possessing business capacity, in general, a person may be controlled by such an insane delusion with respect to the subjects of his testamentary disposition as to render him incapable of making a valid will. *American Bible Soc. v. Price*, 115 Ill. 623.

**Undue Influence.**—But as was said in *Mountain v. Bennet*, 1 Cox 353, if a dominion was acquired by any person over a mind of sufficient sanity for general purposes and of sufficient soundness and discretion to regulate his affairs in general, if such dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind.

1. *Whitney v. Twombly*, 136 Mass. 145; *Kramer v. Weinert*, 81 Ala. 414.

It is not necessary that the testator, at the time of making his will, should be capable of managing business generally, if he then understands what he is doing. *Kinne v. Kinne*, 9 Conn. 102; *Stubbs v. Houston*, 33 Ala. 555; *Brown v. Riggin*, 94 Ill. 560. It is not necessary that he should be able to traffic with and mortgage his property. *Howard v. Coke*, 7 B. Mon. (Ky.) 655.

Bad management and waste of an inherited estate does not necessarily show testamentary incapacity. *Hall v. Hall*, 17 Pick. (Mass.) 373; *Brinkman v. Rueggessick*, 71 Mo. 553.

2. 1 Redf. on Wills 128; *Schouler on Wills* (2d ed.), p. 62; *Banks v. Goodfellow*, L. R., 5 Q. B. 549; *Comstock v. Hadlyme*, etc., Soc., 8 Conn. 254; *Terry v. Buffington*, 11 Ga. 345; *Howard v. Coke*, 7 B. Mon.

(Ky.) 655; *Brinkman v. Rueggessick*, 71 Mo. 553; *Jackson v. Hardin*, 83 Mo. 175; *Thompson v. Kyner*, 65 Pa. St. 368; *Converse v. Converse*, 21 Vt. 168; *Kirkwood v. Gordon*, 7 Rich. (S. Car.) 474; *Harrison v. Rowan*, 3 Wash. (U. S.) 580; *Doe v. Vancleve*, 4 Wash. (U. S.) 262.

Less capacity may be required to make a will than to make a deed. *Kerr v. Lunsford*, 31 W. Va. 680; *Jarrett v. Jarrett*, 11 W. Va. 584.

A less degree of imbecility will suffice to create testamentary incapacity than will serve as an excuse for a crime. *McTaggart v. Thompson*, 14 Pa. St. 149. 3. *Coleman v. Robertson*, 17 Ala. 84; *McElroy v. McElroy*, 5 Ala. 81; *Stewart v. Elliott*, 2 Mackey (D. C.) 307. See also *Boughton v. Knight*, L. R., 3 P. & M. 64.

*Schouler* says: "The true criterion is not whether the testator is capable of a particular transaction *inter vivos*, but whether he was capable of making a will. The comparison is one of different standpoints, rather than of different degrees from a common standpoint." *Schouler on Wills* (2d ed.), § 67.

In *Maryland*, it is provided by statute that the inquiry as to the capacity of the testator must always be whether, at the time of executing or acknowledging the will and testament, he was capable of executing a valid deed or contract. *Code of Maryland*, art. 93, § 300; *Davis v. Calvert*, 5 Gill & J. (Md.) 300; *Tyson v. Tyson*, 37 Md. 567.

4. *Bac. Abr.*, vol. 10, p. 546; *Harris v. Berrall*, 1 Sw. & Tr. 153; *Scruby v. Fordham*, 1 Add. 74; *Benson v. Benson*, L. R., 2 P. & D. 172; *Brunt v. Brunt*, L. R., 3 P. & M. 37; *In re Brand*, 3 Hagg. 754; *Allison v. Allison*, 7 Dana (Ky.) 94; *In re Johnson's Will*, 40 Conn. 587. No will nor alterations thereof which were made when the testator was of unsound mind can be valid. 1 Wms. on Exors. (Perkins' Am. ed. 1877) 61, 62.

will may be established, nevertheless, if its contents can be ascertained.<sup>1</sup>

2. **Time to Which Question Relates.**—The time to which the question of testamentary capacity relates is the precise time of the execution of the will.<sup>2</sup> And a will executed while the testator is of sound mind, is not affected by his subsequent insanity;<sup>3</sup> nor is a will executed while the testator is insane revived or established by his failure to destroy or cancel it upon a subsequent recovery.<sup>4</sup> If a will is executed while the testator is of sound mind, and a codicil is added when he is insane, the codicil may be rejected and the will admitted to probate; but if a will is executed while the testator is insane, a codicil, added when of sound mind, is a republication of the will and entitles it to probate.<sup>5</sup>

**II. PERSONS WANTING UNDERSTANDING**—1. **Idiots.**—The will of an idiot is necessarily void. An idiot may be defined as one born without understanding, hopelessly incurable, and without lucid intervals.<sup>6</sup> If one can transact any business intelligently,

1. **Revocation.**—A will destroyed by a person not possessing testamentary capacity is not a revocation of such will. *Rich v. Gilkey*, 73 Me. 595; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *Rhodes v. Vinson*, 9 Gill (Md.) 169; *McIntire v. Worthington*, 68 Md. 203; *Batton v. Watson*, 13 Ga. 63; *Forbush v. Weber*, 99 Ind. 588; *Allison v. Allison*, 7 Dana (Ky.) 94. In *Ford v. Ford*, 7 Humph. (Tenn.) 92, where a testator in a fit of insanity directed his will to be destroyed, it was held that this did not amount to a revocation.

An insane man can have no intent such as is necessary to revoke a will. *Smith v. Wait*, 4 Barb. (N. Y.) 28.

In *Forman's Will*, 1 Tuck. (N. Y.) 205, the tearing up of a will by a testatrix when under such mental excitement as incapacitated her from forming a reasonable and intelligent intention to revoke her will, was not considered a revocation.

In *Idle v. Bowen*, 11 Wend. (N. Y.) 227, it was held that a revocation by burning the will by the testator could be impeached by showing the incompetency of the testator at the time of the act. See also *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158, where *Walworth, Ch.*, ruled to the same effect.

2. *Ayrey v. Hill*, 2 Add. 210; *Billinghurst v. Vickers*, 1 Phill. 191; *Handley v. Stacey*, 1 F. & F. 574; *Etter v. Armstrong*, 46 Ind. 197; *Shailer v. Bumstead*, 99 Mass. 112; *Kerr v. Lunsford*, 31 W. Va. 659. "The very date of the paper propounded," *McCullough's Will*, 35 Pa. Leg. Int. 169.

3. *Swinb. on Wills*, pt. 2, § 3, p. 77; *Forse's Case*, 4 Co. 60 b (ed. 1826), vol. 2, p. 439.

In *New Mexico*, it is expressly declared by statute that a will made before the testator's insanity is valid. *Code of New Mexico*, § 1378.

4. *Swinb. on Wills*, pt. 2, § 3, p. 76, where it is said, "And so strong is the impediment of insanity of mind that if the testator make his testament after this furor hath overtaken him, and while as yet it doth possess his mind, albeit the furor afterwards departing or ceasing, the testator recover his former understanding, yet doth not the testament made during his former fit recover any strength or force thereby." *Godolph.*, pt. 1, ch. 8, § 2; 1 *Lom. Exors.* 7; 11 *Mod.* 157.

5. 1 *Redf. on Wills*, p. 323; 1 *Wms. on Exors.* 61 (*Perkins' ed.* 1877); *Billinghurst v. Vickers*, 1 Phill. 187; *Wood v. Wood*, 1 Phill. 357; *Brounker v. Brounker*, 2 Phill. 57.

If the testator was sane at the time of making the last of several codicils, it is not necessary to prove sanity at the time of making the other codicils, since the last is in law a republication of those prior thereto. *Brown v. Riggis*, 94 Ill. 560.

6. **Idiots.**—*Bac. Abr.*, vol. 5, A 1; *Schouler on Wills* (2d ed.), § 90; 1 *Redf. on Wills* 61, 64; *Whart. & Stillé's Med. Jur.* 1873, § 33. The principal characteristics of idiocy are thus described by *Ray (Med. Jur. Insanity 54)*: "Idiocy is that condition of mind in which the reflective, and all or a part of the affec-

he is not an idiot.<sup>1</sup> The will of an idiot, though wise in its provisions, is nevertheless void.<sup>2</sup>

**2. Persons Deaf and Dumb, and Blind Persons.**—At common law persons who were born deaf and dumb were presumed to be idiots, and were held to be incapable of making wills.<sup>3</sup> At present, however, it seems that there is not even *prima facie* presumption of incapacity, and whether such persons are to be

tive powers are either entirely wanting, or are manifested to the slightest possible extent. In reasoning powers many idiots are below the brutes, unable to compare two ideas together; nothing leads them to act but the faint impressions of the moment, and these are often insufficient to induce them to gratify even their instinctive wants." *Beverly's Case*, 4 Co. 123; *Browning v. Reane*, 2 Phill. 69; *Bannatyne v. Bannatyne*, 14 Eng. L. & Eq. 581; *Bonner v. Matthews*, cited 1 Shelf. Lunacy 276.

The term "idiot" is restricted to persons foolish from birth, supposed to be naturally without mind. *Spedling v. Worth County*, 68 Iowa 152. See *Stewart v. Lisenard*, 26 Wend. (N. Y.) 255.

1. *Errickson v. Fields*, 30 N. J. Eq. 634. *Bannatyne v. Bannatyne*, 14 Eng. L. & Eq. 581, is a leading English case, in which the will was attacked on the ground of the idiocy or imbecility of the testator. It appeared that he was placed in an asylum in 1815 and remained there till 1817, when he was released. He made a rational will in 1820, which was written for him by his mother. In 1822 he was again placed in the asylum, and remained there till he died in 1849. In 1838 he was found by a commission to have been of unsound mind without lucid interval since 1815. The evidence showed that from 1818 to 1821 he kept a bank account and drew drafts on the same, which were paid to him over the bank counter, and there was no evidence that he received assistance in these transactions. The will was attacked on the ground, not of lunacy nor of monomania, but of idiocy or imbecility; but it was sustained, Dr. Lushington of the ecclesiastical court saying, "Many acts of business could possibly be done by a lunatic and the lunacy not detected; but it is scarcely possible to predicate the same of an idiot or imbecile person." The case supports the proposition that there can be no such thing as a "lucid interval" in a case of idiocy; the same judge having said further that the char-

acteristic of idiocy is permanence with little or no variation, though often in the case of idiots it does sometimes happen that there will be a greater degree of excitement demonstrated at some than at other periods.

2. *Swinb. on Wills*, pt. 2, § 4, pl. 5, 7; *Bac. Abr. Wills*, B 12; *Potter, J.*, in *Harper v. Harper*, 1 *Thomp. & C. (N. Y.)* 354.

In *Townsend v. Bogart*, 5 *Redf. (N. Y.)* 93, the testatrix was an unmarried woman, 52 years old, and owned considerable real estate; she resided with her mother until the death of the latter, after which she lived with a cousin 17 years, until her own death. She was a member of, and attended church, took care of her room and person, and was able to do some light house and needle work. She stuttered and could utter only short sentences; never learned to read and write, though she attended school for three years; was unable to count more than ten, or tell the time of day from the clock; could neither add nor multiply; had no idea of the value of property, or of money beyond ten cents; did not know the amount of her property; and was easily lost on familiar streets. Two of her sisters were in an insane asylum, and she herself was adjudged an idiot eight years before her death. She had a weak mind and was unable to attend to most things which require only ordinary intelligence. Ten years before her death she signed a paper with her mark, leaving all her property to a daughter of the cousin with whom she lived; but probate thereof was refused, on the ground that she was an idiot, and incompetent to execute a will.

3. 2 *Bl. Com.* 497; *Swinb.*, pt. 2, § 4; *Taylor on Med. Jur.* 690; *Wms. on Exors.* (6th Am. ed.) 21; *Brower v. Fisher*, 4 *Johns. Ch. (N. Y.)* 441; *Potts v. House*, 6 *Ga.* 324.

In the time of Coke, the presumption seems to have been conclusive. 1 *Jarm. on Wills* (6th Am. ed.) 47; *Co. Litt.* 42 b; *Yong v. Sant*, *Dyer* 56 a, n. 13.

treated as mentally incompetent depends upon the evidence that can be given of their capacity;<sup>1</sup> but if the presumption does exist, it yields to proof of mental capacity,<sup>2</sup> as by proof that a person has sufficient understanding to declare his wishes by signs, to cause them to be reduced to writing, and to execute the paper as a will.<sup>3</sup>

One who is blind merely, is capable of making a will; and such will may be admitted to probate on proof that it was read to, or, if not read, that its contents were known to him.<sup>4</sup>

1. Perrine's Case, 41 N. J. Eq. 409; Dickenson v. Blissett, 1 Dick. 268.

2. Schouler on Wills, § 94; Christinas v. Mitchell, 3 Ired. Eq. (N. Car.) 535; Potts v. House, 6 Ga. 324; *In re Harper*, 6 M. & G. 732; Morrison v. Lennard, 3 C. & P. 127; 14 E. C. L. 238; Elliot's Case, Carter 53; Harrod v. Harrod, 1 Kay & J. 49; Moore v. Moore, 2 Bradf. (N. Y.) 265.

In Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441, where the *prima facie* presumption of incapacity was recognized, a commission was issued to inquire as to the mental competency of such a person.

In Dickenson v. Blissett, 1 Dick. 268, a person who was born deaf and dumb, and who had attained to her majority, applied for the possession of her real estate and an assignment of her property. Lord Hardewick, having put questions to her in writing, to which she gave sensible answers in writing, thereupon granted the application. See Perrine's Case, 41 N. J. Eq. 409.

**Proof that a Testator Understood Contents of Will.**—It should appear that the testator knew and approved the contents of the paper, and its force as a testamentary act. Shelf. on Lunacy 3; 1 Wms. on Exors. (6th Am. ed.) 21 n; 7 Encyc. Brit. (7th ed.) 645; Durfur v. Croft, 3 Moore P. C. 136; Rollwagen v. Rollwagen, 63 N. Y. 504; Potts v. House, 6 Ga. 324.

In Goods of Owston, 2 Sw. & Tr. 461, where the testator, who was deaf and dumb, made his will by communicating his instructions to an acquaintance by signs and motions, who prepared a will in conformity therewith, which was afterwards duly executed by the testator, the court required an affidavit from the draughtsman of the will, stating the nature of the signs and motions by which the instructions were communicated. This will, however, was denied probate. See also Goods of Geale, 3 Sw. & Tr. 431.

And in Weir v. Fitzgerald, 2 Bradf.

(N. Y.) 42, it was held that "something more is necessary to establish the validity of a will in cases where, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inferences cannot be drawn from the mere formal execution. Additional evidence is, therefore, required that the testator's mind accompanied the will; that he knew what he was executing, and was cognizant of the provisions of the will."

3. Schouler on Wills, § 95; 1 Wms. on Exors. (6th Am. ed.) 21 n; Weir v. Fitzgerald, 2 Bradf. (N. Y.) 42; Moore v. Moore, 2 Bradf. (N. Y.) 265.

4. 1 Redf. on Wills, p. 56; 1 Jarm. on Wills (6th Am. ed.) 35; Wharton & Stillé's Med. Jur., § 14; Mitchell v. Thomas, 6 Moore P. C. 137; *In re Arford*, 1 Sw. & Tr. 540; Edwards v. Finchen, 4 Moore P. C. 198; Barton v. Robins, 3 Ph. 455 n; Ray v. Hill, 3 Strobb. (S. Car.) 297; Reynolds v. Reynolds, 1 Spears (S. Car.) 256; Clifton v. Murray, 7 Ga. 564.

If the will of a blind person is read to him, it is not necessary that the reading should be in the presence of a witness. Martin v. Mitchell, 28 Ga. 382.

The circumstance that the blind man had dictated the will, and when it was read to him, directed the attestation to be made, it being attested in the same room in his presence, and the terms of the statute being complied with, though he had lost the controlling power of sight, and no fraud being alleged, has been held sufficient. Neil v. Neil, 1 Leigh (Va.) 6.

If the will is not read to the testator, that fact is not sufficient to avoid it, when it can be shown from other circumstances that the testator knew its contents or substance. Longchamp v. Fish, 2 B. & P. N. R. 415; Barton v. Robins, 3 Ph. 455 n; Clifton v. Murray, 7 Ga. 564; Boyd v. Cook, 3 Leigh (Va.) 32; Lewis v. Lewis, 6 S. & R. (Pa.) 496; Hess' Appeal, 43 Pa. St. 73.



Persons who are deaf, dumb, and blind should not be judicially considered incapable from the fact of the additional affliction. This only calls for a more careful consideration of the testator's capacity.<sup>1</sup>

Persons who were not born deaf, dumb, and blind, but who have become so from supervening causes, are presumed competent.<sup>2</sup> Wherever the disability is not congenital, it is to be treated as a circumstance only, to be considered with others, in determining the capacity of the testator.<sup>3</sup>

It is not considered necessary, in the probate of a will made by a deaf and dumb person, or by a person who is blind, that the witnesses should declare that the testator was cognizant of the contents of the will.<sup>4</sup>

**3. Lunatics**—*a.* IN GENERAL.—A lunatic is one who is usually insane, but who has intervals of reason;<sup>5</sup> though the term is frequently used to describe all persons of unsound mind who are not

If reasonable ground is laid for believing that the will was not read, or that there was fraud or imposition of any kind practiced upon the testator, it is incumbent upon those who would support the will to meet such proof by evidence and to satisfy the jury, either that the will was read or that the contents were known by the testator. *Harrison v. Rowan*, 3 Wash. (U. S.) 580. See also *Harden v. Hays*, 9 Pa. St. 163; *Harding v. Harding*, 18 Pa. St. 342; *Hoshauer v. Hoshauer*, 26 Pa. St. 406.

In *Harleston v. Corbett*, 12 Rich. (S. Car.) 604, it was held that any proof, which satisfactorily shows that the testator was cognizant of the contents of the will, is competent. The declarations of the blind man, made after the execution of his will, were given in evidence to show that he knew the contents when he executed the will.

By the Roman law, a blind man might make a nuncupative will, by declaring the same before seven witnesses; but he could not make a testament in writing, unless it was read to him and acknowledged by him to be his will before the witnesses. See *W. v. Fitzgerald*, 2 Bradf. (N. Y.) 68.

1. 1 Redf. on Wills, p. 55; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Reynolds v. Reynolds*, 1 Spears (S. Car.) 256.

Although, as in the case of persons deaf and dumb at common law, they were considered incapable of having *animus testendi*. 2 Bl. Com. 497.

In *Georgia*, "a deaf, dumb and blind person may make a will, provided the interpreter and scrivener are both at-

testing witnesses thereto, and are both examined upon the motion for probate of the same." Code, § 2412. In *New Mexico*, "the deaf and dumb from birth cannot make a will, unless they can declare it in writing." Code, § 1378.

2. 1 Redf. on Wills 52; *Schouler on Wills* (ed. 1892), § 96; *Yong v. Sant*, Dyer 56 a, n. 13.

3. *Schouler on Wills* (ed. 1892), § 96; *Wilson v. Mitchell*, 101 Pa. St. 495, where the testator was over 100 years old, blind and deaf; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Gombault v. Public Admr.*, 4 Bradf. (N. Y.) 226, where the testator, totally deaf, communicated his instructions on a slate.

4. 1 Redf. on Wills 57; *Schouler on Wills*, § 99; *Longchamp v. Fish*, 5 B. & P. N. R. 415; *Fencham v. Edwards*, 3 Curt. 63; *Barton v. Robins*, 3 Ph. 455; *Moore v. Paine*, 2 Cas. temp. Lee 595.

As subscribing witnesses, all that it is necessary they should prove, is that ceremony which they witnessed and which the statute requires. *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 69.

But Mr. Jarman's rule in regard to this point is the very least that will insure safety, "that, in proportion as the infirmities of the testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practiced." 1 Jarman on Wills (6th Am. ed.) 47.

5. *Beverly's Case*, 4 Co., 124 b; 1 Wms. on Exors. (6th Am. ed.) 23.

idiots or imbeciles. The term is not of as wide import as *non compos mentis*.<sup>1</sup>

*b. LUCID INTERVALS.*—A will made during a lucid interval is valid,<sup>2</sup> while one not made in a lucid interval is void, even though it is wise, just, and natural in its provisions.<sup>3</sup> A lucid interval is not a mere remission of mania; it must continue long enough to give some assurance of a return of a sound and disposing mind.<sup>4</sup> It is not necessary that the patient be restored to the

1. 1 Redf. on Wills 63. The term "*non compos mentis*" is of larger import and includes all persons of unsound mind. Co. Litt. 246 b; *Rochford v. Ely*, *Ridgway* 528.

The generally accepted medico-legal definition of lunacy is, that it is "the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health." *Lundway v. Croft*, 3 Curt. 678.

Dr Ray, says: "Madness is not indicated so much by any particular extravagance of thought or feeling as by a well-marked change of character or departure from the ordinary habits of thinking, feeling, and acting, without any adequate external cause. To lay down, therefore, any particular definition of mania founded on symptoms, and to consider every person mad who may happen to come within the range of its application, might induce the ridiculous consequence of making a large portion of mankind of unsound mind. . . . When the sanity of an individual is in question, instead of comparing him with a fancied standard of mental soundness, as is too commonly the custom, his natural character should be diligently investigated, in order to determine whether the apparent indication of madness is not merely the result of the ordinary and healthy constitution of the faculties. In a word, he is to be compared with himself and not others." *Ray's Med. Jur. Insanity* (5th ed.), § 133.

2. *Lucid Interval.*—*Gombault v. Public Admr.*, 4 Bradf. (N. Y.) 226; *Wright v. Lewis*, 5 Rich. (S. Car.) 212; *Swinb. pt. 2*, § 3, pl. 3, where it is said, "Howbeit, if these mad or lunatic persons have clear or calm intermissions, then during the time of their quietness and freedom of mind they may make their testaments, appointing executors and disposing of their goods at their pleasures; so that neither the furor going before, nor following the making of the testament doth hinder the same begun

and finished in the meantime." 1 Wms. on Exors. (Perkins' Am. ed.) 33; *Godolph. pt. 1*, ch. 8, § 2; *Wentw.*, ch. 1, p. 33 (14th ed.); *Hall v. Warren*, 9 Ves. 610; *Rodd v. Lewis*, 2 Cas. temp. Lee 176.

*Georgia Code*, § 2407, provides that a lunatic may make a will during a lucid interval.

3. *Schouler on Wills*, § 78; 1 Wms. on Exors. (Perkins' Am. ed.) 361 n; *Harper v. Harper*, 1 Thomp. & C. (N. Y.) 351; *Potts v. House*, 6 Ga. 324.

4. 1 Redf. on Wills 109; *Schouler on Wills* (ed. 1892), § 108; *Taylor's Med. Jur.* 651. Some authorities deny altogether the existence of such a thing as a "lucid interval," but admit that there may be times when a lunatic has sufficient capacity to execute a will. 1 *Whart. & Stillé's Med. Jur.* (3d ed.), § 745. The distinction is too finely drawn for legal purposes, and the term will continue to hold its place in legal nomenclature. *Schouler on Wills* 1892, § 109. But the term should not be confounded with that state of mind in which one partially insane, or a monomaniac, is competent to execute a will; that is, when his delusions are of a kind which cannot influence any testamentary disposition he may make. There is no such thing as a "lucid interval" in a case of partial insanity, since the patient is at all times insane, but with respect only to one or more subjects. 1 Wms. on Exors. (Rand & T. Am. ed.) 73; *Dew v. Clark*, 1 Add. 279; *Smee v. Smee*, L. R., 5 P. D. 84.

No intelligible definition of the distinction between a remission of lunacy and a lucid interval can be given, except it is made to depend upon duration and degree. 1 Redf. on Wills 109, 112. Dr. Taylor says: "By a lucid interval we are to understand a temporary cessation of the insanity, or a perfect restoration to reason. This state differs entirely from a remission, in which there is a mere abatement of the symptoms. . . . Nothing more is intended by a lucid interval than that the

precise condition of mind in which he was before the inception of lunacy, but he should so far recover his mental faculties as to appreciate his testamentary act.<sup>1</sup>

A party who alleges a lucid interval must prove it.<sup>2</sup> Where, however, a will is wise and natural in its provisions, it is in itself strong evidence that it was made in a lucid interval and that it is therefore valid.<sup>3</sup> While on the other hand, if it be foolish and

patient shall become entirely conscious of his acts and capacity." Taylor on Med. Jur. (ed. 1861) 651.

1. *Boyd v. Eby*, 8 Watts (Pa.) 66; *Lucas v. Parsons*, 27 Ga. 621. Lord Chancellor Thurlow is said to have held in *Atty. Gen'l v. Parnter*, 3 Bro. C. C. 441, that the lunatic must be absolutely restored to his former state of mind in order to do a valid and responsible act; but this *dictum* was repudiated by Lord Eldon in *Ex p. Holyland*, 11 Ves. 10, when he said: "There may be frequent instances of men restored to a state of mind inferior to what they possessed before; yet it would not be proper to support commissions of lunacy against them," and in *Hall v. Warren*, 9 Ves. 611, Sir Wm. Grant said: "If general lunacy is established, they will be under the necessity of showing, not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the party to judge soundly of the act."

**Wills Sustained.**—Wills made during lucid intervals have been sustained in the following cases: *Hall v. Warren*, 9 Ves. 611; *Ex p. Holyland*, 11 Ves. 11; *White v. Driver*, 1 Ph. 84; *Symes v. Green*, 1 Sw. & Tr. 401; *Nichols v. Binns*, 1 Sw. & Tr. 239; *Cartwright v. Cartwright*, 1 Ph. 90; *Chambers v. Queen's Proctor*, 2 Curt. 415; *Gombault v. Public Admr.*, 4 Bradf. (N. Y.) 226; *Maris v. Freeman*, 3 Redf. (N. Y.) 181; *Dickie v. Van Vleck*, 5 Redf. (N. Y.) 284; *Brock v. Luckett*, 4 How. (Miss.) 459; *Goble v. Grant*, 3 N. J. Eq. 629; *Lucas v. Parsons*, 27 Ga. 593; *Chandler v. Barrett*, 21 La. Ann. 58.

In *Dickie v. Van Vleck*, 5 Redf. (N. Y.) 284, the testator called on a lawyer who was a stranger to him, in 1871, dictated a rational will to him, transacted business intelligently in 1871 and 1872, had had attacks of insanity in 1870, and was adjudged a lunatic in 1874. The will was held valid, particular stress having been laid upon the fact of the giving instructions for the will to a strange attorney, as

evincing the mental capacity of the testator.

**2. Burden of Proof.**—If derangement be proved to have existed at any particular time, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done and to which the lucid interval refers. This rule was stated by Lord Thurlow in *Atty. Gen'l v. Parnter*, 3 Bro. C. C. 441, and *approved* by Lord Erskine in *White v. Wilson*, 13 Ves. 89; *Prinsep v. Dyce Sombre*, 10 Moore P. C. 278. See also, to the same effect, *White v. Driver*, 1 Ph. 88; *Ayrey v. Hill*, 2 Add. 210; *Kinleside v. Harrison*, 2 Ph. 459; *Brogden v. Brown*, 2 Add. 445; *Evans v. Knight*, 1 Add. 239; *Wood v. Wood*, 1 Ph. 363; *Wheeler v. Alderson*, 3 Hagg. 605; *Tatham v. Wright*, 2 Russ. & M. 21, 22; *Steed v. Calley*, 1 Keen 620; *In re Taylor's Will*, 1 Edm. Sel. Cas. (N. Y.) 375; *Clark v. Fisher*, 1 Paige (N. Y.) 171; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; *Titlow v. Titlow*, 54 Pa. St. 216; *Harden v. Hays*, 9 Pa. St. 15; *Boyd v. Eby*, 8 Watts (Pa.) 66; *Gangwere's Estate*, 14 Pa. St. 417; *Saxon v. Whitaker*, 30 Ala. 237; *Duffield v. Morris*, 2 Harr. (Del.) 375; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Puryear v. Reese*, 6 Coldw. (Tenn.) 21; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Rush v. Megee*, 36 Ind. 69; *Hoge v. Fisher*, Pet. (C. C.) 163; *Wood v. Sawyer*, Phill. (N. Car.) 251.

Proof of a lucid interval is rendered very difficult by the fact that the patient often appears entirely rational when there is really no abatement of his disease. *Brogden v. Brown*, 2 Add. 445.

Strong proof of capacity should be required in a case in which a consultation of physicians was held at the instance of those in whose favor the will was to be made, to decide upon the testator's sanity. *Christy v. Clarke*, 45 Barb. (N. Y.) 529.

3. *Schouler on Wills*, § 78; 1 Wms. on

extravagant in its character, the contrary may be presumed; subject, however, to the rebuttal of the presumption by proof of execution during a lucid interval.<sup>1</sup>

**4. Persons Partially Insane—Monomaniacs—***a. IN GENERAL.*—The doctrine that the testator's partial insanity or monomania will invalidate a will if it is the offspring of the particular delusion under which he labors, but does not invalidate a will which is in itself rational and in no way attributable to such delusion, is now established in *England*,<sup>2</sup> and the same doctrine has been

Exors. (Perkins' Am. ed.) 361 n; Swinb. Wills, pt. 2, § 3, pl. 14; Cartwright v. Cartwright, 1 Ph. 90; Nichols v. Binns, 1 Sw. & Tr. 239; Symes v. Green, 1 Sw. & Tr. 401; Scruby v. Fordham, 1 Add. 74; Weir's Will, 9 Dana (Ky.) 441; Gombault v. Public Admr., 4 Bradf. (N. Y.) 226; Kempsey v. McGinniss, 21 Mich. 123; Goble v. Grant, 3 N. J. Eq. 629.

In Cartwright v. Cartwright, 1 Ph. 90, it was said that the best proof of the existence or non-existence of lucid intervals is that which arises from the act itself, and that, if it can be proved that it is a rational act, rationally done, the whole case is proved. In this case the testatrix had early in life been deranged, but she recovered and afterwards carried on her own house and establishment like any sane person. Several months before she made her will, and after making it, many of the worst features of her insanity reappeared, and on the day it was made her manner was wild and agitated, to such an extent that she gave the attesting witnesses the impression that she was insane. Her physician had previously denied her the use of books and writing materials, and had kept her hands tied up; but on the day the will was made gave her writing materials, in compliance with her importunate demands, and loosened her hands, on which she immediately wrote out and sealed her will, tearing up several sheets of paper during the process and pacing the room in a disordered manner. The will was rational, proper, natural, and conformable to the testatrix's affections, and she made a judicious selection of executors and trustees. She was impressed with the importance of making her will, and was greatly agitated by her inability to get writing materials. The will was upheld.

So in Kingsbury v. Whitaker, 32 La. Ann. 1055, it was held that where a will was made by the testator himself, un-

aided by others, and its provisions were sage and judicious, containing nothing "sounding in folly," it should be presumed, even in the case of a person habitually insane, that it was made during a lucid interval; and that the burden of proof was on those who attacked it to show insanity at the moment it was made. See also Chandler v. Barrett, 21 La. Ann. 58. And in Weir's Will, 9 Dana (Ky.) 434, it was held that when a lunatic writes his own will, in a natural manner, and the provisions of it are altogether sensible, proper and judicious, the will itself proves that when he wrote it he had a lucid interval.

But in Nicholas v. Freeman, 1 Str. & Tr. 239, it was held that the fact that the provisions of the will were reasonable was not conclusive, but strong evidence of its having been made in a lucid interval. And Sir H. Jenner Fust in Chambers v. Queen's Proctor, 2 Curt. 415, says that while a rational act done in a rational manner is entitled to great weight, it cannot be arbitrarily declared "the strongest and best proof" of a lucid interval. See also Bannatyne v. Bannatyne, 2 Rob. 472.

1. Swinb. on Wills, pt. 2, § 3, pl. 14, 16. Mr. Redfield says that the presumption in question is but little more than one of fact, "since it is every day's experience that a sensible man, in the fullest most unquestionable possession of all his mental powers, will sometimes make the strangest, most unaccountable disposition of his property without, and indeed contrary to, all supposed motive to be deduced from any process of fairly conducted *à priori* reasoning." 1 Redf. on Wills 122. See also Arbery v. Ashe, 1 Hagg. Ecc. 214; Thompson v. Kyner, 65 Pa. St. 368; Munday v. Taylor, 7 Bush. (Ky.) 491; Schouler on Wills (ed. 1892), § 112.

2. 1 Redf. on Wills 63; Schouler on Wills (ed. 1892), § 144. The doctrine of "partial insanity" was established in *England* by the leading

case of *Dew v. Clark*, 1 Add. 279; 3 Add. 79. In that case, the testator, besides laboring under mental perversion on religious subjects and in some other particulars, entertained an insane aversion to his daughter. He had shown great violence and irritability of temper towards his wife, who died shortly after the birth of the daughter. Testator refused to see the latter for two or three years after her birth, and declared, while she was in her earliest infancy, that she was born depraved, was the special property of Satan, and destined to be the victim of vice and evil. He persisted in this belief up to the time of his death. The daughter was respectful and attentive to the testator, behaved herself at all time with decorum and propriety, and was a person of strictly moral and religious habits. The testator was an electrician, and of sound mind except as to the delusion respecting his daughter. He disposed of an estate of the value of £40,000, leaving the daughter, his only child, an annuity of £100. The will was rejected. Sir John Nicholl, a distinguished probate judge, observed in this case: "It was said that 'partial insanity' was unknown to the law. The observation could only have arisen from mistaking the sense in which the court used that term. It was not meant that a person could be partially insane and sane at the same moment of time; to be sane the mind must be perfectly sound; otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects." This decision was rested on the authority of Greenwood's Case (cited *Dew v. Clark*, 3 Add. 79), where the testator conceived the idea that his brother had administered poison to him, which delusion became the prominent feature of his insanity. He recovered his senses in a few months and returned to his profession, which was that of a barrister, but could never divest himself of the delusion respecting his brother, who was his heir apparent, and accordingly, executed a will disinheriting him. A jury found against the will in the court of king's bench; a contrary verdict was found in the common pleas, and the suit was finally compromised. 1 Wms. on Exors. (Perkins' ed.) 42. The existence or possibility of such a thing as "partial insanity" was denied by Lord Brougham in *Waring v. Waring*, 6 Moore P. C. 341, who there said that, "When we predicate that one is of unsound mind only upon certain points,

we are wrong in supposing such a mind really sound on other subjects; it is sound only in appearance," and that "no confidence can be placed in the acts, or in any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be." In this case the testatrix was a widow who died without issue, leaving a considerable amount of real and personal property, and two brothers and five sisters as her next of kin. She executed a will in 1821 making her eldest brother, Rev. Thomas Waring, her sole heir and executor. In 1834 she executed another will, making one Henry Waring, a stranger to the family, the principal beneficiary. The last will was wholly in the handwriting of the deceased, and in itself disclosed no positive evidence of a disordered mind. In 1841 a commission found that the testatrix had been insane from 1838. She was a widow and remarried in 1821, and shortly after became strange and eccentric in her conduct, very suspicious of servants and others, had an idea that she was persecuted, that her husband was trying to poison her, that certain respectable ladies made faces at her at church, that she was preached against from the pulpit, that certain of the nobility and even her male servants were in love with her, and entertained many other delusions of an extravagant character; but none, it seems, respecting any of her relatives, unless perhaps one, namely, an heir apparent who had become a Catholic, to which denomination she was greatly averse. The will was rejected. The case of *Smith v. Tebbitt*, L. R., 1 P. & M. 398, seems to support the dictum of Lord Brougham in *Waring v. Waring*, 6 Moore P. C. 341. Sir J. P. Wilde there said: "A person who is affected by monomania, although sensible and prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will." Here the testatrix imagined that her deceased husband was the "devil," and refused to go into mourning for him, that her heirs-at-law were "doomed to perdition," that she herself was "the Holy Ghost," and her physician "the Father," and she caused a tiara of jewels to be made for her in which to ascend to heaven. She left the bulk of her estate to her physician as the gift of "one member of the Trinity," to another, having provided sundry legacies for relatives, servants, and others. The will was set aside.

generally recognized in the courts of the *United States*.<sup>1</sup> The doctrine, however, was denied in some of the earlier English cases.<sup>2</sup>

*b. DELUSIONS.*—A delusion which may incapacitate one from making a will has been defined as the conception of the existence of something extravagant, which has no existence whatever, but of which the person entertaining it is incapable of becoming permanently disabused by argument, reason, or proof.<sup>3</sup> A mere

The doctrine of *Waring v. Waring*, 6 Moore P. C. 341, and *Smith v. Tebbitt*, L. R., 1 P. & M. 398, is expressly repudiated and that of *Dew v. Clark*, 3 Add. 79, reaffirmed; namely, that the will of one suffering from delusions, will not be set aside if it is rational in itself, and in no way attributable to such delusions. *Banks v. Goodfellow*, L. R., 5 Q. B. 547. In this case two delusions affected the testator's mind: one, that he was pursued by spirits, the other, that a man, long since dead, came personally to molest him, the dead man having no claim on the testator's bounty. The will was rational and made in favor of the testator's niece, and was sustained. *Cockburn, C. J.*, there said: "When the jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed or guided by a judge." In *Boughton v. Knight*, L. R., 3 P. & M. 64, these principles were reaffirmed, but the will was set aside because the aversion of the testator to certain of his children who were excluded by the will, was considered to amount to an insane delusion. In *Smee v. Smee*, L. R., 5 P. D. 84, the same doctrines were declared, but the will was rejected as having been the result of the testator's delusions. In *Murfett v. Smith*, L. R., 12 P. D. 116, the will was sustained, the decision having been rested upon the authority of *Banks v. Goodfellow*, L. R., 5 Q. B. 549, without an opinion. So, also, *Russell v. Lefrancois*, 8 Can. Supreme Ct. Rep. 335.

1. See 1 Redf. on Wills 81; Schouler on Wills (6th Am. ed.) 61, note.

The doctrine with regard to partial

insanity, as adjudged in *Dew v. Clark*, 3 Add. 79, has been recognized very generally in the American courts. See *Clapp v. Fullerton*, 34 N. Y. 190; *Lathrop v. Borden*, 5 Hun (N. Y.) 560; *Merrill v. Rolston*, 5 Redf. (N. Y.) 220; *Forman's Will*, 54 Barb. (N. Y.) 274; *Boyd v. Eby*, 8 Watts (Pa.) 72; *Pidcoch v. Potter*, 68 Pa. St. 342; *Benoist v. Murrin*, 58 Mo. 307; *Gardner v. Lamback*, 47 Ga. 133; *Potts v. House*, 6 Ga. 324, and cases cited throughout this section.

But in *Indiana*, the doctrine seems not to be recognized. In *Willett v. Porter*, 42 Ind. 250, and in *Eggers v. Eggers*, 57 Ind. 461, it was held that the provision of the statute declaring persons of "unsound mind" incompetent to execute a will must be construed to include every species of unsoundness of mind, whether partial or complete.

In *Montana* (Prob. Code, § 433), and in *New Mexico* (Code, § 1378), a person having an insane delusion is declared incompetent to make a will.

2. *Waring v. Waring*, 6 Moore P. C. 341; *Smith v. Tibbett*, L. R., 1 P. & M. 398.

3. *Dew v. Clark*, 3 Add. 79; *Banks v. Goodfellow*, L. R., 5 Q. B. 549; *Boughton v. Knight*, L. R., 3 P. & M. 68; *Middleditch v. Williams*, 45 N. J. Eq. 726; *Stanton v. Wetherwax*, 16 Barb. (N. Y.) 259; *Mullins v. Cottrell*, 41 Miss. 291; *Benoist v. Murrin*, 58 Mo. 307; *Potter v. Jones*, 20 Oregon 239; *Smith v. Smith*, 48 N. J. Eq. 566.

Other definitions are: "a belief in something impossible in the nature of things or the circumstances of the case," *Ray Jour. of Insanity*, Apl. 1865, 515. "A belief in the existence or truth of things which no man in his senses can admit," *Taylor Med. Jur.* (6th ed.) 626. These definitions have been criticised by Sir J. P. Wilde in *Smith v. Tebbitt*, L. R., 1 P. & M. 378, as "begging the question" and "arguing in a circle;" but they were pronounced by Sir James Hannon in *Boughton v. Knight*, L. R., 3 P. & M. 64, sufficient for all practical purposes. 1 Redf. on Wills 71, 72.

mistake of fact which is the result of false evidence is not such a delusion.<sup>1</sup>

One whose mind is perverted by insane delusions with reference to one or many subjects, however unreasonable and absurd, may nevertheless make a valid will, provided the provisions thereof are not influenced by such delusions.<sup>2</sup> But a will shown

In *Chaney v. Bryan*, 16 Lea (Tenn.) 67, this definition is approved. Monomania is a morbid affection of the mind, consisting in a mental or moral perversion, or both, in regard to some particular subject or class of subjects; an insane delusion, believing in the existence of things which do not exist, and which no sane man would believe.

And in *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619, Denio, C. J., said: "If a person persistently believes opposed facts which have no real existence except in his perverted imagination and against all evidence of probability, and conducts himself, however logically, upon the assumption of the existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity."

Delusions and hallucinations brought about by the use of cocaine and morphine, will, like other delusions, incapacitate a testator. *In re Underwood* (Ohio), 21 Wkly. L. Bull. 279.

The following characteristics of monomania or partial insanity are laid down by Dr. Hammond in his treatise on insanity, and quoted approvingly in *1 Whart. & Stillé's Med. Jur.* 1873, § 60, n: "First, that one of the most prominent features of this species of insanity is a morbid feeling of hatred to friends, and a disposition to do them injury; second, that it is especially a symptom of monomania to imbibe delusions which exercise a governing influence over the mind of the affected individual, and force him to the commission of acts which in a state of sanity he would not perpetrate; third, that the monomaniac has power to conceal his delusions and to arrest the paroxysms to which he may be subjected."

In *Nichols v. Binns*, 1 Sw. & Tr. 239, Sir C. Cresswell said: "Where a person is laboring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of the delusion; but where he is afflicted with habitual insanity without delusions, his sanity is to be tested by his answers to questions, his apparent rec-

ollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals."

1. Schouler on Wills (2d ed.) 146; *Middleditch v. Williams*, 45 N. J. Eq. 726; *White's Will*, 121 N. Y. 406; *Hall v. Hall*, 38 Ala. 131.

It must be an insane delusion. *Brown v. Ward*, 53 Md. 376; *Fulleck v. Allison*, 3 Hagg. 527.

Belief based on evidence, however slight, is not a delusion. A delusion rests on no evidence whatever, but is based on mere surmise. *Tittel's Estate*, Myr. Prob. (Cal.) 12.

It is only the belief of facts which no rational person could believe, that is an insane delusion. 1 Wms. on Exors. 35; 1 Redf. on Wills 71. So in *Clapp v. Fullerton*, 34 N. Y. 190, it was held not sufficient to justify the rejection of a will, that a testator, in other respects competent, entertained the mistaken idea that one of his daughters was illegitimate, if it was not the effect of an insane delusion, but of slight and inadequate evidence, acting upon a jealous and suspicious mind. See also *Floreys v. Florey*, 24 Ala. 241.

An instruction that, if the testator was mistaken in his belief that his relatives had mistreated him, and therefore made no provisions for them, he was of unsound mind, was erroneous. The fact of such mistaken belief does not, as a matter of law, amount to an insane delusion. *Carpenter v. Bailey*, 94 Cal. 406.

In the case of *Date's Estate*, 12 N. Y. Supp. 205; 58 Hun (N. Y.) 608, the testator was declared competent, on the evidence of the scrivener, a lawyer who was also one of the subscribing witnesses, and who testified that the testator directed changes to be made in his will as to his son, because of reports of his bad conduct which he had heard.

2. *Dunham's Appeal*, 27 Conn. 192; *Potts v. House*, 6 Ga. 324; *Wetter v. Habersham*, 60 Ga. 193; *Boardman v. Woodman*, 47 N. H. 120; *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Lee v. Scudder*, 31 N. J. Eq. 634; *James v. Langdon*, 7 B. Mon. (Ky.) 193; *Pidcock v.*

to be the direct offspring of delusions which control the mind of the testator, cannot be sustained.<sup>1</sup>

The exclusion of relatives is frequently the result of insane delusions in respect to them, and whenever this can be proved in any particular case, probate of the will should be refused.<sup>2</sup> When, however, the testator has made his will with an appreciation of his property and the claims of those who were the natural objects of his bounty, the exclusion of his relatives, or apparent unjust

Potter, 68 Pa. St. 342; Rice v. Rice, 50 Mich. 448; Blackley's Will, 48 Wis. 294; Cole's Will, 49 Wis. 179; Chaffin's Will, 33 Wis. 557; Florey v. Florey, 24 Ala. 241; *In re* Maxwell's Estate, 1 Russ & Ches. (Nova Scotia) 229.

Where it is shown that the testator was under an insane delusion, his mental capacity is to be measured by the relation of the delusion to the testamentary act. Matter of Vedder, 6 Dem. (N. Y.) 92.

In Hollinger v. Syms, 37 N. J. Eq. 221, a delusion of the testator in regard to his own physical condition did not affect the testamentary disposition.

In Rice v. Rice, 53 Mich. 432, the testator was proved to have entertained many strange and unreasonable delusions, among them that he was a great man, that his services were needed by the general government, and that he was likely to be made secretary of the treasury; but his will, not being affected by such delusion, was sustained.

A delusion of a testatrix that she had been robbed and was destitute, is insufficient to establish testamentary incapacity. Rodger's Estate, 19 W. N. C. (Pa.) 383.

Georgia Code, section 2407, provides that a monomaniac may make a will, provided the same be in no way the result of, nor connected with, his delusions.

1. Whitney v. Twombly, 136 Mass. 145; American Seamen's Friend Soc. v. Hopper, 43 Barb. (N. Y.) 627, *aff'd* 33 N. Y. 624; Stanton v. Wetherwax, 10 Barb. (N. Y.) 263; Merrill v. Rolston, 5 Redf. (N. Y.) 220; Johnson v. Moore, 1 Litt. (Ky.) 372; Towney v. Long, 76 Pa. St. 106.

In Morse v. Scott, 4 Dem. (N. Y.) 514, the testator was induced, by an insane delusion that his body was going to be preserved to the end of time, to provide in his will for the perpetual maintenance of his vault, and it was thereby regarded as invalid.

In Brinton's Estate, 13 Phila. (Pa.)

234, an insane delusion with respect to the testator's property was held to invalidate his will, although his memory and reasoning powers in other respects were unimpaired.

It is error to instruct the jury in effect, that a will may be sustained, though the result of an insane delusion, if they believe the testator would have made the same will if he had been in his right mind. Cotton v. Ulmer, 45 Ala. 378.

2. *Relatives Excluded—Wills Rejected.*—Merrill v. Rolston, 5 Redf. (N. Y.) 221; American Seamen's Friend Soc. v. Hopper, 43 Barb. (N. Y.) 625; *aff'd* 33 N. Y. 619; Matter of Dorman, 5 Dem. (N. Y.) 112; Woodbury v. Obeare, 7 Gray (Mass.) 470; Tittel's Estate, Myr. Prob. (Cal.) 12; Sherley v. Sherley, 81 Ky. 240; Johnson v. Moore, 1 Litt. (Ky.) 371; Harrel v. Harrel, 1 Duv. (Ky.) 204; Carlin v. Baird (Ky. 1890), 13 S. W. Rep. 434; Carter's Estate, 11 Pa. Co. Ct. Rep. 140; Leech v. Leech, 1 Phila. (Pa.) 247; Evans v. Arnold, 52 Ga. 169; Lucas v. Parsons, 24 Ga. 640; Burkhart v. Gladish, 123 Ind. 338; Staser v. Hogan, 120 Ind. 207; American Bible Soc. v. Price, 115 Ill. 623; Ballantine v. Proudfoot, 62 Wis. 216.

Georgia Code, section 2399, provides in substance that where an entire estate is bequeathed to a stranger, to the exclusion of the wife and children, the will should be closely scrutinized, and upon the slightest evidence of aberration of intellect, fraud or undue influence, probate should be refused.

By the Roman civil law, a will which totally excluded any child of the testator from participation in his estate, was styled "inofficious," and condemned as the product of insanity, in consequence of which it became customary in *England*, for the testator to bequeath a disinherited child a shilling or other small legacy, to rebut the presumption that because of the testator's insane forgetfulness, he was omitted from the will. But



discrimination against them, although harsh and unreasonable, if not the offspring of some insane delusion, cannot affect the validity of the will.<sup>1</sup>

no such presumption exists at common law, it being requisite only in case of an "inofficious" will, that there should be satisfactory proof of the testator's knowledge and approval of its contents. 1 Wms. on Exors. (Perkins' Am. ed.) 53, 54. In *Boughton v. Knight*, L. R., 3 P. & M. 64, it was said that a man moved by capricious, mean, or even bad motives, may wholly or partially disinherit his own children and leave his property to a stranger; but there is a point beyond which it will cease to be a question of harsh and unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect, and if such a repulsion, amounting to a delusion, is shown to have existed prior to the execution of the will, the party who propounds that will must show that it was inoperative when the will was made. *Baker v. Lewis*, 4 Rawle (Pa.) 359; *In re Mintz's Will*, 5 Phila. (Pa.) 206.

In *Calhoun v. Jones*, 2 Redf. (N. Y.) 34, the will was rejected on the ground that it proceeded from an insane delusion of the testator that his father and sister, his only heirs at law, hated him because of a difference in their religious belief, and that the father had treated him harshly and unjustly on that account. In *Crandall v. Shaw*, 2 Redf. (N. Y.) 100, the testator gave his relatives but \$11,000 and bequeathed \$300,000 to a charity. He had the delusion that his relatives were impostors, not related to him, and were combining to get his property and injure him. The will was rejected.

In *Lockwood's Will*, 2 Conn. (N. Y.) 118, the testator had been in an insane asylum and had been discharged as "improved." Besides entertaining a great many most extravagant ideas and delusions, he believed that his relatives were trying to poison him to obtain his property, declaring that their intentions had been revealed to him by the birds at night. He was a very close man, and had about \$23,000 in the bank, most of which he made himself. He left his entire estate to charities, except to his executor "a sum from my estate . . . large enough to be over and above any bribe that may be offered by my brothers, sisters, and children for the

redemption of this will and their heirship to my estate." Probate was refused.

In *Ballentine v. Proudfoot*, 62 Wis. 216, the testatrix entertained a delusion that her only living child and her husband had ill-treated her and purposely made her uncomfortable and unhappy while she lived with them, and firmly believed that they proposed to poison her or make way with her in some manner. The exclusion of them from the provisions of the will was held to be plainly the result of these delusions, and was, therefore, invalid.

And in the *Matter of Kahn*, 1 Conn. (N. Y.) 510, the testator was under a similar delusion. He believed that his wife and children had entered into a conspiracy against him, and had attempted to poison him, and send him to a lunatic asylum. Probate of the will was refused.

In the *Matter of Dorman*, 5 Dem. (N. Y.) 112, the testator entertained great dislike to his children. He habitually, and without apparent cause, denounced them as robbers and thieves, and at such times manifested great excitement, and refused to be reasoned with on the subject. It was held that he was a monomaniac with regard to them, and that his disowning them was the result of the delusion.

**Evidence.**—In *Mill's Appeal*, 44 Conn. 484, it was held that, for the purpose of showing that the testator was under the influence of an insane delusion in believing one of his heirs at law to be a lewd character, evidence of the good character of such an one is admissible. See also *Burkhart v. Gladish*, 123 Ind. 337. But see *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

**1. Wills Sustained.**—*Banks v. Goodfellow*, L. R., 5 Q. B. 549; *Murfett v. Smith*, L. R., 12 P. D. 116; *Hoby v. Hoby*, 1 Hagg. Ecc. 146; *Phillips v. Chater*, 1 Dem. (N. Y.) 533; *Potter v. M'Alpine*, 3 Dem. (N. Y.) 108; *Bull v. Wheeler*, 6 Dem. (N. Y.) 123; *Thompson v. Thompson*, 21 Barb. (N. Y.) 107; *Thompson v. Quimby*, 2 Bradf. (N. Y.) 449; *Gamble v. Gamble*, 39 Barb. (N. Y.) 373; *Ogden's Will* (Surr. Ct.), 2 N. Y. Supp. 345; *Comstock's Estate* (Surr. Ct.), 7 N. Y. Supp. 334; *In re Gross' Will* (Supreme Ct.), 14 N.

Y. St. Rep. 429; Zeigler's Will, 19 N. Y. Supp. 947; 65 Hun (N. Y.) 621; Chadil's Will (Supreme Ct.), 19 N. Y. Supp. 947; Hall v. Hall, 38 Ala. 131; Stoelker v. Thornton, 88 Ala. 241; Snow v. Benton, 28 Ill. 306; Schneider v. Manning, 121 Ill. 376; Conway v. Vizzard, 122 Ind. 266; Bomgardner v. Andrews, 55 Iowa 638; Schildnecht v. Rompf (Ky. 1887), 4 S. W. Rep. 235; Gordon v. Morrow (Ky. 1889), 10 S. W. Rep. 373, a case of erroneous instruction; Kevil v. Kevil, 2 Bush (Ky.) 614; Cleveland v. Lyne, 5 Bush (Ky.) 383; Tudor v. Tudor, 17 B. Mon. (Ky.) 383; Fraser v. Jennison, 42 Mich. 206; Rice v. Rice, 50 Mich. 448; Mullins v. Cottrell, 41 Miss. 291; Benoist v. Murrin, 58 Mo. 307; Boardman v. Woodman, 47 N. H. 120; Den v. Gibbons, 22 N. J. L. 117; Stackhouse v. Horton, 15 N. J. Eq. 202; Middleditch v. Williams, 45 N. J. Eq. 726; Smith v. Smith, 48 N. J. Eq. 566. In this last case the testator's entire estate was devised to a charity, excluding his wife and children. Potter v. Jones, 20 Oregon 239; Cauffman v. Long, 82 Pa. St. 77; McKim's Estate, 9 Pa. Co. Ct. Rep. 209; Frowert's Estate, 11 Phila. (Pa.) 136; Chaney v. Bryan, 16 Lea (Tenn.) 63; Denson v. Beazley, 34 Tex. 191; Cole's Will, 49 Wis. 179. Mere bitter prejudices or ill-feeling, without reasonable ground therefor, will not avail against the validity of the will. Frowert's Estate, 11 Phila. (Pa.) 136; White's Will, 121 N. Y. 406; Den v. Gibbons, 22 N. J. L. 117; Carter v. Dixon, 69 Ga. 82.

In Kevil v. Kevil, 2 Bush (Ky.) 614, and Thomas v. Stump, 62 Mo. 275, it is said that a gross inequality in the distribution of the testator's estate may be taken into consideration upon the question of his mental capacity, but is not of itself sufficient to show incapacity, nor to invalidate the will. See notes to Kevil v. Kevil, 15 Am. Law Reg. (O. S.) 79.

In Foster's Estate, 9 Pa. Co. Ct. Rep. 216, it was attempted to show that the testatrix had conceived a prenatal hatred of her son, whom she excluded from the will, devising her whole property to a daughter. The son had married an obscure person against the testatrix's wishes, and had acted in other respects in a manner tending to estrange him from his mother. The will was admitted to probate.

Moral insanity, such as a profound hatred of another, is insufficient to invalidate a will, unless it amounts to an in-

sane delusion, under the influence of which the will is executed. Contempt, hatred, distrust, and a fear of a husband will not of themselves invalidate the will of the wife, which in a large measure excludes him from sharing in her property. Forman's Will, 54 Barb. (N. Y.) 274; Frere v. Peacock, 1 Rob. 442; 2 Taylor Med. Jur. (2d Eng. ed.) 555; 12 Am. Law Reg. (O. S.) 385.

The delusion of a testator that his brother was exercising his muscle for the purpose of killing him, is insufficient to set aside a will by which all of the testator's property was devised and bequeathed to his wife. Fricke's Will (Supreme Ct.), 19 N. Y. Supp. 315.

A delusion of the testator as to the chastity of his divorced wife and the illegitimacy of their child, was held insufficient to invalidate his will, which did not discriminate unjustly against the child. Cole's Will, 49 Wis. 179.

To establish insane delusion, the contestant must do something more than simply show "a mistaken notion" on the part of the testator as to the feelings or intentions of his relatives in reference to him or his property. Mosser v. Mosser, 32 Ala. 551; Hall v. Hall, 38 Ala. 131; Shorb v. Brubaker, 94 Ind. 165; Hite v. Sims, 94 Ind. 333; Carpenter v. Bailey, 94 Cal. 406.

In Coit v. Patchen, 77 N. Y. 533, the testatrix, a married woman, at the age of fifty-eight was a person of business capacity and intelligence, and entirely competent to dispose of her property. At that time she had an attack resembling apoplexy or paralysis, but on her recovery managed her business in person, executed deeds, conversed intelligently with her friends, gave intelligent instructions for her will, changed her views, on her attorney's advice, and though not in full possession of her health or former mental vigor, collected rents, directed improvements on her property, and conducted her own affairs like a capable person. She discriminated against her husband and some of her children in the will; but it was considered that the discrimination was due to jealousy of the husband, and resentment against the children for taking part against her in bitter family quarrels for many years, and the contestants' theory of an insane delusion on her part was rejected and the will sustained.

In Lathrop v. American Board of Foreign Missions, 67 Barb. (N. Y.) 590, the testator's will was refused probate

Religious beliefs of a strange and unusual character will not affect the capacity of the testator,<sup>1</sup> unless they amount to morbid

on the ground that he was a monomaniac in respect to freemasons, and expressed fears that he would lose his life and property among them, and because he entertained delusions towards his relatives who were freemasons, and excluded them from his will. But in *White's Will*, 121 N. Y. 406, a dislike of freemasonry and of a son because he was a freemason, was not sufficient to establish an insane delusion.

In *Shorb v. Brubaker*, 94 Ind. 165, evidence that the testator expressed the opinion that his children had ill-treated him, stating no fact, and an opinion expressed by such children, as witnesses, that they had not mistreated him, was held to be insufficient to justify an instruction that if the testator was influenced by such belief in framing his will, and that it was a delusion, the fact would justify the verdict for the contestants. See also *Hite v. Sims*, 94 Ind. 333, where it was held that the finding that testator was laboring under a delusion that certain of his children had treated him badly, would not justify a refusal to admit the will to probate.

**Persons Having no Interest.**—A delusion as to a particular person, who might expect a legacy, but has no interest in having the will set aside, is no sufficient objection to the testator's capacity. *Stackhouse v. Horton*, 15 N. J. Eq. 202.

So in *Cleveland v. Lyne*, 5 Bush (Ky.) 383, it was held that persons not heirs apparent of the testator at the time of his death, but who by reason of an unexpected casualty would have become so had he lived a short while longer, and who were excluded from the will, cannot avail themselves of the testator's delusions regarding them, in order to set aside the will.

Insane delusion and prejudice toward a son-in-law will not invalidate a will, unless it results in the exclusion of the son-in-law's wife. A son-in-law is not one of the presumed objects of a testator's bounty. *Brace v. Black*, 125 Ill. 33.

1. *Schouler on Wills* (2d ed.), § 166; *Austen v. Graham*, 29 Eng. L. & Eq. 38; *Weir's Will*, 9 Dana (Ky.) 434; *Williams v. Williams*, 90 Ky. 28; *Denson v. Beazley*, 34 Tex. 191; *American Bible Soc. v. Stover*, 12 N. Y. Wkly. Dig. 213. See *INSANITY*, vol. 11, p. 154.

In *Gass v. Gass*, 3 Humph. (Tenn.) 278, it appeared that the testator believed that there were degrees in heaven; that whatever circle of life a man lived in on earth would be enjoyed by him in heaven; that his pre-eminence there depended materially upon the amount of property he acquired here, and the charitable use he made of it. The court refused to charge that these opinions, of themselves, amounted to insane delusions, leaving the jury to determine that question from their character and the extent to which the testator carried them. The instructions were approved on appeal, the supreme court intimating that it was impossible for men to determine how far merely theoretical beliefs in regard to the future life are founded in delusions, there being no mode of testing their accuracy.

A court has no jurisdiction to decide whether a doctrine held by any particular religious sect be true or false. A delusion common to all the members of a religious sect cannot invalidate a will. *Newton v. Carbery*, 5 Cranch. (C. C.) 626.

In *Bonard's Will*, 16 Abb. Pr. N. S. (N. Y.) 128, the testator bequeathed an estate of the value of \$150,000 to the American Society for the Prevention of Cruelty to Animals; in consequence it was claimed of his belief, that the souls of men after death passed into the bodies of animals. He was a Frenchman by birth, residing in the city of New York, and had no family. His will was contested by certain persons living in France, who alleged themselves to be his heirs. The will contained no reference to his peculiar belief, nor did it appear that he had made any declaration of his opinions in connection with his will. The will was established. In this case, the Surrogate, in delivering his opinion, said: "If a judicial officer should assume that merely because a man earnestly believed in that doctrine (metempsychosis), he was insane, or labored under an insane delusion incapacitating him for making a will, if prompted by that faith . . . it would not fall very far short in principle of assuming that all mankind who did not believe in the particular faith which the judge accepts respecting the future state, are more or less insane or the victim of an insane delusion."

delusions which pervert his judgment and reason.<sup>1</sup> Nor does belief in witchcraft render a will invalid, unless it is shown to be the offspring of that belief.<sup>2</sup> Belief in spiritualism is held not to be an insane delusion.<sup>3</sup>

c. **ECCENTRICITY.**—Unusual and irregular habits, known as eccentricities, do not incapacitate one from making a will,<sup>4</sup> unless

1. Weir's Will, 9 Dana (Ky.) 445. See also *Smith v. Tebbitt*, L. R., 1 P. & M. 398.

In *American Bible Soc. v. Price*, 115 Ill. 630, the testator bequeathed the bulk of his estate to a religious corporation, under the impression that such a gift would insure the salvation of his soul. The will practically excluded a wife and children, and was rejected. See notes on this case 22 Cent. L. J. 338.

2. *Thompson v. Thompson*, 21 Barb. (N. Y.) 107; *Thompson v. Quimby*, 2 Bradf. (N. Y.) 449; *Matter of Vedder*, 6 Dem. (N. Y.) 92; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Leech v. Leech*, 1 Phila. (Pa.) 244; *Schildnecht v. Rompf* (Ky. 1887), 4 S. W. Rep. 235; *Woodbury v. Obear*, 7 Gray (Mass.) 467.

In *Addington v. Wilson*, 5 Ind. 137, the testator believed in witches, and that his wife and daughters were witches; in *Kelly v. Miller*, 39 Miss. 17, the testator believed in witches and conjurors, and that his mother was bewitched, and that his horse and gun were bewitched, and that when he broke bread at table it turned into blood; in *Lee v. Lee*, 4 McCord (S. Car.) 183, the testator believed that all women were bewitched, would not sleep on a bed made by a woman, and imagined himself engaged in constant warfare with evil spirits; in *Robinson v. Adams*, 62 Me. 369, the testatrix was a spiritualist, who believed that her son-in-law was under the control of an evil spirit. She kept books of spiritual communication which she considered of great value, and declared that the spirit of her deceased husband directed the terms of the will; in *Brown v. Ward*, 53 Md. 377, the testatrix was a spiritualist who believed that she communed with spirits, could cure the sick, and foretell future events; in *Smith's Will*, 52 Wis. 543, the testator was a spiritualist and claimed to have received a message from his deceased wife, telling him to marry the appellant beneficiary, and who frequently consulted mediums about his business, etc. In all these cases, however, the wills were sustained by the highest tribunals. See *Matter of Vedder*, 6 Dem. (N. Y.) 92.

3. Schouler on Wills (2d ed.), § 168; *Robinson v. Adams*, 62 Me. 369; *Brown v. Ward*, 53 Md. 393; *Keeler's Will* (Supreme Ct.), 3 N. Y. Supp. 629; *LeBau v. Vanderbilt*, 3 Redf. (N. Y.) 384; *In re Storey's Will*, 20 Ill. App. 183; *Middleditch v. Williams*, 45 N. J. Eq. 726; *Smith's Will*, 52 Wis. 543; 36 Am. Rep. 426; *Chaffin's Will*, 32 Wis. 557.

In *Middleditch v. Williams*, 45 N. J. Eq. 735, the chancellor said: "Believing, as I do, that these manifestations are correctly described by Vice-Chancellor Gifford in *Lyon v. Home*, L. R., 6 Eq. 655, when he called them 'mischievous nonsense, well calculated on the one hand to delude the vain, the weak, the foolish and the superstitious, etc.,' still it seems to me to be entirely clear that it cannot be said that a person who does believe in their reality is, because of such belief, of unsound mind or 'subject to an insane delusion. No court has yet so held.'"

**Undue Influence.**—But the will of one who entertained such belief has been set aside on the ground of undue influence exercised on the mind of the testator through such belief. As in *Thompson v. Hawks*, 14 Fed. Rep. 902, where the testator in disposing of his property followed implicitly the directions which he believed the spirit gave him. And in *Greenwood v. Cline*, 7 Oregon 18, where the testatrix, prior to the execution of the will, accompanied the legatee to a spiritual seance where a pretended letter, purporting to be from the deceased husband of the testatrix, warning her against her son and advising her to dispose of her property in a particular way, the will was set aside on the ground of undue influence. See also **UNDUE INFLUENCE**.

4. **Eccentricities.**—1 Redf. on Wills 71, 72; Schouler on Wills (2d ed.), § 144; *Taylor's Med. Jur.* (1836), p. 639; *Prentiss v. Bates*, 88 Mich. 567; *Brick v. Brick*, 66 N. Y. 144; *Ingoldsby v. Ingoldsby*, 20 Grant Ch. (Up. Can.) 131; *In re Wilkie's Estate*, 17 Nova Scotia 543.

*Georgia Code*, section 2408, provides that "eccentricity of habit or thought

such eccentricities have been indulged in to such an extent as to amount to insanity.<sup>1</sup>

*d. DELIRIUM.*—Delirium is a species of insanity resulting from the diseased state of the body, and is totally inconsistent with testamentary capacity.<sup>2</sup> But this species of insanity is temporary in its character, and the law does not allow a presump-

does not deprive a person of the power of making a testament."

Eccentricity is said to be distinguished from an insane delusion, by the fact that the eccentric man is aware of his differences from other men and persists in them, while a monomaniac is not conscious of his peculiarities, and believes himself to be guided by the wisest and most judicious counsels. 1 Redf. on Wills, 71, 72; Taylor on Med. Jur. (1866) 639.

In *Mercer v. Kelso*, 4 Gratt. (Va.) 106, the testator was a man of many strange and unreasonable habits and most extraordinary eccentricities, but he was adjudged to have a sound and disposing mind.

Eccentricity was illustrated in *Lee v. Lee*, 4 McCord (S. Car.) 183. The testator was a man filthy in his dress, slept in a hollow gum, he ate out of a pot with a broken spoon, and had no furniture in his house, although he was a man of considerable means; he imagined himself engaged in constant warfare with evil spirits, complained of incessant assaults, and provided the strangest weapons for his defense. His will, however, which was drawn up by his direction from dictation, was declared to be a valid instrument.

An eccentric will was that in which the testator, after disinheriting his next of kin in favor of a stranger, directed his executors to cause some parts of his bowels to be converted into fiddle strings, others to be sublimated into smelling salts, and the remainder of his body vitrified into lenses for optical purposes, explaining in a letter accompanying the will, that these directions were not given in a spirit of singularity or whim, but that he had a mortal aversion to funeral pomp, and wished his body to be converted into purposes useful to mankind. The testator was shown to have conducted his affairs with great shrewdness and ability, and to have been regarded by his associates as a man of sound mind. The will was admitted to probate. *Morgan v. Boys*, cited in Taylor Med. Jur. (ed. 1858) 657.

In another case, the testator, an Eng-

lishman who had lived long in the east and professed the Mahometan religion, directed that the residuum of his estate should go to the poor of Constantinople, and towards erecting a cenotaph in that city, inscribed with his name and bearing a perpetually burning light. The testator had lost his wife and child, and had no kin nearer than a brother of independent means. The will was sustained. *Austen v. Graham*, 29 Eng. L. & Eq. 38.

In *Lewis' Case*, 33 N. J. Eq. 219, the testator, besides being miserly, squalid, dishonest, profane, and irascible and otherwise eccentric in character, bequeathed the bulk of his estate to his executors, to be applied to the reduction of the debt incurred by the *United States* in the war of 1861. He had no relatives. The will was sustained.

1. Schouler on Wills (2d ed.), § 145; Ray Med. Jur. (1839) 129, § 92; *Mudway v. Croft*, 3 Curt. 678; *Frere v. Peacock*, 1 Rob. 442. In *Yglesias v. Dyke* (Prerog. Court, May, 1852), cited 2 Taylor Med. Jur. 556 (2d Eng. ed.), it was shown that the testatrix kept fourteen dogs of both sexes, which were provided with kennels in her drawing-room. Her will was rejected on the ground of eccentricity amounting to insanity. So, the will of another woman who had a strong propensity for cats, provided them with meals at regular hours, and furnished them with plates and napkins. The author observes, however, that a "propensity for animals proves nothing in relation to the existence of insanity, unless there is at the same time good evidence of intellectual aberration."

2. *Delirium.*—Schouler on Wills (2d ed.), § 121; 1 Redf. on Wills, p. 91; Ray on Med. Jur. "Insanity," pars. 346, 350; Taylor on Med. Jur. (1861) 632; Whart. & Stillé's Med. Jur. (2d ed.), § 255; *Jackson v. Moore*, 14 La. Ann. 209; *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Clark v. Ellis*, 9 Oregon 128; *Staples v. Wellington*, 58 Me. 453.

In *Owing's Case*, 1 Bland Ch. (Md.) 370, Bland Ch., says: "What is commonly called delirium is always preceded or attended by a feverish and

tion of its continuance from proof of its existence at any particular time.<sup>1</sup>

· *e.* DRUNKENNESS.—Neither the frequent use of intoxicating liquors nor habitual drunkenness, will of themselves incapacitate the testator.<sup>2</sup> But if the will is executed during a period when

highly diseased state of the body. The patient in delirium is wholly unconscious of surrounding objects, or conceives them to be different from what they really are; his thoughts seem to drift about, wildering and tossing amidst distracted dreams, and his observations, when he makes any, as often happens, are wild and incoherent.”

The law contemplates this species of mental derangement as an intellectual eclipse; as a darkness occasioned by a cloud of disease passing over the mind. Shelf. on Lunacy, 43; Brodgen v. Brown, 2 Add. 441.

1. Clark v. Ellis, 9 Oregon 138; Dimes v. Dimes, 10 Moore, P. C. 422.

It will continue only during the continuance of the fever in which it originated. If a fever is shown to exist at a given time, the law does not presume its continuance, as in the case of fixed insanity. Staples v. Wellington, 58 Me. 453.

In Brodgen v. Brown, 2 Add. 455, Sir John Nichol, comparing lucid intervals in the case of habitual insanity with intervals of reason in cases of delirium, says, “that the apparently rational intervals of persons merely delirious for the most part, are really such.”

In Brown v. Riggin, 94 Ill. 561, it was held that the proof of periodical epileptic attacks, loss of consciousness, the usual sequence of such attacks with fever and delirium, was not such proof of insanity as will justify an instruction based upon the presumption of its continuance.

In Matter of Bush, 1 Conn. (N. Y.) 330, the testatrix was suffering from typhoid fever and was shown to be the subject of frequent attacks of delirium. But upon the testimony of expert witnesses, the court was satisfied that the delirium was intermittent and that during intervals, she was of a disposing mind, and that the fever did not effect any organic change in the mind. The will was shown to be executed during such an interval, and upheld.

In Lillibridge's Estate, 133 Pa. St. 211, the court refused to set aside a will as an issue *derisari rel non*, 20 years after the testator's death, on evidence

that the will was executed while the testator was suffering from typhoid pneumonia, from which he died, there being nothing to show that he was delirious at the very time the will was executed.

2. Drunkenness. — Black's Estate, Myr. Prob. (Cal.) 24; Johnson's Estate, 57 Cal. 529; Harper's Will, 4 Bibb (Ky.) 244; Hubbard's Will, 6 J. J. Marsh. (Ky.) 59; Pierce v. Pierce, 38 Mich. 412; Turner v. Cheesman, 15 N. J. Eq. 243; Kahl v. Schober, 35 N. J. Eq. 461; Banister v. Jackson, 45 N. J. Eq. 702; Julke v. Adam, 1 Redf. (N. Y.) 454; McLaughlin's Will, 2 Redf. (N. Y.) 504; Reed's Will, 2 Conn. (N. Y.) 403; Gardner v. Gardner, 22 Wend. (N. Y.) 526; Schreiber's Will (Surr. Ct.), 5 N. Y. Supp. 47; Matter of Watson, 12 N. Y. Supp. 115; 58 Hun (N. Y.) 608; Peck's Will, 17 N. Y. Supp. 248; 62 Hun (N. Y.) 622; Peck v. Cary, 27 N. Y. 9; Waters v. Cullen, 2 Bradf. (N. Y.) 354; O'Neil v. Murray, 4 Bradf. (N. Y.) 311; Harmony Lodge's Appeal (Pa. 1889), 18 Atl. Rep. 10; McPherson's Appeal (Pa. 1887), 11 Atl. Rep. 205; Hight v. Wilson, 1 Dall. (U. S.) 94; Hannum v. Spear, 2 Dall. (Pa.) 291; Weisman's Estate, 45 Leg. Int. (Pa.) 274; Starrett v. Douglas, 2 Yeates (Pa.) 46; Black v. Ellis, 3 Hill (S. Car.) 68; Key v. Holloway, 7 Baxt. (Tenn.) 576; Temple v. Temple, 1 Hen. & M. (Va.) 476; Billingshurst v. Vickers, 1 Ph. 187; Ayrey v. Hill, 2 Add. 206; Handley v. Stacey, 1 F. & F. 574; Bell v. Lee, 28 Grant Ch. (Up. Can.) 150.

A drunkard may make a valid will, even if at the time of the execution of the instrument he is under the influence of liquor, provided he comprehends the nature, extent, and disposition of his estate. Peck v. Cary, 27 N. Y. 9; Matter of Reed, 2 Conn. (N. Y.) 403; Gardner v. Gardner, 22 Wend. (N. Y.) 526; Key v. Holloway, 7 Baxt. (Tenn.) 575.

In Lewis v. Jones, 50 Barb. (N. Y.) 645, it was held that an habitual drunkard, though subject to the control of a commission, was not necessarily incapacitated from making a will.

The question of the effect of intoxi-

the mind of the testator is in a state of delirium from intoxication, it cannot be a valid testamentary act.<sup>1</sup> Nor can one have

cation upon the capacity of a person, is not one to be determined by expert testimony, but is dependent upon the facts of the particular case. *Pierce v. Pierce*, 38 Mich. 418; *Ayrey v. Hill*, 2 Add. 209. And contradictory testimony as to such circumstances should be left for the jury to decide upon. *Best v. Best* (Ky. 1889), 11 S. W. Rep. 810. In *Gharky's Estate*, 57 Cal. 274, where the only issue presented by the contestant was the unsoundness of the testator's mind, it was held that the question whether the testator was drunk at the time the will was executed, should not be submitted to the jury as a special issue.

In *Duffield v. Morris*, 2 Harr. (Del.) 375, it was held that delirium tremens produced by drunkenness, as affecting testamentary capacity was the same as insanity produced in any other manner.

**Burden of Proof.**—Proof of drunkenness does not destroy the legal presumption of the testator's general capacity, and the burden of showing the manner of capacity at the time of the execution of the will rests on the contestant. *Black v. Ellis*, 3 Hill (S. Car.) 68; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Andress v. Weller*, 3 N. J. Eq. 604; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Lee's Case*, 46 N. J. Eq. 193; *Crittenden's Estate*, Myr. Prob. (Cal.) 50. As was said in *Lee's Case*, 46 N. J. Eq. 193, inebriety, although long continued and resulting occasionally in temporary insanity, does not require proof of lucid intervals to give validity to the act of the drunkard, as is required where general insanity is proved. And, consequently, where habitual intoxication is shown, there will be no presumption that there was incapacitating drunkenness at the time of making the will. But in *Cockran's Will*, 1 T. B. Mon. (Ky.) 263, where it was proved that for some time, before the execution of the will, and until his death, the testator's mind was in general in a state of derangement produced by the habitual and intemperate use of ardent spirits, it was held that it was necessary for the establishment of the will that it should be shown by clear and statutory testimony to have been made in a lucid interval.

1. 1 Redf. on Wills 160; *Peck v. Cary*, 27 N. Y. 9; *Edge v. Edge*, 38 N. J. Eq.

211; *Chapleau v. Chapleau*, 1 Leg. News (Can.) 473.

The rule is thus laid down by Swinburn: "He that is overcome by drink, during the time of his drunkenness is compared to a madman, and therefore, if he make his testament at that time, it is void in law; which is to be understood when he is so excessively drunk that he is utterly devoid of reason and understanding, otherwise, if he be not clean spent, albeit his understanding is obscured and his memory troubled, yet he may make his testament, being in that case." Swinb. on Wills, pt. 2, § 6; 1 Redf. on Wills 160; *Schouler on Wills* (2d ed.), § 126; 1 Wms. Exors. (Perkins' Am. ed.) 59; *Ayrey v. Hill*, 2 Add. 206; *Billinghurst v. Vickers*, 1 Ph. 191; *Wheeler v. Alderson*, 3 Hagg. 602.

Shelford observes that incapacity arising from intoxication differs from ordinary lunacy, in that the effects of drunkenness subsist only while the excitement lasts; so that there can scarcely be such a thing as latent ebriety, that is, a case of incapacity from mere drunkenness when the man is to all outward appearances capable; and that consequently, in cases of this description, all which is required to be shown is the absence of such excitement, at the time of the act done, as would vitiate it; for under a slight degree of excitement from liquor, the memory and understanding may be as correct as in the total absence of any exciting cause. Shelf. on Lunacy (Eng. ed. 1833) 276, 305. The sufficiency of the excitement to vitiate the act must depend upon the circumstances of each case; the degree of such excitement belongs to a description of cases that admits of no definite rule. *Ayrey v. Hill*, 2 Add. 209.

The existence of a commission is only *prima facie* evidence of incapacity in the case of a drunkard. 1 Jarm. on Wills (6th Am. ed.) 65; 1 Wms. on Exors. (4th Am. ed.) 37, note 1, and 38, note 1; Shelf. Lunacy (Eng. ed. 1833) 296; *Sergeson v. Seeley*, 2 Atk. 413; *Groom v. Thomas*, 2 Hagg. 449; *Lewis v. Jones*, 50 Barb. (N. Y.) 645.

Where a committee of a drunkard gives no bond and does not take charge of the property, and the drunkard manages his own affairs for 35 years thereafter, the presumption is that the proceedings were abandoned, and that

testamentary capacity whose mind has become so impaired from habitual drunkenness, as to be deprived of judgment and reason.<sup>1</sup>

**5. Feeble-Minded Persons—***a. IN GENERAL.*—Mere weakness of understanding is not of itself sufficient to incapacitate a testator;<sup>2</sup> but there may be incapacity in the testator without total deprivation of reason.<sup>3</sup> And a testator who has been of feeble mind from his birth, or who has been reduced to that condition by disease,<sup>4</sup>

the drunkard being reformed, was competent to make a will. *Leckey v. Cunningham*, 56 Pa. St. 370.

1. U. S. v. Drew, 5 Mason (U. S.) 28; *Starrett v. Douglas*, 2 Yeates (Pa.) 48; *Hannigan's Estate*, Myr. Prob. (Cal.) 135; *Burritt v. Silliman*, 16 Barb. (N. Y.) 199; *Peck v. Cary*, 27 N. Y. 9; *McSorley v. McSorley*, 2 Bradf. (N. Y.) 188.

*Blackstone*, 2 Bl. Com. 496, in enumerating the persons who, by reason of mental disability, are incapable of making a will, adds, "Such as have their senses besotted with drunkenness."

**2. Weakness of Understanding.**—*Schouler on Wills* (2d ed.), § 70; *Hoban v. Campan*, 52 Mich. 346; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Horn v. Pullman*, 72 N. Y. 269; *Snyder v. Sherman*, 23 Hun (N. Y.) 139; *Wade v. Holbrook*, 2 Redf. (N. Y.) 378; *Gray's Will*, 5 N. Y. Supp. 464; 52 Hun (N. Y.) 614; *Matter of Gross*, 14 N. Y. St. Rep. 429; *Dornick v. Reichenback*, 10 S. & R. (Pa.) 84; *Heister v. Lynch*, 1 Yeates (Pa.) 108; *Kimball v. Cuddy*, 117 Ill. 217; *Chandler v. Barrett*, 21 La. Ann. 58.

In *Mountain v. Bennett*, 1 Cox 356, Lord Chief Baron Eyre said: "It is not necessary to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question, whether he is a person of sound and disposing mind, memory, and understanding. A man perhaps may not be insane, and yet not equal to the important act of disposing of his property by will." In *Osmond v. Fitzroy*, 3 P. Wms. 129, it is said that "courts cannot measure the size of people's understanding and capacities, nor examine into the prudence or wisdom of men in disposing of their estates."

3. *Abraham v. Wilkins*, 17 Ark. 292; *Butlin v. Barry*, 1 Curt. 614; *Delafield v. Parish*, 25 N. Y. 9.

**4. Imbecility from Disease.**—In the following cases wills were contested on the ground of incapacity arising from

weakness of understanding produced by disease:

*Paralysis.*—*McDaniel's Will*, 2 J. J. Marsh. (Ky.) 331; *Smith v. Smith*, 75 Ga. 477; *Rothrock v. Rothrock*, 22 Oregon 551; *Trish v. Newell*, 62 Ill. 196; *Brock v. Lockett*, 4 How. (Miss.) 459; *Irish v. Smith*, 8 S. & R. (Pa.) 573.

In respect to paralysis and its effect on the mind, Mr. Justice Washington observed in *Hoge v. Fisher*, Pet. (C. C.) 163, "If no actual derangement or mental imbecility be found, it is not sufficient *per se* to assign a cause of derangement which might or might not have produced that effect. Paralysis, for instance, is sometimes a cause of mental derangement, and frequently it is not. If attended by apoplexy or an affection of the nerves, it necessarily affects the mind; but it frequently affects only the muscles, thereby producing bodily infirmity alone, and leaving the mind unimpaired. If the patient survives the stroke for any considerable length of time, it may in general be concluded that it was simply a paralysis affecting the body only."

In *Legg v. Myer*, 5 Redf. (N. Y.) 628, the testator had suffered from a stroke of paralysis for about six weeks. He was unconscious at first, but improved rapidly, so that his physician left him, and though he never fully recovered his power of speech or strength of mind, he read the paper every day and frequently called attention to articles that interested him; read the Bible often, received visits and shook hands with his visitors; understood conversation; showed an interest in money matters; was able to comprehend the extent of his property, the number of his children and their relations to him, and could understand ordinary business affairs. The will was sustained. *Birdsall's Will* (Surr. Ct.), 13 N. Y. Supp. 421; *Sheldon v. Dow*, 1 Dem. (N. Y.) 503; *Tacke's Will* (Surr. Ct.), 3 N. Y. Supp. 198.

In *Meeker v. Meeker*, 75 Ill. 260, where the testator's capacity was attacked on the ground of imbecility



or by the use of medicines and drugs,<sup>1</sup> is incapacitated from making a will, when he has not sufficient mind and memory to be able to understand the effect and operation of his will upon his property, and those entitled to receive it.<sup>2</sup>

produced by paralysis, the court properly excluded evidence that the testator's ancestors and relatives were affected with the same disease; such fact if proven having no tendency to show the effect of paralysis on the mind.

*Consumption.*—*In re Andrews*, 33 N. J. Eq. 514; *Ayres v. Ayres*, 43 N. J. Eq. 505; *Langton's Will*, 1 Tuck. (N. Y.) 301; *Berry v. Hamilton*, 10 B. Mon. (Ky.) 129; *Primmer v. Primmer*, 75 Iowa 415; *Doyle's Estate*, 7 Pa. Co. Ct. Rep. 657.

*Epilepsy.*—*Lewis' Will*, 51 Wis. 101; *Brown v. Torrey*, 24 Barb. (N. Y.) 583; *Foot v. Stanton*, 1 Deane Ecc. 19.

*Softening of the Brain.*—*Silverthorn's Will*, 68 Wis. 372; *Parramore v. Taylor*, 11 Gratt. (Va.) 220; *Fricke's Will* (Supreme Ct.), 19 N. Y. Supp. 315; *Newlin's Estates*, 7 Pa. Co. Ct. Rep. 648; *Cockrill v. Cox*, 65 Tex. 676.

*Chills and Fever.*—*Jones v. Harris*, 3 Rich. (S. Car.) 14.

*Heart Disease.*—*Mahoney's Will*, 12 N. Y. Supp. 122; 58 Hun (N. Y.) 608.

*Extreme Physical Debility.*—*Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577.

*Hysteria and Mental Distress.*—*De Haven's Appeal*, 75 Pa. St. 337.

*Palsy.*—*Reed's Will*, 2 B. Mon. (Ky.) 79.

*Throat Tumor.*—*Freeman v. Freeman*, 19 Ont. 141.

*Malignant Sore.*—*Thomas v. Stump*, 62 Mo. 275.

*Dyspepsia and Vertigo.*—*Bartholick's Will*, 1 Conn. (N. Y.) 373.

*Vertigo.*—*Soule's Will* (Surr. Ct.), 3 N. Y. Supp. 259.

1. *Use of Medicines and Drugs—Morphine, Opium.*—A person thrown into a stupor from the use of medicines, as from the administration of morphine, may be incapable of making a will. See *Garrison v. Blanton*, 48 Tex. 299; *Stedham v. Stedham*, 32 Ala. 525; *Bush v. Lisle*, 89 Ky. 393. But the mere fact that the testator was addicted to the use of morphine at the time the will was executed, when it is not shown that he was under the influence at that time, will not affect his capacity. *Frost v. Wheeler*, 43 N. J. Eq. 573. So also the administration of opium is not sufficient to show want of testamentary capacity, when it is not shown that the

drug affected the mental powers of the testator, further than to cause sleepiness, or that she was at all affected by it when she executed the will. *In re Glockner's Will* (Surr. Ct.), 2 N. Y. Supp. 97.

2. *Delafield v. Parish*, 25 N. Y. 9. This is a leading case in *New York*, on the degree of capacity requisite for the execution of a will in cases of imbecility. The testator, Mr. Henry Delafield, was a New York banker, without children. He made his will in 1842, bequeathing the residuum of his estate to two brothers, having amply provided for his wife and certain relatives. His estate continued to augment in value at the rate of \$60,000 per annum for 7 years, all of which increment, if he had died in the meanwhile, would have gone to his brothers under the residuary clause of the will. In 1849, he suffered an attack of paralysis and apoplexy, which deprived him of the power of speech and the use of his right arm and leg. He enjoyed good, but not uninterrupted health, until his death 7 years later, occasionally having spasms or convulsions. He could not, from his first attack, utter anything more than a few inarticulate sounds, described by witnesses as resembling the syllables "yah, yah," "yeah, yeah," "nin, nin," "nyeh," and supposed by them to mean "yes" and "no." He accompanied these sounds by gestures and motions of the left hand and arm, and by shaking his head. The gestures usually consisted in waving his hand in different directions, with his fingers extended, putting his fingers in his mouth, or raising his hand and shaking it. The external senses were not seriously affected. He would look at books and papers occasionally, but could not read at all. An unsuccessful attempt was made to induce him to write with his left hand, and block letters were placed before him, but he would not use them and pushed them away, nor would he use a dictionary to express his thoughts. The newspapers were read to him, but he showed no comprehension or appreciation of the reading. He was not intrusted with the management of his business nor allowed to have money; could not supply his own wants, and

b. PERSON IN EXTREMIS.—The fact that the testator when he executed his will was *in extremis*, raises no presumption of incapacity.<sup>1</sup> The same test is to be applied here as in other cases, and if, although in a dying condition, the testator has sufficient intelligence to comprehend his estate and the effect and operation of his will, he has sufficient capacity to make it. In the notes will be found numerous cases in which the testamentary capacity of persons *in extremis* is considered.<sup>2</sup>

c. OLD AGE.—Extreme old age, with its attendant physical and intellectual weakness, does not of itself incapacitate the tes-

was washed, dressed, and attended at the table like a child, and was even frequently unable to control his evacuations. His wishes were not easily ascertained, and sometimes could not be understood at all. He would also assent to contradictory suggestions. Before his attack, he was a calm, quiet, undemonstrative gentleman, rarely even exhibiting any emotion, and deeply absorbed in his business. After the attack, he occasionally shed tears, exhibited at times a want of decency, indulged in freaks, caprices, and whims, and had to be restrained from going into dangerous places. He was said to have pulled out his watch when passing the city hall clock, and to have insisted on being driven to his old office and to other places of his former business, to have assented by nods to suggestions to return home when out driving, to have called attention to the stopping of the clock, and to have laughed heartily at a ridiculous circumstance recalled to him by an acquaintance. While in this condition, he executed three codicils to his will, diverting the residuum of his estate from his brothers; his hand was guided while executing the first two; it did not appear whether he was assisted in making his mark to the third. The instructions for the codicils were given by his wife to counsel, and she was the principal beneficiary, although she was amply provided for by the will. The testator was declared to be not of sound mind and memory, and the codicils were set aside. While this case does not in terms overrule the decision in *Stewart v. Lisenard*, 26 Wend. (N. Y.) 255, it is considered practically to have done so, and to have established the rule stated in the text. See also *Blanchard v. Nestle*, 3 Den. (N. Y.) 37; *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *Alston v. Jones*, 10 Paige (N. Y.) 98; *Person v. Warren*, 14 Barb. (N. Y.) 488; *Osterhout v. Shoemaker*,

3 Den. (N. Y.) 37; *Petrie v. Shoemaker*, 24 Wend. (N. Y.) 85; *Burger v. Hill*, 1 Bradf. (N. Y.) 360.

1. *Jackson v. Jackson*, 39 N. Y. 153; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577.

2. *Wills Sustained*.—*Martin v. Walton*, 1 Lee Ecc. 230; *Hall v. Hall*, 18 Ga. 40; *Horne v. Horne*, 9 Ired. (N. Car.) 99; *Bush's Will*, 1 Conn. (N. Y.) 330; *Walther's Will* (Surr. Ct.), 7 N. Y. Supp. 417; *Connor's Will*, 7 N. Y. Supp. 855; 55 Hun (N. Y.) 606; *Patterson's Will*, 13 N. Y. Supp. 463; 59 Hun (N. Y.) 624; *O'Brien v. Dwyer*, 45 N. J. Eq. 689; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Andress v. Weller*, 3 N. J. Eq. 604; *Ayres v. Ayres*, 43 N. J. Eq. 565; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577; *Converse v. Converse*, 21 Vt. 168. See also *Leech v. Leech*, 1 Phila. (Pa.) 244; *Duggan v. McBreen*, 78 Iowa 591; *Rankin v. Rankin*, 6 T. B. Mon. (Ky.) 531. In this last case the testator was under sentence of death for murder when the will was made.

A testatrix, being ill, gave instructions for her will at 11 o'clock in the morning; she executed the will at 6 in the evening, and died in two hours. The court instructed the jury that if the testatrix, at the time of giving the instructions, had sufficient discretion for that purpose, and was able afterwards at the time of execution to remember the instructions, she was competent. *Hathorn v. King*, 8 Mass. 371. See also *Tomkins v. Tomkins*, 1 Bailey (S. Car.) 92; *Billinghurst v. Vickers*, 1 Ph. 187.

The occasional flightiness or wandering of intellect of a dying man is of slight weight as bearing upon the question of his testamentary capacity. *McMasters v. Blair*, 29 Pa. St. 298; *Leech v. Leech*, 1 Phila. (Pa.) 244.

A person to be competent to execute a will must be able to do more than answer simple questions by an affirma-

tator.<sup>1</sup> Nor does the loss of memory accompanying such a state, which does not amount to a forgetfulness of his interests and affairs, and of the relation he sustains to others, disqualify him.<sup>2</sup>

tive or negative. *Marquis of Winchester's Case*, 6 Co. Rep. 23.

In *Menzies v. White*, 9 Grant Ch. (Up. Can.) 574, the will of a person executed when roused from a stupor into which he was thrown by an accident which resulted fatally, was sustained.

**Wills Rejected.**—*Harwood v. Baker*, 3 Moore P. C. C. 282; *Coop's Will* (Surr. Ct.), 6 N. Y. Supp. 664; *Copeland v. Copeland*, 32 Ala. 512; *Den v. Johnson*, 5 N. J. L. 454; *Tucker v. Sandidge*, 85 Va. 546; *Sutton v. Sutton*, 5 Harr. (Del.) 450; *Muller v. St. Louis Hospital Assoc.*, 73 Mo. 242. In this last case the element of undue influence was prominent.

In *Knapp v. Reilly*, 3 Dem. (N. Y.) 427, the testator had been thrown by disease into a state of chronic stupor, from which he could be aroused, but into which he would relapse almost immediately. The will executed by him when so aroused was rejected.

**1. Extreme Old Age.**—*Bird v. Bird*, 2 Hagg. 142; *Lewis v. Pead*, 1 Ves. Jr. 19; *Kinleside v. Harrison*, 2 Ph. 461; *Griffith v. Robins*, 3 Madd. 122; *Mackenzie v. Handasyde*, 2 Hagg. 211; *Ex p. Crammer*, 12 Ves. 452; *Sherwood v. Sanderson*, 19 Ves. 283; *Ridgway v. Darwin*, 8 Ves. 65; *Bleeker v. Lynch*, 1 Bradf. (N. Y.) 458; *Springstead's Will*, 8 N. Y. Supp. 596; 55 Hun (N. Y.) 603; *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *Stebbins v. Hart*, 4 Dem. (N. Y.) 501; *Cornwell v. Riker*, 2 Dem. (N. Y.) 354; *Stewart's Will*, 13 N. Y. Supp. 219; 59 Hun (N. Y.) 618; *In re Berrien* (Surr. Ct.), 24 N. Y. St. Rep. 332; *Maverick v. Reynolds*, 2 Bradf. (N. Y.) 360; *Gray's Will*, 5 N. Y. Supp. 464; 52 Hun (N. Y.) 614; *Clearwater's Will* (Surr. Ct.), 2 N. Y. Supp. 99; *Williams' Will*, 2 Conn. (N. Y.) 579; *In re Woodfall*, 1 Leg. Gaz. (Pa.) 66; *In re Woods*, 13 Phila. (Pa.) 236; *Napfle's Estate*, 134 Pa. St. 492; *In re Wintermute*, 27 N. J. Eq. 447; *Collins v. Townley*, 21 N. J. Eq. 353; *Sutton v. Morgan*, 30 N. J. Eq. 629; *Kise v. Heath*, 33 N. J. Eq. 239; *Clifton v. Clifton*, 47 N. J. Eq. 227; *Harris v. Betson*, 28 N. J. Eq. 211; *Rusling v. Rusling*, 36 N. J. Eq. 607; *Brady v. McBride*, 39 N. J. Eq. 495; *Wadding-*

*ton v. Buzby*, 45 N. J. Eq. 173; *Spencer v. Moore*, 4 Call (Va.) 423; *Campbell v. Carnahan* (Ark. 1890), 13 S. W. Rep. 1098; *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Watts v. Bullock*, 1 Litt. (Ky.) 252; *Hoskins v. Hoskins* (Ky. 1888), 7 S. W. Rep. 546; *McKnight v. Wright*, 12 Rich. (S. Car.) 232.

*Georgia Code*, section 2408, provides that "old age, and the weakness of intellect resulting therefrom, does not, of itself, constitute incapacity; but if that weakness amounts to imbecility, the testamentary capacity is gone. In cases of doubt as to the extent of this weakness, the reasonable or unreasonable disposition of his estate should have much weight in the decision of the question."

**2. Schouler on Wills** (2d ed.), § 134; *Bice v. Hall*, 120 Ill. 597; *Yoe v. McCord*, 74 Ill. 33; *Bleeker v. Lynch*, 1 Bradf. (N. Y.) 458; *Crolius v. Stark*, 64 Barb. (N. Y.) 112; *Clarke v. Davis*, 1 Redf. (N. Y.) 249. *Compare* *Wood v. Wood*, 4 Brew. (Pa.) 75; *Horbach v. Denniston*, 3 Pittsb. (Pa.) 49; *Richmond's Appeal*, 59 Conn. 226; *Horne v. Pullman*, 72 N. Y. 269; *Hovey v. Chase*, 52 Me. 304; *Eddy's Case*, 32 N. J. Eq. 701; *Allison's Estate*, 12 N. Y. Supp. 324; 58 Hun (N. Y.) 608. Partial loss of memory is insufficient. *Montague v. Allan*, 78 Va. 592; *Marquis v. Marquis*, 1 Quebec L. Rep. 50.

A testator who, notwithstanding great age, bodily infirmities, and impaired mind, has mind and memory enough to recollect the property of which he is about to dispose, the persons to whom and the manner in which he wishes to bequeath it, and to know and understand the business in which he is engaged, has that sound and disposing memory which qualifies him to make a will. *Watson v. Watson*, 2 B. Mon. (Ky.) 74; *Reed's Will*, 2 B. Mon. (Ky.) 79. See also, to the same effect, *Taylor v. Kelly*, 31 Ala. 59; *Stancell v. Kenan*, 33 Ga. 56; *Nailing v. Nailing*, 2 Sneed (Tenn.) 630; *Maverick v. Reynolds*, 2 Bradf. (N. Y.) 360; *Bleeker v. Lynch*, 1 Bradf. (N. Y.) 470; *Chrisman v. Chrisman*, 16 Oregon 127; *Norton v. Paxton*, 110 Mo. 456. An impairment of memory will not invalidate a will, when it appears that the testator gave his own directions for the will and at

Yet such a state of mind as amounts to senile dementia incapacitates one from making a will.<sup>1</sup>

### III. PROBATE AND CONTEST—1. Presumption and Burden of Proof.—

Until the contrary appears, testamentary capacity is to be presumed, and where a will is sought to be avoided on the ground of mental disability, the burden is on the party alleging the disability to establish the fact.<sup>2</sup> The decisions, however, are by

different times afterwards referred to its provisions. *Sharp's Appeal*, 134 Pa. St. 492.

In *Wilson v. Mitchell*, 101 Pa. St. 495, the testator was over 100 years old, when he made his will. He had been a man of remarkable vigor of mind, but when he executed the will he was blind, and his hearing was impaired; his mind acted slowly; he was forgetful of recent events and of names; he repeated questions in conversation, would sometimes seem bewildered when aroused from sleep, and was extremely filthy in his habits. The court was nevertheless of the opinion that he was competent, and his will was sustained. See also *Fow's Estate* (Pa. 1892), 23 Atl. Rep. 447; *Tallman's Will* (Pa. 1892), 23 Atl. Rep. 986.

In *Merrill v. Rush*, 33 N. J. Eq. 537, the testatrix was 83 years old, dictated her own will, mentioned 20 legatees to the scrivener and noted the omission of one by him. The will was sustained, though it appeared that the testatrix had made an unjust and unfounded charge against a person who had no claims upon her bounty, and was forgetful in respect to several unimportant matters.

The fact that the testator at the age of 68 married a girl of 18 years, is not of itself evidence of imbecility. *Thomas v. Stump*, 62 Mo. 275.

1. **Senile Dementia.**—*Schouler on Wills* (2d. ed.), § 130; *Swinb. on Wills*, p. 2, § 5; *Harvey v. Sullens*, 46 Mo. 147; *Minor v. Thomas*, 12 B. Mon. (Ky.) 106.

In *Dumond v. Kiff*, 7 Lans. (N. Y.) 465, the testator made his will in June, at the age of 80. Neither of the subscribing witnesses testified that he was of sound mind; one of them thought the contrary. In the following autumn he did not know his children, inquired how many he had, could only name some of them, and died soon thereafter. The will was rejected.

In *Liddington's Will*, 4 N. Y. Supp. 646; 51 Hun (N. Y.) 638, the testator was 92 years old, feeble, deaf, nearly

blind, and subject to periodical attacks of sickness, in which his mind wandered. The will, which gave a large part of his estate to the wife of the scrivener, was rejected.

**Lucid Interval.**—There may be such a thing as a "lucid interval" in a case of senile dementia, during which the person will be competent to execute a will. *Kerr v. Lunsford*, 31 W. Va. 686.

2. **Presumption and Burden of Proof.**—*Groom v. Thomas*, 2 Hagg. 434; *Harris v. Ingledew*, 3 P. Wms. 91; *Tucker v. Phipps*, 2 Atk. 324; *Atty. Gen'l v. Parnter*, 3 Bro. C. C. 443; *White v. Wilson*, 13 Ves. 89; *Evanturel v. Evanturel*, 16 L. Can. Rep. 353; *Harrison v. Rowan*, 3 Wash. (U. S.) 580; *Hoge v. Fisher*, Pet. (C. C.) 163; *Den v. Vancleve*, 4 Wash. (U. S.) 262; *Hall v. Unger*, 2 Abb. (U. S.) 507; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; *Allen v. Public Admr.*, 1 Bradf. (N. Y.) 378; *Jackson v. King*, 4 Cow. (N. Y.) 207; *Dickie v. Van Vleck*, 5 Redf. (N. Y.) 286; *Legg v. Myer*, 5 Redf. (N. Y.) 630; *Delafield v. Parish*, 25 N. Y. 9; *Brown v. Torrey*, 24 Barb. (N. Y.) 586; *Stewart v. Lispenard*, 26 Wend. (N. Y.) 255; *Eau v. Snyder*, 46 Barb. (N. Y.) 232; *Howard v. Moot*, 64 N. Y. 262; *Turnure v. Turnure*, 35 N. J. Eq. 437; *Trumbull v. Gibbons*, 22 N. J. L. 117; *Sloan v. Maxwell*, 3 N. J. Eq. 581; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Elkinton v. Brick*, 44 N. J. Eq. 154; *McCoon v. Allen*, 45 N. J. Eq. 708; *Harris v. Vanderveer*, 21 N. J. Eq. 561; *O'Donnell v. Rodiger*, 76 Ala. 222; 52 Am. Rep. 322; *Saxon v. Whitaker*, 30 Ala. 237; *Copeland v. Copeland*, 32 Ala. 512; *Eastis v. Montgomery*, 95 Ala. 486; *Knox v. Knox*, 95 Ala. 495; *Daniel v. Hill*, 52 Ala. 430; *Stubbs v. Houston*, 33 Ala. 555, *overruling Dunlap v. Robinson*, 28 Ala. 100; *McDaniel v. Crosby*, 19 Ark. 533; *Guthrie v. Price*, 23 Ark. 396; *McCulloch v. Campbell*, 49 Ark. 367; *Rogers v. Diamond*, 13 Ark. 479; *Tobin v. Jenkins*, 29 Ark. 151; *Jenkins v. Tobin*, 31 Ark. 309; *Smith v. Smith*, 4 Baxt. (Tenn.) 293; *Frear v. Williams*, 7 Baxt. (Tenn.) 550;

Key v. Holloway, 7 Baxt. (Tenn.) 575; Puryear v. Reese, 6 Coldw. (Tenn.) 21; Bartee v. Thompson, 8 Baxt. (Tenn.) 508; Werstler v. Custer, 46 Pa. St. 502; Grubbs v. McDonald, 91 Pa. St. 236; Landis v. Landis, 1 Grant's Cas. (Pa.) 248; Linton's Appeal, 104 Pa. St. 228; Grabill v. Barr, 5 Pa. St. 441; Heenan's Estate, 39 Leg. Int. (Pa.) 179; Egbert v. Egbert, 78 Pa. St. 326; Thompson v. Kyner, 65 Pa. St. 377; Titlow v. Titlow, 54 Pa. St. 222; Tyson v. Tyson, 37 Md. 567; Davis v. Calvert, 5 Gill & J. (Md.) 300; Higgins v. Carlton, 28 Md. 115; Townsend v. Townsend, 7 Gill (Md.) 24; Perkins v. Perkins, 39 N. H. 163; Pettus v. Bingham, 10 N. H. 524; Halley v. Webster, 21 Me. 461; Barnes v. Barnes, 66 Me. 300; Kinloch v. Palmer, 1 Mill (S. Car.) 216; Hobby v. Bobo, 12 Rich. (S. Car.) 247, note; Chandler v. Ferris, 1 Harr. (Del.) 454; Panaud v. Jones, 1 Cal. 488; Moore v. Allen, 5 Ind. 521; Burton v. Scott, 3 Rand. (Va.) 399; Allen v. Griffin, 69 Wis. 529; Stephenson v. Stephenson, 62 Iowa 153; Blake v. Rourke, 74 Iowa 519; Taylor v. Wilburn, 20 Mo. 306. (The element of undue influence enters so largely into this last case that it can scarcely be considered to be in conflict with the *Missouri* doctrine, that the burden rests upon the proponent, and is not shifted by a *prima facie* case of competency made out by the testimony of the subscribing witnesses.) Payne v. Banks, 32 Miss. 292; 1 Redf. on Wills 32; Swinb. on Wills, pt. 2, § 3, p. 4; 1 Wms. on Exors. (Perkins' Am. ed.) 20; Schouler on Wills, §§ 173, 174. And see *INSANITY*, vol. 11, p. 159.

In *Delafield v. Parish*, 25 N. Y. 9, four of the judges were of the opinion that the burden devolved upon the proponents to establish the testator's competency, under a statute which provided that, "If it should appear upon the proof taken that such will was duly executed, and that the testator at the time of executing the same was in all respects competent to devise real estate, and not under restraint, the will should be admitted to probate." But five of the judges held that the statute could not be construed to intend that if the proof was evenly balanced, the will should be declared invalid, and stated the rule to be that, "At common law and under the *New York* statutes, the legal presumption is that every man is *compos mentis*; and the burden of proof that he is *non compos mentis* rests on the party who alleges that an unnatural condition of

mind existed in the testator. He who sets up the fact that the testator was *non compos mentis* must prove it." *Jones v. Jones*, 63 Hun (N. Y.) 630.

The presumption of sanity when first thrown in the scale, as it certainly may be, relieves the legatee from giving express evidence in the first instance to show mental capacity of the testator. *In re Robinson's Estate*, 20 Nova Scotia Rep. 271.

Where the testator was not interdicted as *non compos mentis* when the will was made, and there is nothing to show that he was subject to hallucinations, it will be presumed that he was of sound and disposing mind. *Lacombe v. Dambourges*, 3 Can. Law J. 10.

The burden is not shifted from the contestant by a statute which provides, among other things, that the will shall be admitted to probate if it appears that the testator, at the time of executing the same, was competent to devise his property. *Herbert v. Berrier*, 81 Ind. 1.

After a will has been regularly admitted to probate, the burden is on the contestant to show want of capacity in the testator. *Howard v. Moot*, 64 N. Y. 262; *Renn v. Samos*, 33 Tex. 760; *Jenkins v. Tobin*, 31 Ark. 306; *Rogers v. Diamond*, 13 Ark. 479; *McDaniel v. Crosby*, 19 Ark. 533.

**English Rules.**—The following rules, drawn from the decision in *Sutton v. Sadler*, 3 C. B. N. S. 87; 91 E. C. L. 86, represent the English practice, and are commended in 1 Wms. on Exors. 23 (6th Am. ed.), Perkins' note: "If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs. The burden of proof rests upon the person attempting to invalidate what on its face purports to be a legal act. Sanity must be presumed until the contrary is shown. . . . But it must be borne in mind that the presumption of sanity is not to be treated as a legal presumption, but, at the most, as a mixed presumption of law and fact (if not as a mere presumption of fact); that is, an inference to be made by a jury from the absence of evidence to show that the testator did not enjoy that soundness which experience shows to be the general condition of the human mind. If, therefore, a will is produced before a jury and its execution proved, and no other evidence offered, the jury should be properly told that they ought

no means uniform, many cases holding that the party propounding a will must prove the capacity of the testator;<sup>1</sup> but this requirement, apparently in conflict with the rule first stated, has been, in some instances, considered to apply only to the formal

to find for the will. And if the party opposing the will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favor of the will. And in each case the presumption of competency would prevail. Still the *onus probandi* lies in every case on the party relying on a will, and he must satisfy the jury that it is the will of a capable testator; and when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the will is the will of a competent testator, they ought not to affirm by their verdict that it is so."

In *England*, the general rule is that the person claiming under the will in an issue *devisavit vel non* must call all of the subscribing witnesses and make them his witnesses as to the mental capacity of the testator. *Keays v. McDonnell*, 6 Ir. Eq. 611. The rule on this point is not uniform in *America*. Schouler on Wills (2d ed.), § 177.

**Presumption Prima Facie Only.**—In the case of *Rutland v. Gleaves*, 1 Swan. (Tenn.) 198, the evidence tended to show that the testatrix was not well informed as to the contents and effect of the will which she signed, and the court held that it was error to instruct the jury "that if they believed the will was correctly read to the testatrix and that she was of sound mind, the legal presumption would be that she understood its contents," without explaining to them that the presumption was *prima facie* only and might be rebutted.

1. The following authorities support the proposition that the burden of proof is upon the proponent of the will to show mental capacity in the testator, and remains with him throughout the proceeding. *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524; (in this case it was held that the statute enabling persons of "sound mind" to make a will, imposed upon the executor the burden of showing the testator's mental capacity, and that the burden did not shift on evidence of sanity given by the subscribing witnesses.) *Baldwin v. Parker*, 99 Mass. 79; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Gerish v. Nason*, 22 Me. 438; *Cilley v. Cilley*, 34 Me. 162;

*Robinson v. Adams*, 62 Me. 369; *Hardy v. Merrill*, 56 N. H. 227; *Comstock v. Hadlyme, etc., Soc.*, 8 Conn. 261; *Taff v. Hosmer*, 14 Mich. 309; (in this case Judge Cooley sets out the *Michigan* practice fully. See abstract from his opinion in *INSANITY*, vol. 11, p. 155.) *Aikin v. Weckerly*, 19 Mich. 482; *Beaubien v. Cicoth*, 8 Mich. 9; *Kempsey v. McGinniss*, 21 Mich. 123; *Prentis v. Bates*, 93 Mich. 234; (where it is said that the rule placing the burden on the proponents throughout the case is firmly established in *Michigan*, *overruling* *Prentis v. Bates*, 88 Mich. 567. See the strong dissenting opinion of Grant, J., in *Prentis v. Bates*, 93 Mich. 234.) *McGinniss v. Kempsey*, 27 Mich. 363; *Elliott v. Welby*, 13 Mo. App. 19; *Benoist v. Murrin*, 58 Mo. 322; *Jones v. Roberts*, 37 Mo. App. 163; *Cravens v. Faulconer*, 28 Mo. 19; *Tingley v. Cowgill*, 48 Mo. 291; *Norton v. Paxton*, 110 Mo. 456; *Harvey v. Sullen*, 56 Mo. 372; *Evans v. Arnold*, 52 Ga. 169; *Williams v. Robinson*, 42 Vt. 658; *Moyer v. Swygart*, 125 Ill. 267; *Potter v. Potter*, 41 Ill. 80; *Mueller v. Rehan*, 94 Ill. 142; *Rigg v. Wilton*, 13 Ill. 15; *Yoe v. McCord*, 74 Ill. 38; *Carpenter v. Calvert*, 83 Ill. 62; *Hubbard v. Hubbard*, 7 Oregon 44; *Chrisman v. Chrisman*, 6 Oregon 127; *In re Layman's Will*, 40 Minn. 371. (This last decision is based on a *Minnesota* statute which requires proof of sanity to be offered by the proponent.)

In *West Virginia*, the reason given for placing the burden on the proponent is, that at common law a person could not make a will, and that the statute enabling persons of sound mind to make a will changed the common-law presumption of sanity, and required the proponent to show sanity when the will was executed. *McMeehan v. McMeehan*, 17 W. Va. 685. And see *Nicholas v. Kershner*, 20 W. Va. 261.

The burden of proving capacity to make a will rests upon the proponents, *Fulton v. Andrew*, L. R., 7 H. L. 448; and *a fortiori*, when it appears that the testator was subject to delusions. *Smee v. Smee*, L. R., 5 P. D. 84. See also *Paske v. Ollatt*, 2 Ph. 323; *Barry v. Butlin*, 2 Moore P. C. 480; *Browning v. Budd*, 6 Moore P. C. 430; *Sutton v.*

proof required in probate proceedings, and to be satisfied by a *prima facie* case of competency made out by the testimony of the subscribing witnesses.<sup>1</sup>

Sadler, 3 C. B., N. S. 87; 91 E. C. L. 86; Baker v. Batt, 2 Moore P. C. 317; Symes v. Green, 1 Sw. & T. 401; Pantton v. Williams, 2 Curt. 530; Wallis v. Hodgson, 2 Atk. 56. The burden is upon the proponent in the court below, and also on appeal from an order establishing the will. Potts v. House, 6 Ga. 324.

In a suit to set aside a will, probate of the will is not sufficient to shift the burden of proof to the plaintiff, the contestant. Rogers v. Thomas, 1 B. Mon. (Ky.) 390; Rigg v. Wilton, 13 Ill. 15.

In Evans v. Arnold, 52 Ga. 169, the court said: "We think the court erred in charging that after the *factum* of the will was duly proven, the burden of showing the other requisites ceased as to the propounders, and on the issue of sanity or insanity, the burden was on the caveators. We are aware of the fact that there are respectable authorities asserting this rule. It has the countenance of no less an authority than Mr. Redfield, though he lays it down rather as a logical deduction from certain other rules than as law. The truth is, the rule is unsettled. The general rule of law undoubtedly is that one is presumed sane until the contrary is shown, and this may also be said of the rule that he who holds the affirmative of a proposition must prove his assertion. But when one comes into a court of justice to give the property of the deceased person a different direction from that given by the law, he takes upon himself to prove all the conditions on which his right depends. . . . I am not, myself, prepared to say that the general doctrine of the law as to sanity is to be entirely disregarded. Undoubtedly, sanity is the normal condition of man; and if, on an examination of the circumstances attending the execution, nothing unusual appear; if the testator appear to be aware of what he is doing, and acts as sane men do, I am of the opinion that a *prima facie* case is made out, at least that a verdict for the will would be justified, if, when the facts are detailed, the act as done is done as sane men do things—as if a man ask a witness to attest his will, and the witness do so on its being signed by the testator—the very act of signing intelligently is a sane act. . . . Still, the rule

is undoubted, that it is a part of the propounder's case to prove the sanity and freedom of the testator, and unless the jury be affirmatively satisfied that the testator was of sound and disposing mind, they should find against the will."

1. Carpenter v. Calvert, 83 Ill. 62; Wilbur v. Wilbur, 129 Ill. 392; Pendlay v. Eaton, 130 Ill. 69; Hawkins v. Grimes, 13 B. Mon. (Ky.) 257.

There is much conflict of decision upon this point, having its origin in a rule of probate practice, requiring the executor to offer some evidence of the testator's sanity on propounding the will, and to examine the subscribing witnesses on that point, whether his capacity was or was not impeached; but it is said that the weight of authority supports the rule as stated in the text. 1 Wms. on Exors. (Rand. & Tal. Am. ed.) 110 n; 1 Redf. on Wills (1876) 31.

The expression "burden of proof," should not be confounded with the expression "weight of evidence;" because it is the duty of the proponent in every case to satisfy the jury by a preponderance of testimony, that the will was made by a competent testator. The expression meant, that standing alone, without proof on either side, the will is to be established or rejected in consequence of the failure of the one side to offer proof of capacity, or of the other side to give some evidence of incapacity. Barry v. Butlin, 2 Moore P. C. 480; Scott v. Wood, 81 Cal. 400; Keays v. McDonnell, 6 Ir. Eq. 611.

In a contested case, the competency of the testator must be established to the satisfaction of the court, beyond a reasonable doubt. Keays v. McDonnell, 6 Ir. Eq. 611. In Pantton v. Williams, 2 N. C. App. 29, Lord Brougham said: "The course of administration directed by the law is to prevail against him who cannot satisfy the court of probate that he has established a will. . . . There is no duty cast upon the court to strain after probate, and to grant it where doubts remain wholly unremoved. In Smith v. Newman, cited Keays v. McDonnell, 6 Ir. Eq. 611, Judge Keatinge instructed the jury: 'Has it been made out to your perfect satisfaction that the deceased, when he executed this will, was of sound mind? If you entertain a reasonable doubt, the plaintiff has failed

The burden of proof sometimes shifts to the proponent where there are gross inequalities in the will, which are unexplained.<sup>1</sup>

to prove his case, and it is your duty to find for the defendant.”

See *Harper v. Harper*, 1 Thomp. & C. (N. Y.) 351, where it is said, *citing* *Delafield v. Parish*, 25 N. Y. 9, that the burden of proof to show unsoundness of mind rests on the contestant, but that “it is also the rule in the first instance that the party propounding the will must prove the mental capacity of the testator.” This apparent solecism is thus explained by Mr. Perkins, 1 Wms. on Exors. (6th Am. ed.) 32, note x<sup>3</sup>; “Much of the conflict among the cases has arisen from treating the presumption of sanity in case of wills as one of law—a legal presumption—and then holding that the burden of proof is upon the person who has the benefit of that presumption.” The annotator concludes that the difficulty may be avoided “by treating the presumption as one of fact, making only a *prima facie* case in favor of the proponent, without relieving him of the burden of proof.”

In an action to contest the validity of a will, if the plaintiff fail to introduce testimony to show want of capacity in the testator, the court may, when the plaintiff rests, direct a verdict for the defendant, under *Ohio Rev. St.*, § 5861, which provides that the order of probate shall be *prima facie* evidence of validity of the will. *Wagner v. Ziegler*, 44 Ohio St. 59. For the rule before this statute see *Green v. Green*, 5 Ohio 278.

The proponent must show affirmatively before resting his case, that the testator was of sound mind, under *New York Code Civ. Proc.*, § 2623, which provides that “if it appears to the surrogate that the testator, at the time of executing it, was in all respects competent to make a will.” *Ramsdell v. Viele*, 6 Dem. (N. Y.) 244, *citing* *Kingsley v. Blanchard*, 66 Barb. (N. Y.) 317; *Miller v. White*, 5 Redf. (N. Y.) 321; *Matter of Cottrell*, 95 N. Y. 336; *Redf. Surr. Prac.* (3d ed.) 216. See also *Crispell v. Dubois*, 4 Barb. (N. Y.) 397; *Lake v. Ranney*, 33 Barb. (N. Y.) 49; *Lissauer's Will* (Surr. Ct.), 5 N. Y. Supp. 260.

Where the infirmities of the testator, or his impaired mental capacity, are such that an inference of competency cannot be drawn from the formal execution of the will, and one of the sub-

scribing witnesses is dead and the other but little acquainted with the testator, the burden is upon the proponent to satisfy the surrogate beyond a reasonable doubt of the testator's capacity; that he could comprehend the nature of his property, what it was, and how situated; and also appreciate the relations to him, of those entitled to his bounty. *Matter of Kiedaisch*, 2 Conn. (N. Y.) 438.

There would seem to be an inconsistency in holding, first, that the executor or proponent must offer evidence of the testator's capacity, and, second, that the testator is presumed to have been sane, and that the contestant must prove his insanity. Upon this point Judge Redfield says: “We cannot but feel that all the apparent confusion in the matter has arisen from the modern gloss which has been incorporated with the old rule, that the party propounding the will must adduce some proof of the testator's sanity at the time of executing the will, which, with all due submission, we venture to affirm is either a fallacy, or else it is the expression of a principle too refined for our apprehension. For no man's comprehension can be so far blunted that he will not be able to perceive the incongruity of requiring a party to give positive proof of the existence of a fact which the law presumes in the absence of all proof.” 1 Redf. on Wills (1876) 46 n.

Where a will, rational in its provisions, is shown to have been duly executed, the burden of showing want of mental capacity shifts to the contestant. *Fee v. Taylor*, 83 Ky. 259; *Milton v. Hunter*, 13 Bush (Ky.) 163; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *Browne v. Molliston*, 3 Whart. (Pa.) 129; *Spratt v. Spratt*, 76 Mich. 384; *Aikin v. Weckerly*, 19 Mich. 482; *Banker v. Banker*, 63 N. Y. 409; *Duffield v. Morris*, 2 Harr. (Del.) 375; *Perkins v. Perkins*, 39 N. H. 163; *McCulloch v. Campbell*, 49 Ark. 367; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Mayo v. Jones*, 78 N. Car. 402.

1. Gross inequalities in the provisions of a will, when no reasons appear therefor, shift the burden to the proponents, and require them to show the mental capacity of the testator. *Matter of Budlong's Will*, 126 N. Y. 423, *aff'd* 54 Hun (N. Y.) 131; *Gay v. Gillilan*, 92 Mo. 250.

In the case of *Caldwell v. Anderson*,



The presumption is that a person once insane continues in that state of mind, and if the habitual insanity of the testator be shown, and it is alleged that the will was executed in a lucid interval, the burden of proof shifts to the proponent;<sup>1</sup> though if the proof only shows a case of insanity, directly connected with some violent disease with which the testator was attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject

104 Pa. St. 204, Gordon, J., said, "Where the testator is shown to be of weak mind, without regard to the cause or causes from which that weakness has arisen, though it be not sufficient in itself to wholly destroy testamentary capacity, and the person by whom, or under whose advice, the will has been written, being a stranger to the testator's blood, receives a legacy or bequest, large as compared to the testator's estate, the burden of proof shifts from the contestants to the proponent of the will." *Boyd v. Boyd*, 66 Pa. St. 283; *Cuthbertson's Appeal*, 97 Pa. St. 163.

1. 1 Wms. on Exors. (6th Am. ed.) 33; Swinb. on Wills, pt. 2, § 3, pl. 7; *Cartwright v. Cartwright*, 1 Ph. 100; *Atty. Gen'l v. Parnter*, 2 Bro. C. C. 443; *Hall v. Warren*, 9 Ves. 611; *White v. Driver*, 1 Ph. 88; *Groom v. Thomas*, 2 Hagg. 434; *Waring v. Waring*, 6 Moore P. C. C. 341; *Germani v. Draper*, 6 Notes of Cas. 418; *Johnson v. Blane*, 6 Notes of Cas. 422; *Fowles v. Davidson*, 6 Notes of Cas. 461; *Chambers v. Queen's Proctor*, 2 Curt. 415; *Hoge v. Fisher*, Pet. (C. C.) 163; *Clark v. Fisher*, 1 Paige (N. Y.) 171; *Bogardus v. Clark*, 4 Paige (N. Y.) 623; *Clarke v. Sawyer*, 3 Sandf. Ch. (N. Y.) 351; *Gombault v. Public Admr.*, 4 Bradf. (N. Y.) 226; *Griffin v. Griffin*, R. M. Charl. (Ga.) 217; *Titlow v. Titlow*, 54 Pa. St. 216; *Rush v. Megee*, 36 Ind. 69; *Harrison v. Bishop*, 131 Ind. 161; *Stevens v. Stevens*, 127 Ind. 560; *Chandler v. Barrett*, 21 La. Ann. 58; *O'Donnell v. Rodiger*, 76 Ala. 222. The proponent cannot shift the burden back to the contestant, by showing that the testator had lucid intervals. *Saxon v. Whitaker*, 30 Ala. 237. But if it appears that the will was made in a lucid interval, the burden shifts to the contestant to show incapacity at the time of execution. *Mifflin v. Smedley*, 3 Del. Co. Ct. (Pa.) 143.

Where a person becomes insane after executing his will, and the will is found mutilated shortly before his death, the burden is upon the party alleging a rev-

ocation, to show that it was mutilated while the testator was of sound mind. *Harris v. Berral*, 1 Sw. & Tr. 153.

In *Porter v. Campbell*, 2 Baxt. (Tenn.) 81, a verdict in favor of a will was set aside for error of the judge in instructing the jury that if the testator retained a holographic will among his papers during lucid intervals, "it would be very strong, if not conclusive proof" that he intended it to remain his will.

It is error for the court to reject evidence of the testator's insanity prior to the making of the will, on the ground that the burden is on the contestant to show insanity at the very time the will was executed. *Reichenbach v. Ruddach*, 127 Pa. St. 564.

But the fact that the testator had been insane some years prior to the execution of the will, does not raise a presumption that he was insane when the will was published; especially if it appears that after a cure, no symptoms of relapse were ever manifested. *Snow v. Benton*, 28 Ill. 306. See also *Hall v. Unger*, 2 Abb. (U. S.) 507.

The burden of proof is not shifted to the proponent by proof of the fact that the testator's mind was affected a few years after the will was made, with nothing to show that the derangement was permanent in its character. *Taylor v. Creswell*, 45 Md. 422. Nor by evidence that the testator was sick for some time before making his will, and occasionally suffered paroxysms of pain in which "he did not know anything." *Blake v. Rourke*, 74 Iowa 519.

When the subscribing witnesses testify that the testator was conscious when he executed the will, proof that he was delirious within four hours before that time, does not shift the burden to the proponent. *Lyddy's Will*, 5 N. Y. Supp. 636.

Mental capacity or incapacity of a testator at the time of the execution of the will, will be presumed to have continued to the time of the execution of a codicil. *Thomas' Estate*, 20 W. N. C. (Pa.) 336.

in controversy.<sup>1</sup> If the will is rational on its face, and is shown to have been properly executed and attested, it will be strong evidence that the testator was competent; but if there are circumstances shown counterbalancing such presumption, the proponent must affirmatively establish that the testator was of sound mind when the will was executed.<sup>2</sup>

If the testator was under guardianship as a person of unsound mind, he was *prima facie* incapable of making a will, and the burden of proof rests upon the proponent to show that his reason was afterwards recovered.<sup>3</sup>

1. *Trish v. Newell*, 62 Ill. 201; *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Lee v. Lee*, 4 McCord (S. Car.) 183; *Grabill v. Barr*, 5 Pa. St. 441; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Cartwright v. Cartwright*, 1 Ph. 100; 1 Wms. on Exors. 17, 18; *Swinb. on Wills*, pt. 2, § 3; *Collison on Lun.* 55; *Shelf. on Lun.* 275.

And especially where it is shown that the testator was cured and no symptoms of a return of the malady were ever manifested, there can be no presumption that insanity was present at the time of the publication of his will. *Snow v. Benton*, 28 Ill. 306. But a temporary derangement of intellect, from disease or other cause, will create, while it lasts, an incapacity to make a will, if the party's situation is apparent. *Aubert v. Aubert*, 6 La. Ann. 104.

2. *Schouler on Wills* (1892), § 113; 1 Redf. on Wills (1876) 51; *Symes v. Green*, 1 Sw. & Tr. 401. In this case the testator, after being undoubtedly insane for a fortnight, had a lucid interval of a month, and then became depressed as to his religious condition to such an extent as to convince his friends of his insanity. While in this condition, he made his will; it was in his own handwriting, was perfectly rational, and in no way connected with, nor did it refer to, the subject upon which he was deranged. The testimony of the subscribing witness was against his sanity, and the court required the proponent to establish the testator's competency affirmatively, failing in which, the will was rejected. See *Cartwright v. Cartwright*, 1 Ph. 90, in which a rational will written by the testatrix in a lucid interval was sustained, and *Clark v. Lear*, cited 1 Ph. 90, 119, where a carefully framed will in the testator's handwriting, alleged to have been executed in a lucid interval, was rejected because of an absurd devise to a young woman whom the testator had met by chance.

See *supra*, this title, *Lucid Intervals*; *Temple v. Temple*, 1 Hen. & M. (Va.) 476; *Singer v. Isbey*, 4 Lanc. (Pa.) 193; *Lee v. Lee*, 4 McCord (S. Car.) 183.

But the fact that the will is unreasonable is not of itself proof of incapacity of the testator. *Munday v. Taylor*, 7 Bush (Ky.) 491.

3. 1 Redf. on Wills (1876) 43; *East India Co. v. Dyce Sombre*, 4 W.R. 714; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Little v. Little*, 13 Gray (Mass.) 264; *Stone v. Damon*, 12 Mass. 488; *Hamilton v. Hamilton*, 10 R. I. 538; *Johnson's Estate*, 57 Cal. 529.

In *Stone v. Damon*, 12 Mass. 488, it was decided that the rule that a decree adjudging a person *non compos mentis* was conclusive evidence of his insanity, did not apply where the testamentary capacity of such person was in dispute. In *Bogardus v. Clark*, 4 Paige (N. Y.) 623, it was held that such a decree was not conclusive on the parties to the proceeding, as to a devise of real estate by the alleged lunatic.

The fact that a person is under guardianship as a lunatic, while it raises a strong presumption of testamentary incapacity, does not invalidate a will then made. 1 Wms. on Exors. (Perkins' ed.) 38 n; *Schouler on Wills* (1892), § 81; 10 Moore P. C. 244; *Cooke v. Cholmondely*, 2 Mac. & G. 22; *Bannatyne v. Bannatyne*, 16 Jur. 864; *Robinson v. Robinson*, 39 Vt. 267; *Lucas v. Parsons*, 27 Ga. 593; *Slinger's Will*, 72 Wis. 22; *Titlow v. Titlow*, 54 Pa. St. 216; *Dyre's Estate*, 12 Phila. (Pa.) 156; *Rice v. Rice*, 50 Mich. 448; *Pendleton's Will*, 1 Conn. (N. Y.) 480.

In *Stevens v. Stevens*, 127 Ind. 560, it was held that an instruction that the proof to overcome the presumption of insanity arising from an adjudication of lunacy must be "*clear, explicit, and satisfactory*," was not made erroneous by italicising those adjectives.

In *Re Burr*, 2 Barb. Ch. (N. Y.) 208,

Generally speaking, the party upon whom the burden of proof rests, has the right to open and close.<sup>1</sup>

**2. Relevancy, Admissibility, and Weight of Testimony**—*a.* IN GENERAL.—All facts connected with the personal history of the testator, and bearing upon his capacity, are admissible in evidence on

the chancellor, having become satisfied that the lunatic had so far recovered as to be capable of disposing of his property by will, suspended proceedings in lunacy partially, so as to enable the alleged lunatic to make a will under the superintendence of some officer of the court, to guard against improper influences.

**Subsequent Adjudication of Insanity.**—In *Brady v. McBride*, 39 N. J. Eq. 495, the will of a person, executed when she was eighty-two years old and blind, was admitted to probate on satisfactory evidence of capacity, though two years after the will was made, an inquisition of lunacy found her to be of unsound mind, and to have been in that condition for three years.

1. The party setting up the will, where the burden of proof is upon him, goes forward with his proof, and has the right to open and close, *Boardman v. Woodman*, 47 N. H. 120; *Judge v. Stone*, 44 N. H. 593; *Perkins v. Perkins*, 39 N. H. 163; and this no matter in what form the issues for trial may be drawn. *Hardy v. Merrill*, 56 N. H. 227. And see *Brooks v. Barrett*, 7 Pick. (Mass.) 96; *Phelps v. Hartwell*, 1 Mass. 71; *Buckminster v. Perry*, 4 Mass. 593; *Blaney v. Sargeant*, 1 Mass. 335; *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48; *Kempsey v. McGinniss*, 21 Mich. 123; *Aikin v. Weckerly*, 19 Mich. 482. In *Tuff v. Hosmer*, 14 Mich. 310, the proponent proved by the subscribing witnesses, the execution of the will and the sanity of the testator. The contestant then put in testimony impeaching the testator's capacity, and rested. The proponents then went fully into the question of sanity, against objection, putting in affirmative and not rebutting evidence of capacity. It was decided, *Cooley, J.*, rendering the opinion, that the proponent of the will has the affirmative, and must first make out a *prima facie* case of sanity, and that therefore he is entitled to the opening and close, and that the contestant could open and close only when the pleadings were such as in the absence of proof would establish the right claimed against him; but that he could

neither be required nor was he entitled to open for the purpose of disproving allegations not yet in any manner supported, and which the proponent must establish to maintain his case.

In *Maryland*, the party alleging the insanity of the testator has the burden of proof, and the right to open and close. *Townshend v. Townshend*, 7 Gill (Md.) 29; *Higgins v. Carlton*, 28 Md. 143.

So in *Delaware*, if the contestant does not deny the formal execution of the will. *Chandler v. Ferris*, 1 Harr. (Del.) 454, citing *Bell v. Buckmaster*, and *Cubbage v. Cubbage*, unreported Del. Cases.

In *Brooks v. Barrett*, 7 Pick. (Mass.) 94, it was held that the right to open and close was with proponent, as he had, in the first case, to prove the execution of the will, and examine the subscribing witnesses as to the sanity of the testator.

In *Syme v. Broughton*, 85 N. Car. 367, *Ashe, J.*, said: "In the case of *St. John's Lodge v. Callender*, 4 Ired. (N. Car.) 335, Chief Justice Ruffin says: 'From the nature of an issue *devisavit vel non*, he who alleges the affirmative opens the case, and for that reason the party propounding the will is commonly spoken of as the plaintiff. But it is inaccurate, for properly speaking there is neither plaintiff nor defendant; both sides are equally actors, in obedience to the order directing the issue. In neither case is the party in the affirmative at liberty to withdraw and defeat a trial, more than the party in the negative.' He further adds that 'the paper itself, the *res* is *sub judice*, and the judge gives his sentence for or against it without noticing particular persons.' It follows, if the will must be proved by the subscribing witnesses, that the burden is upon the propounder, and he would have the privilege of opening and concluding. And when the will has been *prima facie* established by the statute, evidence, which, according to the case of *Mayo v. Jones*, 78 N. Car. 402, does not extend to proof of the sanity of the testator, as that, it is said, is presumed, if the caveators

an issue as to his mental condition.<sup>1</sup> So evidence of insanity in members of the testator's family is admissible.<sup>2</sup> Although the question at issue relates to the capacity of the testator at the time of the execution of the will, it is competent to show insanity both before and after.<sup>3</sup> But general reputation as to unsoundness of mind in the testator is inadmissible.<sup>4</sup> The will in contest, and all the facts and circumstances attending its execution, are

should seek to defeat the will by proving the insanity of the deceased, the burden would be shifted to them, but that would not take from the propounder the right to open and conclude the argument." *McRae v. Lawrence*, 75 N. Car. 289.

In *South Carolina*, on appeal, the case is tried *de novo*, and the appellant has the burden and the right to open and close. *Southerlin v. McKinney*, Rice (S. Car.) 35; *Tillman v. Hatcher*, Rice (S. Car.) 271.

In *Indiana*, the right to open and close is given by statute to the defendant (proponent), in an issue *devisavit vel non*, and he does not lose that right by allowing the plaintiff to introduce his evidence first. *Perry v. Bland*, 4 Ind. 297. The same right is given to the contestee by statute, in *Ohio*. *Randebaugh v. Shelley*, 6 Ohio St. 307.

1. *Ross v. McQuiston*, 45 Iowa 145; *Shailer v. Bumstead*, 99 Mass. 112; *Dale's Appeal*, 57 Conn. 127; *Wright v. Tatham*, 5 Cl. & F. 660.

**Inquisitions of Lunacy.**—Lunacy proceedings are admissible in evidence to fix the date of the commencement of the testator's lunacy. *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257.

In *New York*, the finding of an inquisition in lunacy, that the testatrix had been insane for two years preceding the time of inquiry, is admissible in evidence to show incapacity of the testatrix when she destroyed her will, notwithstanding *New York Code Civ. Proc.*, § 2335, which restricts such inquiry to competency at the time of inquisition. *Dominick v. Dominick*, 20 Abb. N. Cas. (N. Y.) 286. See *supra*, this title, *Presumption and Burden of Proof*, as to presumptions arising from proceedings in lunacy against a testator.

**Suicide.**—The fact that the testator committed suicide, does not raise a presumption of his insanity. It is merely a circumstance to be considered with others in determining his capacity at the time the will was executed. *Duffield v. Morris*, 2 Harr. (Del.) 375. In

this case the testator committed suicide the next day after the execution of the will. So, also, in *Chambers v. Queen's Proctor*, 2 Curt. 415; and in both cases the will was established. 1 Redf. on Wills (1876) 116; *Taylor Med. Jur.* (Reese's Am. ed. 1873) 802; *Burrows v. Burrows*, 1 Hagg. 109. See *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *McElwee v. Ferguson*, 43 Md. 479; *Frary v. Gusha*, 59 Vt. 257; *Godden v. Burke*, 35 La. Ann. 160; *Kahn's Will*, 1 Conn. (N. Y.) 510; *Burkhart v. Gladish*, 123 Ind. 338; *Card's Will*, 8 N. Y. Supp. 297; 55 Hun (N. Y.) 607. In this case it is said that the law of *New York* presumes sanity in a suicide, from the fact that the attempt is made a felony by the Penal Code, § 178. *Matter of Frickie*, N. Y. Daily Reg. Feb. 6th, 1886; *Pettitt v. Pettitt*, 4 Humph. (Tenn.) 191.

2. **Hereditary Insanity.**—See *People v. Garbutt*, 17 Mich. 9; *State v. Simms*, 68 Mo. 305; *Baxter v. Abbott*, 7 Gray (Mass.) 71. So the evidence that the father and mother, and remote ancestors of the testator were insane, is admissible, but the witness must be from his personal knowledge. *Coughlin v. Poulson*, 2 McArthur (D. C.) 308. Evidence of insanity of the sister and niece of the testatrix was introduced in *Prentiss v. Bates*, 93 Mich. 234, reversing same case, 88 Mich. 567.

But it should appear that the insanity is transmissible by inheritance. So, the record of a hospital that the testator's father was admitted to the hospital because of intemperance resulting in melancholia, is inadmissible. *Reichenbach v. Ruddach*, 127 Pa. St. 564.

3. *Saxon v. Whitaker*, 30 Ala. 237; *O'Donnell v. Rodiger*, 76 Ala. 222; *Moore v. Spies*, 80 Ala. 129; *Kinne v. Kinne*, 9 Conn. 102; *Terry v. Buffington*, 11 Ga. 337; *Dyer v. Dyer*, 87 Ind. 13; *Staser v. Hogan*, 120 Ind. 207; *Rush v. Megee*, 36 Ind. 69; *Peaslee v. Robbins*, 3 Met. (Mass.) 164; *Whitnack v. Stryker*, 2 N. J. Eq. 8; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144.

4. *Wright v. Tatham*, 5 Cl. & F. 670;

admissible in evidence;<sup>1</sup> and, also, unpublished wills executed by the testator at other times, as they tend to show intelligence and a settled purpose to make dispositions.<sup>2</sup>

b. DECLARATIONS OF TESTATOR.—(See also INSANITY, vol. 11, p. 158).—The declarations of the testator, made at or about the time of the execution of a will, of his acts and conduct,<sup>3</sup> and

Brinkman v. Rueggessick, 71 Mo. 553; Townsend v. Pepperell, 99 Mass. 40; Vance v. Upson, 66 Tex. 476.

1. **The Will as Evidence.**—The will itself, as an act *inter vivos*, in its nature and effect may be judicially regulated as an essential and most important part of the evidences of capacity. Bell v. Martin, 1 Dow. Parl. 386; Jackson v. King, 4 Cow. (N. Y.) 207; Tobin v. Jenkins, 29 Ark. 151; Brogden v. Brown, 2 Add. 445.

The probate of a will is also admissible in evidence, though it contains an *ex parte* affidavit of an attesting witness, that the testator was of sound mind. Summers v. Copeland, 125 Ind. 466.

The will itself, if proper and natural, is strong evidence of the testator's capacity. Young v. Barner, 27 Gratt. (Va.) 96. But the fact that it is unreasonable is not of itself evidence of the want of a disposing mind. Munday v. Taylor, 7 Bush (Ky.) 491.

The hardship of a case, as where children are disinherited, is a circumstance for the consideration of the jury, in connection with the other evidence submitted, tending to show insanity or other mental defect. Addington v. Wilson, 5 Ind. 137.

A bequest of property which does not belong to the testator does not necessarily show his incompetency to make a will. Marks v. Bryant, 4 Hen. & M. (Va.) 91.

The contestant may offer the will in evidence, though it has not been admitted to probate. Curry v. Bratney, 29 Ind. 195; Ware v. Ware, 8 Me. 42; Anderson v. Irwin, 101 Ill. 411.

As to the force and efficacy of the will, its contents and character, as evidence of mental capacity, see Couch v. Couch, 7 Ala. 510; Coleman v. Robertson, 17 Ala. 85; Clark v. Fisher, 1 Paige (N. Y.) 171; Gombault v. Public Admr., 4 Bradf. (N. Y.) 226; Harper v. Harper, 1 Thomp. & C. (N. Y.) 351; Stewart v. Lispenard, 26 Wend. (N. Y.) 313; Munday v. Taylor, 7 Bush (Ky.) 491; Weir's Will, 9 Dana (Ky.) 441; Kevill v. Kevill, 2 Bush (Ky.) 614; Duffield v. Morris, 2 Harr. (Del.) 375; Ross v. Christman, 1

Ired. (N. Car.) 209; Davis v. Calvert, 5 Gill & J. (Md.) 269; Harper's Will, 4 Bibb (Ky.) 244; Goble v. Grant, 3 N. J. Eq. 629; Baker v. Lewis, 4 Rawle (Pa.) 356; Patterson v. Patterson, 6 S. & R. (Pa.) 56; Chandler v. Barrett, 21 La. Ann. 58; Kempsey v. McGinniss, 21 Mich. 123; Williams v. Goude, 1 Hagg. 577; Chambers v. Queen's Proctor, 2 Curt. 415; Nichols v. Binns, 1 Sw. & Tr. 239; McAdam v. Walker, 1 Dow. 178; Symes v. Green, 1 Sw. & Tr. 401; Note, Evans v. Knight, 1 Add. 237; Coghlan v. Coghlan, cited 1 Ph. 120.

2. Love v. Johnston, 12 Ired. (N. Car.) 355.

In Hughes v. Hughes, 31 Ala. 519, overruling Roberts v. Trawick, 13 Ala. 68, a will made eight years before the execution of the will in contest, and disposing of the estate differently, was admitted in evidence.

In Carrico v. Neal, 1 Dana (Ky.) 163, it was held that an inference in favor of the validity of a will, from the fact that many of its provisions were like those of a former will executed by the testator when of a disposing mind, was rebutted by the fact that the will in contest bore a closer resemblance to a paper purporting to be a will made by the testator when he was clearly not of a disposing mind.

3. See INSANITY, vol. 11, p. 158; Dennis v. Weeks, 51 Ga. 24; Reynolds v. Adams, 90 Ill. 134; McTaggart v. Thompson, 14 Pa. St. 149; Rambler v. Tryon, 7 S. & R. (Pa.) 94; Den v. Vancleve, 4 Wash. (U. S.) 262; Smith v. Fenner, 1 Gall. (U. S.) 170; *In re* Clark, 40 Hun (N. Y.) 233; Waterman v. Whitney, 11 N. Y. 157; Cudney v. Cudney, 68 N. Y. 148; Marx v. McGlynn, 4 Redf. (N. Y.) 455; 88 N. Y. 357; Sandford v. Ellithorp, 95 N. Y. 48; such declarations have no force in the case of a sound and vigorous mind. Tunison v. Tunison, 4 Bradf. (N. Y.) 138; Reel v. Reel, 1 Hawks (N. Car.) 248; May v. Bradler, 127 Mass. 414; Comstock v. Hadlyme, etc., Soc., 8 Conn. 254; Boylan v. Meeker, 28 N. J. L. 274; Harring v. Allen, 25 Mich. 505; Ross v. McQuiston, 45

letters<sup>1</sup> written at that time, are admissible in evidence to show the state of his mind at the time the will was made, but not as

Iowa 145; *Bates v. Bates*, 27 Iowa 110; *Stephenson v. Stephenson*, 62 Iowa 163; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Hayes v. West*, 37 Ind. 21; *Bundy v. McKnight*, 48 Ind. 502; *Lamb v. Lamb*, 105 Ind. 456; *Vance v. Vance*, 74 Ind. 370; *Todd v. Fenton*, 66 Ind. 25; *Runkle v. Gates*, 111 Ind. 95; *Reynolds v. Adams*, 90 Ill. 134; *Cockeram v. Cockeram*, 17 Ill. App. 604; *American Bible Soc. v. Price*, 115 Ill. 623; *Tingley v. Cowgill*, 48 Mo. 291; *Rule v. Maupin*, 84 Mo. 587; *Cawthorn v. Haynes*, 24 Mo. 237; *Spoonemore v. Cables*, 66 Mo. 579; *Muller v. St. Louis Hospital Assoc.*, 73 Mo. 243; *Thomas v. Stump*, 62 Mo. 275; *Bush v. Bush*, 87 Mo. 480; *Whitman v. Morey*, 63 N. H. 448; *Griffith v. Diffenderfer*, 50 Md. 466; *Colvin v. Warford*, 20 Md. 357.

Evidence of sudden irritability, moroseness and unprovoked profanity, indicating a complete change of disposition, is competent in connection with other facts, to show mental incapacity of a testator. *Conely v. McDonald*, 40 Mich. 150. So, also, prejudice, ill-will, or hatred on the part of an usually affable testator, and outbursts of violent passion, are admissible in evidence as tending to show his incapacity. *Sherley v. Sherley*, 81 Ky. 240. Also evidence of violent language used by the testator. *In re Brown*, 38 Minn. 112.

In *Hamilton v. Hamilton*, 10 R. I. 538, evidence that testator did not keep his buildings in as good repair in the latter part of his life as previously, was admitted, as showing want of capacity on his part.

Declarations of the testator which are made after the execution of the will, are admissible as evidence of his imbecility of mind. See *Rambler v. Tryon*, 7 S. & R. (Pa.) 94; *McTaggart v. Thompson*, 14 Pa. St. 154; as well as those prior to the execution of the will. *Pratte v. Coffman*, 33 Mo. 76. So in *Dennis v. Weekes*, 51 Ga. 24, the declaration of the testator as follows: "I have done something this evening I ought not to have done. I have made my will, and did not make it as I wanted it, and know I did wrong, but I could not help it," was admitted as tending to show the state of the testator's mind.

But in *Crocker v. Chase*, 57 Vt. 413, the declarations of a testatrix, made three years after the execution of the

will, were not admitted for the purpose of showing her mental condition at the time the will was executed. In this case it was said: "Subsequent declarations are admissible in support of the issue of incapacity, provided they tend to show incapacity at the time they were made. But if they have no tendency to prove such contemporaneous incapacity, they are not admissible against the will." See also *Robinson v. Hutchinson*, 26 Vt. 38.

In *Whitman v. Morey*, 63 N. H. 448, it was held, that upon an issue of insanity, the declarations of the testator showing the state of his feelings towards relatives, may be received. See also *Staser v. Hogan*, 120 Ind. 207.

Where the declarations of the testator were rejected because too remote to form part of the *res gestæ*, and the record does not show the circumstances under which they were made, the action of the court will not be disturbed on appeal. *Dinges v. Branson*, 14 W. Va. 100.

In *Irwin v. Deschamps*, 11 W. N. C. (Pa.) 365, it was held that the loose declarations of the testator were entitled to no weight, where it appeared that he understood the nature and effect of his will.

Evidence of the feelings of a testator towards a son-in-law, and the value of property bequeathed him, is admissible in an issue as to the mental capacity of the testator. *Stokes v. Shippin*, 13 Bush (Ky.) 180.

1. **Letters.**—Sensible, clear, and coherent letters written by a testator immediately before or after making his will, are strong proof of his mental capacity, and are admissible in evidence on that issue. *Blakeley's Will*, 48 Wis. 294; *McNinch v. McNinch*, 2 Rich. (S. Car.) 229; *Foster v. Dickerson*, 64 Vt. 233; *Vance v. Upson*, 66 Tex. 476. Letters addressed to a testator are inadmissible as evidence to his capacity, *Wright v. Doe*, 7 Ad. & El. 313; 34 E. C. L. 95, unless it be shown that they came to him, and that he exercised some act of judgment or understanding upon them. *Waters v. Waters*, 35 Md. 531. But in *Doe v. Samuel*, 1 Han. (New Bruns.) 265, letters written by a testator to his relatives before making his will, which excluded them, stating that he intended to leave

evidence of the facts stated by him.<sup>1</sup> So, evidence of previously expressed intentions of the testator with respect to the disposition of his property is relevant and admissible.<sup>2</sup>

c. DECLARATIONS OF DEVISEES AND LEGATEES.—The declarations of persons interested under a will, affirming the competency of the testator, are generally admitted when they make against the interest of the person uttering them. Where, however, the declaration is made by one of several devisees or legatees, it seems from the weight of authority that it should not be admitted to prejudice the rights of the others.<sup>3</sup>

his property to them, were inadmissible in a contest of the will on the ground of mental incapacity of the testator.

In *Woodward v. Sullivan*, 152 Mass. 470, a letter written by an attorney, at the instance of the testatrix, repudiating a bond which she had made to convey her estate to a certain party, was admitted in a controversy as to her mental capacity to make a will which she executed 2½ years after giving the bond.

A paper written by the testator two years after making his will, explaining his reasons for its provisions, is admissible in evidence to show mental capacity on his part. *Wood v. Sawyer*, Phill. (N. Car.) 251.

1. *Rusling v. Rusling*, 36 N. J. Eq. 603; *Jones v. McLellan*, 76 Me. 49; *Lang's Estate*, 65 Cal. 19; *Moritz v. Brough*, 16 S. & R. (Pa.) 405; *Rule v. Maupin*, 84 Mo. 587; *Gibson v. Gibson*, 24 Mo. 228; *Canada's Appeal*, 47 Conn. 450; *Comstock v. Hadlyme*, etc., Soc., 8 Conn. 254; *Robinson v. Hutchinson*, 26 Vt. 38; *Dickie v. Carter*, 42 Ill. 376; *Bates v. Bates*, 27 Iowa 110; *Thompson v. Updegraff*, 3 W. Va. 629; *Dinges v. Bronson*, 14 W. Va. 100. But see *Reel v. Reel*, 1 Hawks (N. Car.) 250; *Howell v. Barden*, 3 Dev. (N. Car.) 442; and dissenting opinion in *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31.

Such declarations are not admissible as evidence of undue influence. *Comstock v. Hadlyme*, etc., Soc., 8 Conn. 203; *Waterman v. Whitney*, 1 Kern. (N. Y.) 157.

2. *Sutton v. Sutton*, 5 Harr. (Del.) 449; *Seale v. Chambliss*, 35 Ala. 519. Where the testator executed a codicil to his will during a sudden and fatal illness, it was competent to show that he had declared his intention to make the changes contained in the codicil a short time before his illness. *Hammond v. Dike*, 42 Minn. 273. See also *Conch v. Conch*, 7 Ala. 519; *Prather v. McClelland*, 76 Tex. 574; *Bundy v. McKnight*, 48 Ind. 502. But in *Wurzell v. Beckman*, 52 Mich. 478, declarations of a testatrix that she wanted the first will to stand, were inadmissible on an issue as to her mental capacity to make a second will.

The mere fact that a will is in the direction of a preconceived purpose of the testator, is not sufficient to establish the same unless he was of sound mind when the will was made. *Hoover's Will*, 19 D. C. 495. Nor can the will be regarded as invalid because not made in conformity to previous declarations of the testator. *Quisenberry v. Quisenberry*, 14 B. Mon. (Ky.) 386.

3. See *INSANITY*, vol. II, p. 157, where numerous cases are cited. See also as agreeing with the weight of authority, *Dale's Appeal*, 57 Conn. 127; *Seale v. Chambliss*, 35 Ala. 19; *Le Bau v. Vanderbilt*, 3 Redf. (N. Y.) 384.

In this latter case the question arose whether the declarations or admissions of one legatee, tending to show undue influence or want of testamentary capacity, were admissible in evidence in behalf of the contestants. *Calvin, Surrogate*, said: "The apparent irreconcilability of the authorities bearing upon the subject, has caused some embarrassment in deciding the question raised, and will justify a full statement of the cases, so far as they are applicable. In *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399, it was held that the admission of one of several devisees, obviously against his interest, that the decedent had given him the paper propounded as a form of will, and told him 'that it was a mere form, which he might dispose of as he pleased,' was admissible. In *Rogers v. Rogers*, 2 B. Mon. (Ky.) 324, in an action contesting the validity of a will, the circuit judge had refused to permit proof of conversations in which the principal devisee stated a desire to own his

father's homestead, and of another conversation in which said devisee remarked: 'We have had too much trouble and difficulty in getting this will, to attempt getting another.' On the authority of *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399, the court on appeal held the testimony competent, and also stated the English practice of receiving admissions by one parishioner against the whole parishioners, where the question involved was common to all, as one could not be compelled to testify against himself and associates; and said the courts of *Massachusetts* and *Pennsylvania* had virtually applied the same rule in will cases. But the decree was affirmed, notwithstanding the alleged error, because the appellate court concluded that the party was not injured by the exclusion. In *Fairchild v. Bascomb*, 34 Vt. 398, evidence that a legatee stated to one of his brothers (one of the contestants of the will), that he did not know that the deceased had made a will, and that about a week after he stated to another the will's contents, was received, it appearing that said legatee was present at the execution of the will, and that he was sole legatee. In *Atkins v. Sanger*, 18 Mass. 192, evidence was admitted of the declaration of one of the executors and a legatee, as to facts which occurred at the time of making the will. In *PHELPS v. Hartwell*, 1 Mass. 71, testimony was offered to prove a declaration of one of the legatees, giving his opinion, that the testator at the time of making his will was not of sound mind. *Sedgwick, J.*, said that if the appellee, who made the declaration, were solely interested in establishing the will, he should be in favor of admitting the evidence, because he thought that evidence of opinions formed at the time, might be fairly presumed to be among the best means of informing a party as to the real state of the testator's mind; but as the other appellee was interested in the establishment of the will, it would not be proper to admit the evidence offered. In *Davis v. Calvert*, 5 Gill & J. (Md.) 269, on a bill filed by one of the next of kin, against the probate of a will, the plaintiff offered to show that the executor who propounded the will, in a conversation a few days after the death of deceased, declared that though he had promised the deceased to provide for certain children, he did not consider himself bound to do so, because he was convinced that they

were not children of the deceased. The evidence was rejected. But this was held error, the court saying: 'Calvert being executor and contingent devisee, representing every interest under the will, and being also defendant on the record, evidence of any relevant declarations or admissions by him, adverse to the will, and bearing upon the issues, or any of them, ought to have been admitted; the rule being that the admission of a party to the record, is always evidence, though he be but a trustee for another, with certain exceptions not applicable to this case. In *Lewis v. Mason*, 109 Mass. 169, it was held that on the question of undue influence, the statement of deceased's children made in his lifetime to another child, that such child should not stay in the testator's house, and that they had got the testator where they wanted him, was admissible, for the reason that it had some tendency to show a purpose upon the part of the former to keep the testator under their supervision and control, and exclude the other members of the family from any opportunity to interfere. This statement seems to have been made prior to the execution of the will. In *Peebles v. Stevens*, 8 Rich. (S. Car.) 198, it was held that where executors and legatees propounded the will for probate, their declarations, as well after as before the execution of the will, might be given in evidence by the next of kin. The court held them competent testimony, because they were from parties to the cause, and might be used by the adverse party, those making them having a joint interest and representing all the rights and interest of the testatrix, and of her legatees. Some members of the court concurring in the result, put their decision principally upon the ground that a confederacy had been shown between the executors, and that the admission of one confederate bound the others. See also *Durant v. Ashmore*, 2 Rich. (S. Car.) 184. In *Harvey v. Anderson*, 12 Ga. 69, the general rule was stated to be that the declarations of a party to the record, or of one identified in interest with him therein, were, as against such party, admissible in evidence, and that this rule applied to all cases where he had any interest, whether others were joint parties on the same side with him or not, and whatever might be its relative amount. In *Williamson v. Naburs*, 14 Ga. 286, where the admissions of an executrix and legatee of a life interest,



and the proponent of the will, were held competent evidence on the trial of a caveat to that will, Starnes, J., said there was a conflict of opinion in the adjudicated cases on this subject; but held the case of *Harvey v. Anderson*, 12 Ga. 69, made the question *res adjudicata*, and that it was specially in that case reasonable that admissions by one who was executrix, who took the whole property for life, and was proponent of the will, could not have been made against this strong interest and bias, for the purpose of prejudicing the legatees in remainder, or from any other motive than truth. So in *Brown v. Moore*, 6 Yerg. (Tenn.) 272, the declarations of one of several devisees that the will had been unduly or fraudulently procured to be made, were held admissible. In *Smith v. Morgan*, 2 Moody & Rob. 257, it was held that the declarations of an assignee, made before his appointment as such, were competent; but *Fenwick v. Thornton*, M. & M. 51, is cited in *Williams on Executors*, as contrary to this doctrine. "It may be doubted," says the author, p. 1612, 'whether admissions made by an executor or administrator before he was clothed with that character, are receivable in evidence against him in an action brought by or against him, in his representative capacity.' In *Clapp v. Fullerton*, 34 N. Y. 190, the will was propounded by the principal legatee and contested on the ground of testator's imbecility or lunacy, and of undue influence on the part of the proponent—the proponent and contestant being daughters of the deceased—it being alleged that the contestant received but an insignificant legacy, because deceased was laboring under the insane delusion that the contestant was illegitimate. It was proved by a declaration of the proponent that this suspicion had its origin in the mind of her father nearly two years before his death, and in the interim between the execution of the instrument propounded and of a prior will. It does not appear at what period this admission of the proponent was made. It also appeared that the proponent, after the testator's death, intimated to a witness that her mother had been too intimate with her father's brother. This testimony seems not to have been objected to, nor is the question of its admissibility discussed by the court, which affirmed the decree of the surrogate. The evidence must have been given by the contestant for the pur-

pose of showing undue influence exercised by the proponent upon the deceased to induce him to cut off her sister, and therefore, though the evidence were improperly admitted by the surrogate, its admissibility could not have been considered on an appeal by the party who gave it. In *Brick v. Brick*, 66 N. Y. 144, the declarations of deceased's wife, the sole legatee, made several years after the execution of the instrument propounded, was received, but the language of the opinion of Judge Rapallo, in that case, is 'All these declarations were made in 1864, and there is no proof of any attempt prior to the date of the will to interfere with the intercourse between the brothers.' *Julke v. Adam*, 1 Redf. (N. Y.) 454, was a case where the declarations of the widow of the deceased, against whom undue influence was charged, were received. The surrogate admitted the testimony as tending to prove an existing intent and disposition, *citing* *Brush v. Holland*, 3 Bradf. (N. Y.) 240. In that case, the contestants sought to introduce proofs of the declarations of the decedent's widow, to show incapacity and the exercise of undue influence, the widow being a legatee and executrix. The surrogate excluded the admission as such; but as it had some bearing upon the motives and dispositions of the persons charged with procuring the will, he was unwilling to say that in that view and bearing it was entirely inadmissible. The declaration in that case by the widow of her intention to control the deceased in the making of his will was made prior to the execution of the will. In *Horn v. Pullman*, 10 Hun (N. Y.) 471, probate was contested on the ground of mental incapacity, fraud and undue influence. The sole beneficiaries were Mr. and Mrs. Pullman, and the surrogate rejected the admission of Mrs. Pullman, that she thought what property the testator had when he was done with it, ought to be willed to her and her husband, and that they were going to have it, too; also evidence that she said that they had got the property, and had it so fixed that if the children of deceased contested the will, they would have to pay their own cost; that they had consulted a physician beforehand to see if he was competent to make a will, and that he was a nice old man and would do anything she asked him to. This rejection was held error. In *Dan v. Brown*, 4 Cow. (N. Y.) 483,

d. OPINION TESTIMONY—(1) *Non-Professionals*.—The rule prevailing in most of the states of the Union and in *England*, is that a non-professional witness, other than a subscribing witness, may, after stating the facts upon which his opinion is based, say whether he considers that the testator was mentally competent at the time the will was executed;<sup>1</sup> though in some states he is only permitted to state the impressions produced upon him by the conduct of the testator, and is restricted to the actual facts to which he testifies, and cannot give a general opinion

it was held that the admission of the plaintiff or defendant, will in general affect none but himself, and not his co-plaintiff or co-defendant unless they are his partners; that in partition by several tenants in common against others, where the plea was *non tenent insimul*, the admissions of one of the plaintiffs that a will was lost could not be received to affect his co-plaintiff, and that the confessions of one tenant in common of lands, is not evidence against his co-tenant. In *Hammon v. Huntley*, 4 Cow. (N. Y.) 493, it was held that confessions by an executor of a debt due from his testator is not admissible as evidence in a suit for a debt against his co-executor to establish the original demand. And see *James v. Hackley*, 16 Johns. (N. Y.) 273; *Whitney v. Ferris*, 10 Johns. (N. Y.) 66; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558; *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612.

In *Bovard v. Wallace*, 4 S. & R. (Pa.) 499, which was a feigned issue to try the validity of a will, the defendants offered to prove that one of the devisees had declared that the testator at the time of executing that writing, was incapable of making a will, which evidence was excluded as incompetent and the ruling sustained on appeal. And in *Nussear v. Arnold*, 13 S. & R. (Pa.) 323, the declarations of the principal devisee that the testator was incapable of making a will were received in evidence; but on appeal the exception taken to the evidence was sustained. The same rule was followed in *Hauberger v. Root*, 6 Watts & S. (Pa.) 431; *Dietrich v. Dietrich*, 4 Watts (Pa.) 167; *Boyd v. Eby*, 8 Watts (Pa.) 66; *Clark v. Morrison*, 25 Pa. St. 453; *Titlow v. Titlow*, 54 Pa. St. 216; *Dotts v. Feltzer*, 9 Pa. St. 88. The rule in *Massachusetts* is the same, it being held that devisees and legatees have not that joint interest in the will which will make the admissions of one, though he be a

party to the record, admissible against the other legatees. *Sahiler v. Bumstead*, 99 Mass. 112; and in *Alabama*, *Blakey v. Blakey*, 33 Ala. 611; and in *West Virginia*, *Forney v. Ferrell*, 4 W. Va. 729; and in *Ohio*, *Thompson v. Thompson*, 14 Ohio St. 356; and in *Georgia*, *Morris v. Stokes*, 21 Ga. 552. The reasoning and result of the last case go far toward overruling the earlier *Georgia* case above referred to—certainly as applicable to the case under consideration.”

1. *Lester v. Pittsford*, 7 Vt. 158; *Morse v. Crawford*, 17 Vt. 499; *Clifford v. Richardson*, 18 Vt. 620; *Cram v. Cram*, 33 Vt. 15; *Cavendish v. Troy*, 41 Vt. 99. See the very recent case of *Foster v. Dickerson*, 64 Vt. 233, in which a number of questions arising on exceptions to the relevancy and admissibility of opinion testimony are determined. And see *Crane v. Northfield*, 33 Vt. 124; *State v. Hayden*, 51 Vt. 296; *Grant v. Thompson*, 4 Conn. 203; *Dunham's Appeal*, 27 Conn. 192; *Shanley's Appeal*, 62 Conn. 325; *Kinne v. Kinne*, 9 Conn. 102; *Duffield v. Morris*, 2 Harr. (Del.) 375; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Grabill v. Barr*, 5 Pa. St. 441; *Rambler v. Tryon*, 7 S. & R. (Pa.) 90; *Irish v. Smith*, 8 S. & R. (Pa.) 573; *Wogan v. Small*, 11 S. & R. (Pa.) 141; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Bricker v. Lightner*, 40 Pa. St. 199; *Pidcock v. Potter*, 68 Pa. St. 342; *Blocher v. Hostetter*, 2 Grant's Cas. (Pa.) 288, a case of opinion as to the physical capacity of the testator to sign the will; *Dickinson v. Dickinson*, 61 Pa. St. 404; *Boyd v. Boyd*, 66 Pa. St. 290; *Titlow v. Titlow*, 54 Pa. St. 223; *Garrison v. Garrison*, 15 N. J. Eq. 266; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *In re Vanauken*, 10 N. J. Eq. 192; *Den v. Gibbons*, 22 N. J. L. 117; *Weems v. Weems*, 19 Md. 334; *Dorsey v. Warfield*, 7 Md. 65; *Williams v. Lee*, 47 Md. 321; *Stewart*

*v. Redditt*, 3 Md. 67; *Stewart v. Spedden*, 5 Md. 446; *Waters v. Waters*, 35 Md. 541; *Hardy v. Merrill*, 56 N. H. 227; *Carpenter v. Hatch*, 64 N. H. 573; *Temple v. Temple*, 1 Hen. & M. (Va.) 476; *Burton v. Scott*, 3 Rand. (Va.) 399; *Mercer v. Kelso*, 4 Gratt. (Va.) 106; *Fishburne v. Ferguson*, 84 Va. 87; *Clary v. Clary*, 2 Ired. (N. Car.) 78; *State v. Potts*, 100 N. Car. 457; *Heyward v. Hazard*, 1 Bay (S. Car.) 335; *Griffin v. Griffin*, R. M. Charl. (Ga.) 217; *Potts v. House*, 6 Ga. 324; *Walker v. Walker*, 14 Ga. 242; *Dennis v. Weekes*, 51 Ga. 24; *Berry v. State*, 10 Ga. 529; *Roberts v. Trawick*, 13 Ala. 68; *Florey v. Florey*, 24 Ala. 241; *Stubbs v. Houston*, 33 Ala. 555; *In re Carmichael*, 36 Ala. 514; *Fountain v. Brown*, 38 Ala. 72; *Watson v. Anderson*, 13 Ala. 202; *Norris v. State*, 16 Ala. 776; *Powell v. State*, 25 Ala. 21; *Overall v. Bland* (Ky. 1889), 12 S. W. Rep. 273; *Farrell v. Brennan*, 32 Mo. 328; *Appleby v. Brock*, 76 Mo. 314; *Rankin v. Rankin*, 61 Mo. 295; *Baldwin v. State*, 12 Mo. 223; *State v. Bryant*, 93 Mo. 273; *Kelly v. McGuire*, 15 Ark. 555; *Abrahams v. Wilkins*, 17 Ark. 292; *Baughman v. Baughman*, 32 Kan. 538; *Clarke v. State*, 12 Ohio 483; *Runyon v. Price*, 15 Ohio St. 1; *Brockmeyer v. Buck* (Ohio), 12 Wkly L. Bull. 213; *Doe v. Reagan*, 5 Blackf. (Ind.) 217; *Ryman v. Crawford*, 86 Ind. 262; *Kenworthy v. Williams*, 5 Ind. 375; *In re Blood's Will*, 62 Vt. 359; *Leach v. Prebster*, 39 Ind. 492; *Row v. Taylor*, 45 Ill. 485; *Schneider v. Manning*, 121 Ill. 376; *Carpenter v. Calvert*, 83 Ill. 62; *Burley v. McGough*, 115 Ill. 11; *Keighley v. Stafford*, 126 Ill. 507; *American Bible Soc. v. Price*, 115 Ill. 623; *Upton v. People*, 109 Ill. 175; *Rutherford v. Morris*, 77 Ill. 397; *Pelamoures v. Clark*, 9 Iowa 1; *Leverin v. Zack*, 55 Iowa 28; *Meeker v. Meeker*, 74 Iowa 352; *In re Norman's Will*, 72 Iowa 84; *Smith v. Hickenbottom*, 57 Iowa 733; *McIntyre v. McConn*, 28 Iowa 483; *White v. Bailey*, 10 Mich. 155; *Beaubien v. Cicotte*, 12 Mich. 459. He must explain the grounds of his opinion to the jury. *Rice v. Rice*, 50 Mich. 448; *Hoge v. Fisher*, Pet. (C. C.) 163; *Harrison v. Rowan*, 3 Wash. (U. S.) 580; *Brook's Estate*, 54 Cal. 471; *Carpenter's Estate*, 79 Cal. 382; *In re Pinney's Will*, 27 Minn. 280; *Woodcock v. Woodcock*, 36 Minn. 217; *Dower v. Church*, 21 W. Va. 23.

*Doe, J.*, in a dissenting opinion in *State v. Pike*, 49 N. H. 408, said: "In

*England*, no express decision of the point can be found; for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent that it seems no English lawyer has ever presented to any court, any objection, question, or doubt in regard to it. But in *Wright v. Tatham*, 5 Cl. & F. 670; 4 Bing. N. Cas. 489, the question was involved in such a manner, and the number and strength of the judicial opinions were such, as to make that case an authority of the greatest weight in favor of the competency of the evidence." And see *Lawe v. Jolliffe*, 1 W. Bl. 365; *Atty. Gen'l v. Parnter*, 3 Bro. C. C. 442; *King v. Arnold*, 16 St. Tr. 695; *Reg. v. Oxford*, 9 C. & P. 525; 38 E. C. L. 208; *Reg. v. Higginson*, 1 C. & K. 129; 47 E. C. L. 129; *Den v. Clark*, 3 Add. 79; *Wheeler v. Alderson*, 3 Hagg. 602; *Kinleside v. Harrison*, 2 Ph. 449; *White v. Driver*, 1 Ph. 88; *Cartwright v. Cartwright*, 1 Ph. 122.

In *Townsend v. Townsend*, 7 Gill (Md.) 10, *Martin, J.*, said, in reference to certain opinions of a non-professional witness as to the testator's capacity: "The impression made upon the mind of the witness by the conduct, manner, bearing, conversation, appearance, and acts of the testator in various business transactions, for a long series of years, is not mere opinion; it is knowledge, and strictly analogous to the cases of personal identity and handwriting, which are constantly established in the law courts by the opinion and judgment of persons who have enjoyed the opportunity of observing the person, or handwriting sought to be identified, or proved." This, Judge Redfield says, is placing the question upon true ground. And from the fact that the statute is silent in respect to the qualifications of the witness to prove the capacity of the testator, the same author concludes that it was not intended that the testimony of a professional expert should be required for that purpose, and that consequently, a non-professional witness, after stating facts, is competent to express his opinion as to the testator's sanity. 1 Redf. on Wills (1876) 141, 143.

The non-professional witness may be first examined as to his actual observations relating to the testator's state of mind, so as to lay a foundation for discrediting or rejecting his opinions. *Pidcock v. Potter*, 68 Pa. St. 342; *Roberts v. Trawick*, 13 Ala. 68.

While the *California* Code permits an "intimate acquaintance" of a particular person, to give his opinion as to that person's sanity, he cannot testify that in his opinion such person was competent to make a will. *Taylor's Estate*, 92 Cal. 564. But in *Porter v. Throop*, 47 Mich. 313, an old acquaintance of a testatrix was permitted to give his opinion as to her capacity to make the will in question, where the bequests were few and the provisions of the will simple.

In *Richmond's Appeal*, 59 Conn. 226, it was held that a witness had a right to illustrate her opinion of the capacity of a testatrix, by saying that her mental capacity was not greater than that of an average child of seven or eight years.

A non-professional witness may be asked, after testifying to facts within his own observation, whether, from his general appearance, he considered a certain person capable of making a contract or transacting important business. *Wilkinson v. Pearson*, 23 Pa. St. 117; *Titlow v. Titlow*, 54 Pa. St. 216.

It is proper to ask a non-professional witness, who had seen and conversed with the testator about the time of the execution of the will, whether, from his conversation and appearance, he was capable of comprehending or understanding a document of any considerable length if it had been read over to him; and what capacity the testator had, at the time the witness saw him, to understand business matters. *Clary v. Clary*, 2 Ired. (N. Car.) 78. He may also be asked to state his opinion as to the testator's capacity to make an intelligent disposition of his property by will. *In re Pinney's Will*, 27 Minn. 280.

A justice of the peace cannot express his opinion that the testator, who was a lawyer, conducted a case before him a short time before his death, "well and shrewdly." *Staser v. Hogan*, 120 Ind. 207.

Those who have had opportunities to observe the testator, may express an opinion as to his sanity, though they cannot give reasons for their judgment, *Stubbs v. Houston*, 33 Ala. 555; nor detail conversations had with him, *Shanley's Appeal*, 62 Conn. 325; and they may be asked their opinion as to his capacity to transact business, since that does not involve his capacity to make a will. *Brockmeier v. Buck* (Ohio), 12 Wkly. L. Bull. 213. But in

*Chase v. Winans*, 59 Md. 475, the court refused to hear opinion testimony as to the capacity of the testator, more than fifty years having elapsed since his death.

A witness who is not an expert, but who is acquainted with an injured person and has frequently seen him, both before and after the injury, may testify as to whether or not he has observed any change, either in his physical or mental condition, since the happening of the injury. *Bridge v. Oshkosh*, 71 Wis. 363, and where the question is as to whether testamentary capacity has been destroyed by a spell of illness, a non-professional, who observed the testator both in health and sickness, may testify that he saw no change in the mental condition of the testator. *Severin v. Zack*, 55 Iowa 28.

But it is never permissible to allow a non-expert to give his opinion generally as to whether a testator had sufficient capacity to dispose of his property by will. *Schneider v. Manning*, 121 Ill. 376. A question asked such a witness as to what she thinks of the mental condition of a testator, from what she has observed and from what she has heard him say, is objectionable. *Parsons v. Parsons*, 66 Iowa 754. And if the witness admits that he knows no fact or circumstance on which his opinion is founded, he is incompetent. *Bowling v. Bowling*, 8 Ala. 538.

The opinion is not rendered inadmissible by the fact that the witness did not form his opinion at the time he observed the facts testified to, and upon which the opinion is based, *Hathaway v. National L. Ins. Co.*, 48 Vt. 335; and the witness may, in forming his opinion, take into consideration any circumstance within his knowledge or observation which he deems evidence of mental capacity or incapacity at the time in question. *In re Norman*, 72 Iowa 84.

**Opinion on Hypothetical Statement of Facts.**—But a non-expert witness cannot, even upon cross-examination, be permitted to give his opinion upon the question whether a hypothetical statement of facts would, or would not, if true, be evidence of insanity. *Dunham's Appeal*, 27 Conn. 192; *Pittard v. Foster*, 12 Ill. App. 132.

**Weight Given to Opinion.**—The opinions of witnesses as to the capacity of the testator are entitled to but little weight; they should state the facts and leave inferences to the court or jury.

as to his sanity or insanity.<sup>1</sup> In still other states, a non-professional witness is not allowed to state his inference of the capacity or incapacity of the testator from the facts within his knowledge.<sup>2</sup>

*Carpenter v. Calvert*, 83 Ill. 62; *Turner v. Cheesman*, 15 N. J. Eq. 246; *McCulloch's Will*, 35 Leg. Int. (Pa.) 169. And this is especially so, where the opinion is that of a disappointed witness. *Eddey's Appeal*, 109 Pa. St. 406.

If it appear that the testator had capacity to acquire a fortune, and to take care of it in his old age, the opinion of a large number of ignorant witnesses that he was mentally incapable of making a will, is of no weight. *Eddey's Appeal*, 109 Pa. St. 406; *Comb's Appeal*, 105 Pa. St. 155; *Taylor's Estate*, 40 Leg. Int. (Pa.) 279.

The fact that a testator confers a power on his semi-imbecile son to dispose of certain property by will, does not establish testamentary capacity in the son, but is only evidence of the opinion of his father. *Alexander's Will*, 27 N. J. Eq. 463.

1. *Matter of Ross*, 87 N. Y. 514, it was stated thus: "Where non-professional witnesses, who did not attest the execution of a will, are examined as to matters within their own observation bearing upon the competency of the testator, they may characterize, as in their opinion rational or irrational, the acts and declarations to which they testify; but the examination must be limited to their conclusions from the specific facts they disclose, and they cannot be permitted to express their opinions on the general question whether the mind of the testator was sound or unsound." *Clapp v. Fullerton*, 34 N. Y. 190; *Hewlett v. Wood*, 55 N. Y. 634; *Petrie v. Petrie*, 6 N. Y. Supp. 831; 53 Hun (N. Y.) 638; *Bell v. McMaster*, 29 Hun (N. Y.) 272; *Petrie v. Petrie*, 25 N. Y. St. Rep. 309; *Culver v. Haslam*, 7 Barb. N. Y. 314; *Clarke v. Sawyer*, 3 Sandf. (N. Y.) 351. This is the rule for which Judge Redfield contends. 1 Redf. on Wills (1876) 144; *McCarthy's Will*, 55 Hun (N. Y.) 7; *Ramsdell's Will*, 3 N. Y. Supp. 499; 51 Hun (N. Y.) 636. He cannot be asked the broad question whether he considered the party *non compos mentis*, or incapable of managing his affairs. *DeWitt v. Barley*, 9 N. Y. 371.

In *Thomas v. State*, 40 Tex. 60, it was held that non-professional witnesses should be allowed to give their opinions, together with the facts on which

their opinions were based, as to the sanity of the defendant, where it appears that their acquaintance with him was sufficient to enable them to form a correct estimate of his mental condition. In *Brown v. Mitchell*, 75 Tex. 9, it is said that the opinion of one who was present when a will was signed, and who witnessed the appearance, heard the conversation, and can state the condition of the testator at the time, is admissible on the question of mental capacity.

2. *Hastings v. Rider*, 99 Mass. 624; *Buckminster v. Perry*, 4 Mass. 593; *Dickinson v. Barber*, 9 Mass. 225; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Ellis v. Ellis*, 133 Mass. 469; *Smith v. Smith*, 157 Mass. 389; *Williams v. Spencer*, 150 Mass. 346; *Martin v. Perkins*, 56 Miss. 204; *Halley v. Webster*, 21 Me. 461; *Wyman v. Gould*, 47 Me. 159.

But a witness may testify that he did not observe any failure of mind in the testator. *Robinson v. Adams*, 62 Me. 410. See further *Bridgman's Appeal*, 82 Me. 323; *Fayeth v. Chesterville*, 77 Me. 28. And in *May v. Bradlee*, 127 Mass. 414, the committee of the testator, not an expert, was allowed to be asked by the proponent whether he had, while guardian, observed anything which led him to infer in his own mind that his ward was crazy. And in *Nash v. Hunt*, 116 Mass. 237, the witness was permitted to say whether he observed "no incoherence of thought in the testator, nor anything unsound or singular in respect to his mental condition."

In *Poole v. Richardson*, 3 Mass. 330, certain witnesses were allowed "to testify to the appearance of the testator." And in *Barker v. Comins*, 110 Mass. 477, the unprofessional witnesses were allowed to say whether they noticed any change in the testator's intelligence, or want of coherence in his remarks. See also *McConnell v. Wildes*, 153 Mass. 487.

The same rule existed in *New Hampshire* until the case of *Hardy v. Merrill*, 56 N. H. 227; which overruled *Boardman v. Woodman*, 47 N. H. 120; *State v. Pike*, 49 N. H. 399; *State v. Archer*, 54 N. H. 468. The rule in that state now is that non-professional witnesses who are not subscribing

The qualification of non-expert witnesses to give opinions as to the mental soundness of the testator, is a question of fact for the trial court.<sup>1</sup>

(2) *Experts*.—The opinion of an expert<sup>2</sup> as to the sanity of a testator is receivable in evidence, whether founded upon his personal knowledge and observation of the case, or upon a hypothetical statement of facts.<sup>3</sup> Any educated practising physician is

witnesses, may testify to their opinion in regard to the sanity of the testator, when founded upon their knowledge and observation of his appearance and conduct.

1. *Carpenter v. Hatch*, 64 N. H. 573. And where there is no abuse of discretion, the decision of a trial court as to whether a witness is sufficiently acquainted with one, whose sanity is in question, to speak on such issue, will not be interfered with. *People v. Levy*, 71 Cal. 618.

2. An "expert" is defined by Judge Redfield to be "one who has had special opportunity, by study and observation, to imbue his mind with such knowledge as peculiarly fits him to give instruction to others on the particular question involved." 1 Redf. on Wills (1876) 137.

In *Toome's Estate*, 54 Cal. 509, a Roman Catholic priest was held to be an expert *virtute officii*, and competent to express an opinion as to the sanity of the testator whom he attended in his last illness.

3. *Schouler on Wills* (1892), § 206; 1 Redf. on Wills (1876) 154.

The question whether the failure of the testator to provide for a sister, by his will, as he had all his life intended to do, shows mental incapacity, no motive or reason for such failure appearing, is not a matter of science, and should not be put to an expert. *Stockton v. Thorn* (Minn. 1888), 39 N. W. Rep. 143. Nor the question whether the testator if sane "would have cut off his only son with fifty dollars." A belief respecting the sanity of the testator, founded on a provision of his will, is not competent evidence. *Commonwealth Title Ins. Co. v. Gray* (Pa. 1892), 24 Atl. Rep. 640.

The testimony of a medical attendant in an asylum where the testatrix resided when she made her will, is admissible to show her sanity, and that she continued voluntarily in the asylum. *Martin v. Johnston*, 1 F. & F. 122.

A medical witness who has testified to having seen the deceased some two or three months before he made his

will, may be asked, "From what you saw, what was his mental capacity?" Per *Manning, J.*, and *Martin, C. J.*, *contra*, *Campbell and Christianity, J. J.*, in *White v. Bailey*, 10 Mich. 155.

An expert cannot be asked whether, in his opinion, the testator was competent to make a will, the standard of mental capacity for that purpose being a question of law, *Kempsey v. McGinniss*, 21 Mich. 123. See also *Runyon v. Price*, 15 Ohio St. 1; *Fairchild v. Bascomb*, 35 Vt. 398; *Beaubien v. Cicotte*, 12 Mich. 459; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Hewlett v. Wood*, 55 N. Y. 634; nor whether the testator was competent to give orders for a complicated bequest. *Matter of Buckley's Will* (Surr. Ct.), 2 N. Y. Supp. 27.

An expert may be asked, "Was the testator, in your opinion, at the time, etc., capable of planning and executing such a paper as is here offered as his will?" and further, "Was he in a mental and physical condition to transact any business requiring an exercise of the judgment, the reasoning faculties, and a consecutive continuation of thought?" *Beaubien v. Cicotte*, 12 Mich. 459; *Kempsey v. McGinniss*, 21 Mich. 123.

Experts cannot give their opinion as to whether the fact that the life-long purpose of the testator to provide for his sister was abandoned at his death-bed, without apparent motive, indicated any change in his intellect, the jury being as competent judges as any expert on that point. *Stockton v. Thorn* (Minn. 1888), 39 N. W. Rep. 143.

A medical expert may express a direct opinion as to the sanity of the testator, where he has had an opportunity for personal observation. *Baxter v. Abbott*, 7 Gray (Mass.) 71; 1 Redf. on Wills (1876) 154; *contra* *Walker v. Walker*, 34 Ala. 469. He may also state on his examination, in chief the reasons for his opinion. *Collier v. Simpson*, 5 C. & P. 73; 24 E. C. L. 219; *Keith v. Lothrop*, 10 Cush. (Mass.) 453. But he cannot combine his personal knowledge with representations made

competent to testify as an expert,<sup>1</sup> but medical speculations as to the capacity of a testator are of little weight when the facts in evidence thoroughly establish his sanity.<sup>2</sup>

to him by others, such as nurses and physicians, and, from the whole, pronounce a direct opinion as to the testator's sanity. *Heald v. Thing*, 45 Me. 392; *Wetherbee v. Wetherbee*, 38 Vt. 454. Nor give an opinion which requires him to weigh collateral testimony. *Kerr v. Lunsford*, 31 W. Va. 659.

As to how far the superintendent of an insane asylum may give his opinion as to the sanity of a testatrix who was a ward of the asylum, from the record of her case there kept by his predecessor, and not from his personal knowledge, see *Prentis v. Bates*, 93 Mich. 234. In *Potts v. House*, 6 Ga. 324, it was held that the opinion of a medical expert as to the mental capacity of a testator was admissible, whether founded on facts coming within his own observation, or testified by others. Though in *White v. Bailey*, 10 Mich. 155, it was held that neither medical experts nor other witnesses can be allowed in any case to give an opinion upon mental capacity or condition, without first showing the circumstances and facts upon which the opinion is based. And see *Hastings v. Rider*, 99 Mass. 622; *Chandler v. Barrett*, 21 La. Ann. 58.

**Form of Question.**—In *Woodbury v. Obeare*, 7 Gray (Mass.) 467, it was held that in a case of conflicting evidence, the expert witness should not be asked, "Suppose all the facts stated by the witnesses to be true, was the testator laboring under an insane delusion, or was he of an unsound mind?" The proper formula is, "If the jury should find these facts (stating them) to be true, what would be your opinion, upon the facts so found, on the question of the testator's soundness of mind?" The reason given for the objection to the first form of interrogatory is that, the evidence being conflicting, the answer of the witness might tend to mislead, "since it might, unknown to the jury, be founded upon some proposition or statement of facts differing in material particulars from that which appeared to them to be satisfactorily established." *Kempsey v. McGinniss*, 21 Mich. 124.

A hypothetical question should not be so drawn as to call for an interpretation of fact, which the jury are as

competent to make as an expert. *Prentis v. Bates*, 88 Mich. 567.

In *Crowell v. Kirk*, 3 Dev. (N. Car.) 355, approved in *Fairchild v. Bascomb*, 35 Vt. 398, it was held that questions propounded to experts and to others calling for an opinion, should be so framed as to require them to state the degree of the testator's capacity in their own language, in other words, "in the best way they can."

1. *Thomas, J.*, in *Baxter v. Abbott*, 7 Gray (Mass.) 71; *semble*, *Fairchild v. Bascomb*, 35 Vt. 398; *Hastings v. Rider*, 99 Mass. 622; *Chandler v. Barrett*, 21 La. Ann. 58. The rule that the physician must be in active practice, to be called as an expert, is not absolute. 1 Redf. on Wills (1876) 154 n.

A physician may testify as to the testator's unsoundness of mind, but cannot express an opinion as to his testamentary capacity. *Palmer's Estate*, 5 W. N. C. (Pa.) 542. See also *Burdon's Estate*, 11 W. N. C. (Pa.) 138.

A physician may testify from his professional knowledge, whether the condition of testator at the time he committed suicide was an indication of insanity, and whether the act of suicide was evidence of insanity. *Frery v. Gusha*, 59 Vt. 257.

**2. Weight of Expert Testimony.**—*Rankin v. Rankin*, 61 Mo. 295. Physicians as experts are no better prepared to judge of the mental capacity of a person to execute a will, than other men of sound judgment and good common sense. *Carpenter v. Calvert*, 83 Ill. 62.

In *Matter of Kiedaisch*, 2 Conn. (N. Y.) 450, *Ransom, Surrogate*, said, "The testimony of experts, although admissible always and a great aid to a court and jury in discovering where the truth lies in a question of this kind (sanity of testator), cannot ever be held to be conclusive and controlling against the testimony of those persons of intelligence who saw the man daily, and who had transactions with him of a social character and in business." See 1 Redf. on Wills (1876) 155 n, for a general criticism of expert testimony.

The testimony of three subscribing witnesses, showing the sanity of the testator, should prevail over the opinion of an expert which would have the

(3) *Subscribing Witnesses*.—Subscribing witnesses, though non-experts, and unfamiliar with the testator's habits and character, may give their opinion as to his mental capacity at the time the will was executed, and this without first stating the facts upon which such opinion is based.<sup>1</sup>

As a matter of law, the testimony of a subscribing witness has been said to be entitled to no more weight than that of an ordi-

effect of showing the subscribing witnesses to be guilty of perjury. *Lyddy's Will* (Surr. Ct.), 4 N. Y. Supp. 468.

Expert testimony in a case of alleged mental incapacity of a testator, from drunkenness, is not entitled to much weight. *O'Keefe's Estate*, Myr. Prob. (Cal.) 154.

See generally, upon the subject of expert evidence, *EXPERT AND OPINION EVIDENCE*, vol. 7, p. 490.

1. *Schouler on Wills* (1892), § 198; 1 Redf. on Wills (1876) 140, 145; *De Witt v. Barley*, 9 N. Y. 371; *Clapp v. Fullerton*, 34 N. Y. 190; *Petrie v. Petrie*, 6 N. Y. Supp. 831; 53 Hun (N. Y.) 638; *Williams v. Lee*, 47 Md. 321; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Logan v. McGinnis*, 12 Pa. St. 27; *Egbert v. Egbert*, 78 Pa. St. 326; *Titlow v. Titlow*, 54 Pa. St. 223; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Call v. Byram*, 39 Ind. 499; *Duffield v. Morris*, 2 Harr. (Del.) 375; *Beaubien v. Cicotte*, 12 Mich. 459.

But the law expects from the subscribing witnesses, peculiar care, caution, and circumspection. *Sloan v. Maxwell*, 3 N. J. Eq. 563.

In *Hastings v. Rider*, 99 Mass. 624, *Gray, J.*, said: "The subscribing witnesses to a will may testify to their opinion of the testator's sanity, upon its being presented for probate, because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to." And see *Appleby v. Brock*, 76 Mo. 314.

But in *Williams v. Spencer*, 150 Mass. 346, it was decided that a subscribing witness could not express an opinion as to the sanity of the testator, formed from what he had seen and heard since the will was executed. Nor can a subscribing witness express an opinion as to whether the testator had sufficient strength of mind to comprehend a clause creating charitable trusts in a will. *Melanefy v. Morrison*, 152 Mass. 476.

The opinion of the draftsman and subscribing witness of a prior will, that

the testator was, at the time of the execution thereof, of sound mind, is not admissible in a contest of a later will for want of mental capacity of the testator. *Doe v. Gilbert*, 22 New Brunswick Rep. 576.

A subscribing witness cannot be required to state the facts which he observed at the time of the execution of the will before giving his opinion as to the testator's sanity; but either party may examine him as to what then transpired. *Robinson v. Adams*, 62 Me. 369; *Logan v. McGinnis*, 12 Pa. St. 27. But in *Cilley v. Cilley*, 34 Me. 162, it was said that the subscribing witnesses may give their opinions as to the sanity of the testator, when the facts are stated upon which their opinions are founded.

A subscribing witness cannot be asked if he would have attested the will if he had known the testator was insane. Such evidence is irrelevant. Nor can it ordinarily be shown that the testator had a dislike to one of the subscribing witnesses. Per *Gibson, C. J.*, in *Spence v. Spence*, 4 Watts (Pa.) 165.

In *Clary v. Clary*, 2 Ired. (N. Car.) 78, it was said that no good reason appears for the rule which permits a subscribing witness to give his opinion as to the sanity of the testator, and denies the same privilege to others who were present when the will was executed, though they were persons of equal and perhaps greater powers of discrimination, and better acquainted with the social, domestic, and business habits of the testator. And see *Appleby v. Brock*, 76 Mo. 314; *Schouler on Wills* (1887), § 201.

And in *Huff v. Huff*, 41 Ga. 696, it was said that the functions of the subscribing witnesses are not to judge of the mental capacity of the testator; they are merely to witness the execution of the will.

**Necessity for Calling Subscribing Witnesses.**—It is not necessary to establish the validity of a will, that the subscribing witnesses shall testify as to the sanity of the testator at the time



nary witness of equal abilities and opportunities for observation.<sup>1</sup> And where a subscribing witness discredits the capacity of the testator, his testimony should be received with great caution.<sup>2</sup>

**3. Province of Court and Jury.**—The general rule is that the question of mental capacity is one of fact and peculiarly within the province of the jury, and that the court, while it may, according to the practice of some jurisdictions, determine whether there is sufficient evidence to send or withhold a case from the jury,<sup>3</sup> cannot instruct them that such and such facts constitute capacity or incapacity of the testator.<sup>4</sup>

the will was executed. *Cilley v. Cilley*, 34 Me. 162; *Orser v. Orser*, 24 N. Y. 51. But under some conditions the failure of the proponents to call the subscribing witnesses to the will may be a damaging circumstance against their case. *Ulmer's Appeal* (Pa. 1888), 12 Atl. Rep. 686.

1. The rule is, that the value of his testimony is to be determined "with reference to his opportunity for observation, his skill and care in observing, his intelligence and powers of discernment and memory." *Thornton v. Thornton*, 39 Vt. 158. And see *Garrison v. Garrison*, 15 N. J. Eq. 266.

Where the subscribing witnesses to a will are called, and disagree as to the capacity of the testator, other proof may be given as to that fact, and the jury must decide upon the whole evidence. *Bell v. Clark*, 9 Ired. (N. Car.) 239. And though the subscribing witnesses testify that he was not of sound mind, his capacity may be established by other sufficient evidence. *Sechrest v. Edwards*, 5 Metc. (Ky.) 171.

2. The testimony of a subscribing witness who discredits the capacity of the testator, should be received with great caution. *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56; *Lamberts v. Cooper*, 29 Gratt. (Va.) 61. See also *Snyder v. Cunningham* (Ky. 1891), 16 S. W. Rep. 130; *Webb v. Dye*, 18 W. Va. 376; *Young v. Barner*, 27 Gratt. (Va.) 103; *Hoerth v. Zable*, 92 Ky. 202; *Cook's Estate*, 41 Leg. Int. (Pa.) 6; *Howard's Will*, 5 T. B. Mon. (Ky.) 203.

The declaration of a deceased subscribing witness made after the will was executed, cannot be received to show mental incapacity of the testator. *Boardman v. Woodman*, 47 N. H. 120; *Sellars v. Sellars*, 2 Heisk. (Tenn.) 430; *Weatherhead v. Sewell*, 9 Humph. (Tenn.) 272; *Sewall v. Robbins*, 139 Mass. 164. *Contra*, *Harden v. Hays*, 9 Pa. St. 151.

Where the sanity of the testator has been proved by two of the subscribing witnesses, the declarations of the third, who is out of the state and whose handwriting has not been proved, cannot be received to invalidate the will. *Fox v. Evans*, 3 Yeates (Pa.) 506.

The declarations of a subscribing witness made out of court, can only be used to impeach their testimony, and not to show the testator's incapacity. *Stirling v. Stirling*, 64 Md. 138.

3. *Cauflman v. Long*, 82 Pa. St. 72; *Rees v. Stillé*, 38 Pa. St. 138.

The proper question to be submitted to the jury on an inquiry as to the testator's sanity is, whether his mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged when he executed the will. *Harvey v. Sullens*, 56 Mo. 372; *McClintock v. Curd*, 32 Mo. 411; *Tenbrook v. Lee*, 5 Clark (Pa.) 37; *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Jamison v. Jamison*, 3 Houst. (Del.) 108.

4. See *INSANITY*, vol. II, p. 158; *Trezevant v. Rains* (Tex. 1892), 19 S. W. Rep. 567; *Matter of Bull* (C. Pl.), 2 N. Y. Supp. 52; *Gardiner v. Gardiner*, 34 N. Y. 155.

The court cannot instruct the jury in regard to any particular delusion of the testator, that it was a test of insanity, nor that certain specified acts of the testator, if proven, would be strong evidence of insanity. *Gardner v. Lamb-back*, 47 Ga. 133.

In *White v. Helmes*, 1 McCord (S. Car.) 430, a motion was made for a new trial, on the ground that the judge had erred in charging the jury that "no evidence had been given to show that the deceased had been out of his senses at any moment before the will was made," but the motion was denied, the judge having further instructed them that it was their province to decide whether the testator was of sound mind. See

**TESTE.**—In old English practice the initial and emphatic word of the clause at the conclusion of writs, containing the attestation of the sovereign, or chief justice out of whose court it was issued, and the day on which it was issued or granted. It corresponded to the date of other instruments. In modern practice, the word *teste* has been retained, as the name of the corresponding clause

also *Tillman v. Hatcher*, 1 Rice (S. Car.) 271; *Minard v. Minard*, Brayt. (Vt.) 231.

An instruction that the testimony of the testator's neighbors was of more weight than that of others not having the same opportunities of knowing him, is erroneous because it invades the province of the jury in respect to the credibility of witnesses. *Cline v. Lindsey*, 110 Ind. 337; *Durham v. Smith*, 120 Ind. 463.

In *Ware v. Ware*, 8 Me. 42, the appellant (contendant) requested the court to instruct the jury that, if an illusion was fixed upon the mind of the testator as a reality, for months before and up to the time of the execution of the will, and his conduct was at any time influenced by such illusion, he was not of sane mind. . . . And that if he really, for months before and up to the time of executing the will, believed that he was repeatedly visited by a superhuman being whom he saw, felt, heard and conversed with, then he was not of sane mind. The instruction was refused, and on appeal, Mellen, C. J., said: "The question of sanity often depends on a multitude of circumstances, various and minute, peculiar and contradictory, and where lights and shades are sometimes almost lost in each other. Besides, it is perhaps almost impossible for a judge to draw any certain divisional line, and present it beforehand for the regulation of the jury. The line of separation between the powers and provinces of court and jury, in the decision of such cases, we apprehend it is also equally difficult to draw. . . . In addition to these remarks, we would observe that the authorities sanction, in clear language, the course pursued on the trial of this cause. *Starkie*, vol. 3, p. 1707, says, 'The question of sanity is so peculiarly a question of fact for the decision of a jury, that a will of real estate cannot be set aside in equity without being first tried at law on an issue of *devisavit vel non*.'" In *Robinson v. Adams*, 62 Me. 369, the court referred to the jury the question of the existence of com-

munication between the testatrix and her deceased husband, and other kindred questions. This, Judge Redfield thinks, was error. 1 Redf. on Wills (1876), p. 163.

In a case where the delusions of the testator had no effect upon his will, it was held that the judge properly left to the jury the question whether or not he was capable of making a will. *Smee v. Smee*, L. R., 5 P. D. 84.

See generally, as to province of court and jury, *QUESTIONS OF LAW AND FACT*, vol. 19, p. 598.

**Miscellaneous Matters—Practice.**—A general allegation that the testator was of unsound mind, includes every species of unsoundness of mind. *Willett v. Porter*, 42 Ind. 250.

An averment that, by reason of softening of the brain, the testator's "memory and mental faculties had become almost wholly obliterated" and that he had been in that condition for many months before the will was made, and died a few weeks after its execution, sufficiently alleges want of testamentary capacity. *Holden v. Meadows*, 31 Wis. 284.

**Appeal.**—Where the question of capacity to make a will has been properly submitted to a jury, and the judge before whom the trial is had, expresses no dissatisfaction with their verdict, the court will seldom interfere on appeal. *Den v. Ayres*, 13 N. J. L. 153.

Where the evidence preponderates in favor of the will, the court will not reverse a judgment sustaining it because of the admission of immaterial evidence. *Hoar v. Seaman* (Pa. 1888), 15 Atl. Rep. 716.

**Costs.**—An executor propounding the will in good faith is entitled to his costs, whether the will be sustained or rejected. *Perrine v. Applegate*, 14 N. J. Eq. 531. If there are strong circumstances to justify a contest of the will, the court will direct the costs to be paid out of the estate. *Frost v. Wheeler*, 43 N. J. Eq. 573. But not where the contest is unfounded and vexatious. *Nichols v. Binns*, 1 Sw. & Tr. 239; *Stacey v. Spratley*, 4 De G. & J. 199.

in modern writs, being particularly applied to the day on which the writ is witnessed, that is, issued or supposed to be issued, though it is expressive also of the place where the court is or was sitting at such time.<sup>1</sup>

**TESTIMONY**.—(See also BILL TO PERPETUATE TESTIMONY, vol. 2, p. 277; EVIDENCE, vol. 7, p. 42; WITNESSES).—Testimony is oral evidence.<sup>2</sup> Evidence includes all testimony; but "testimony" is only a species of evidence distinguished from documentary or written evidence.<sup>3</sup>

**TEST OATH**.—See EX POST FACTO LAWS, vol. 7, p. 526; OATH, vol. 16, p. 1020.

**TEST-PAPER**.—A document allowed to be used in a court of justice as a standard of comparison for determining a question of handwriting.<sup>4</sup>

**THE**.—The definite article particularizing the subject spoken of.<sup>5</sup>

1. Burr. Law Dict.

In *Gwin v. Latimer*, 4 Yerg. (Tenn.) 27, it was said "that the *teste* of a writ means the date or time at which it is witnessed or issued." As to the necessity of the *teste*, see WRITS; SUMMONS, vol. 24, p. 523.

2. A species of evidence by means of witness. *Carroll v. Bancker*, 43 La. Ann. 1078; 43 La. Ann. 1194. In the old books, "testimony" means witness. Co. Litt. 326.

In *Woods v. State* (Ind. 1893), 33 N. E. Rep. 903, it was held that "testimony" is the statement of a witness under oath, but it need not be made to a judicial tribunal; that a deposition may contain testimony although never used in the pending cause.

3. *Lindley v. Dakin*, 13 Ind. 388; *McConaha v. Carr*, 18 Ind. 443.

So a statement in a bill of exceptions, purporting to contain all the evidence given on a trial, that it contained all the "testimony" given, was held insufficient where it appeared that written or documentary evidence was introduced on the trial. *McDonald v. Elfes*, 61 Ind. 279; *Gazette Printing Co. v. Morss*, 60 Ind. 153.

But in *Miller v. Wolf*, 63 Iowa 233, where the appellant stated in the abstract of evidence, certified on appeal, that it contained all the testimony, although the use of the word "testimony" was acknowledged to be inaccurate, it was said that, "If it can be fairly inferred, however informal the language used, that the appellant claims that he has presented an abstract of all

the evidence, this court will presume that he has, unless the appellee sets out additional evidence." And where a bill of exceptions recited in its introductory clause that in order to maintain the issues on his part, the plaintiff introduced the following "testimony," but from the context it was clear that the word "testimony" referred to documentary evidence, the misuse of the word was not allowed to defeat the operation of the instrument. *Harris v. Tomlinson*, 130 Ind. 426.

4. See HANDWRITING, vol. 9, p. 290.

5. The verdict of a jury finding a party guilty of a bill of scandal is uncertain and cannot be construed as being guilty of the bill of scandal charged in the indictment. A bill of scandal is very different from the bill of scandal. *Sharff v. Com.*, 2 Binn. (Pa.) 514. To the same effect, see *Dart v. McKinney*, 9 Blatchf. (U. S.) 360; *Fisk v. Henarie*, 32 Fed. Rep. 425.

Where, in an election to decide whether or not a school district should issue bonds, the ballot simply read "for bonds" and "against bonds," omitting the word "the," it was held not to invalidate the election. *State v. Metzger*, 26 Kan. 395.

The omission of the word "the" in signing the name of a corporation to a deed of assignment, is not fatal to the subscription. *DeRiesthal v. Walton*, 66 Md. 470.

Under *Massachusetts* Pub. Sts., ch. 197, § 12, providing that an action may be begun against an administrator within two years after "the grant of

**THEATERS.**—(See also COPYRIGHT, vol. 4, p. 147; LITERARY PROPERTY, vol. 13, p. 916; MUNICIPAL CORPORATIONS, vol. 15, p. 949.)

- I. Definition, 1021.
- II. Erection, 1022.
  1. *Municipal Control*, 1022.
  2. *Furnishings—Fixtures*, 1023.
- III. Lease, 1023.
  1. *In General*, 1023.
  2. *Right of City to Lease Municipal Buildings for Theatrical Purposes*, 1025.
- IV. License (See also LICENSE, vol. 13, p. 514; TAXATION—Occupation, Business, and Privilege Taxes, vol. 25, p. 479), 1026.
  1. *In General*, 1026.
  2. *Right of Legislature to Ex-act*, 1026.
  3. *Delegation of Power to Municipalities*, 1027.
  4. *Discretion as to Granting*, 1027.
  5. *Scope of License*, 1028.
  6. *Necessity for License*, 1028.
  7. *Liability for Failure to Procure License*, 1028.
  8. *Construction of Statutes Requiring Licenses*, 1029.

letters testamentary," the word "the" cannot be construed as referring only to the original grant, but upon the death or resignation of an administrator, an action may be begun any time within two years from the grant of letters testamentary to his successor. *Eddy v. Adams*, 145 Mass. 489.

Where a legacy was of "ten shares of the stock of the W. & N. R. Co.," the word "the" preceding stock, is ambiguous, and may as well refer to the stock of the company in general as to the stock owned by the testatrix; but where a subsequent clause of the will bequeaths "the balance of my stock as per my stock book," the legacy is thereby made specific. *Harvard Unitarian Soc. v. Tufts*, 151 Mass. 76.

A statute allowing "the party aggrieved" to prosecute an action to set aside a judgment obtained by fraud of the prevailing party, cannot be construed as giving the right to any person aggrieved, not a party to the action, though he be directly interested in the result. The definite article "the" and the word "party," used with distinct reference to a judgment recovered in an action, are not to be taken to have been employed without regard to their proper signification, unless upon satisfactory reasons apparent in the terms or the obvious purposes of the enactment. *Stewart v. Duncan*, 40 Minn. 410.

"The credit," in a guarantee, points to a definite credit—"something ascertained and known" (per Bramwell, B., *Broom v. Batchelor*, 25 L. J. Ex. 299; 1 H. & N. 255; but the majority of the court was against him in the conclusion, partly led up to by the *dictum* just cited).

The English statute providing that where the annual value of "the house occupied by" a brewer does not exceed ten pounds, the beer brewed by him shall not be chargeable with duty, was held to mean the house occupied by him, in which he lives. The words "in which he lives" do not actually appear in the judgment, but embody its principle, Pollock, B., observing: "It was intended to get at the status of the man who brews." It is difficult to see, however, why it was more easy to read into the exception the words "in which he lives" rather than the words "in which he brews," which the court refused. *Tippett v. Hart*, 52 L. J. M. C. 41; 10 Q. B. Div. 483.

Where a complaint for selling adulterated milk in violation of *Massachusetts Gen. Sts.*, ch. 49, § 151, after alleging the official character of the inspector and that he kept an office and books as required by the statute, charges that the defendant, being a dealer in milk, and so recorded "in the books of said inspector," did sell, etc., instead of an allegation that he was recorded in the books aforesaid, or in the said books, does not sufficiently show that he was recorded in any such books as the statute requires an inspector to keep. In the statute, doubtless "the books" mean the books before mentioned, *i. e.*, the books kept for the purpose of recording the names of persons engaged in the sale of milk; but it does not necessarily follow that these words are to be taken to have the same meaning in the complaint which they have in the statute. *Com. v. McCarron*, 2 Allen (Mass.) 157.

**The Company.**—See COMPANY, vol. 3, p. 366.

- V. Theatrical Advertising; Lithographs, etc., 1031.
- VI. Tickets of Admission, 1033.
  - 1. *In General*, 1033.
  - 2. *Transferability*, 1035.
  - 3. *Reserved Seats*, 1035.
  - 4. *Free Admission*, 1036.
  - 5. *Forgery of Theatre Tickets*, 1038.
- VII. Exclusion of Colored Persons, 1038.
  - 1. *Right to Exclude*, 1038.
  - 2. *Right to Assign Particular Seats*, 1039.
- VIII. Sunday Performances (See also SUNDAY, vol. 24, p. 528), 1040.
  - 1. *Statutes Prohibiting*, 1040.
  - 2. *Contracts with Actors for Sunday Performances*, 1040.
- IX. Nuisances (See also NUISANCES, vol. 16, p. 922), 1041.
- X. Liability of Manager, 1041.
- XI. Manager and Actor, 1043.
- 1. *Contracts with Actors*, 1043.
  - a. *In General*, 1043.
  - b. *Construction of Contracts*, 1043.
  - c. *Employment of Children*, 1045.
  - d. *Illness of Actor*, 1045.
  - e. *Damages—Prospective Profits*, 1046.
- 2. *Characters and Parts*, 1047.
- 3. *Stage Costumes*, 1047.
- 4. *Discharge of Actor*, 1047.
- 5. *Injunctions Restraining Actors*, 1049.
- XII. Criticisms of the Press, 1051.
- XIII. Hissing, 1052.
- XIV. Carriage, Transportation, Baggage, etc., 1053.
- XV. Literary Property in Dramatic Productions (See also COPYRIGHT, vol. 4, p. 147; LITERARY PROPERTY, vol. 13, p. 916), 1054.

**I. DEFINITION.**—A theater, in modern times, is a house for the exhibition of dramatic performances;—a playhouse, comprehending the stage, pit, boxes, galleries and orchestra.<sup>1</sup>

**1. Webster's Dict.**

A theater is any edifice used for the purpose of dramatic, operatic, or other representations, plays, or performances, for admission to which entrance-money is received, not including halls rented or used occasionally for concerts or theatrical representations. U. S. Act, July 13th, 1866, § 9; Abb. Law Dict.

The word theater does not import, necessarily, anything but the stage on which the actors play, and the room in which the acting is done and seen. *Lee v. State*, 56 Ga. 477.

A theater, in ancient times, was an edifice in which spectacles or shows were exhibited for the amusement of spectators; but in modern times, it is a house for the exhibition of dramatic performances. A theatrical exhibition must be either such as pertains to a theater, or to the drama, for the representation of which the theater is designed. A drama is a story represented by action; the representation is as if the real persons were introduced and employed in the action itself. It is ordinarily designed to be spoken, but it may be represented in pantomime, when the actors use gesticulation, sometimes in the form of the ballet, but do not speak; or in opera, where music takes the place of poetry and of ordinary

speech, and the dramatic treatment is essentially different from either. An opera is a musical drama, consisting of airs, choruses, recitations, etc., enriched with magnificent scenery, machinery, and other decorations, and representing some passionate action. The spoken drama, therefore, and the opera, agree in the method or manner which is essential to the dramatic art, viz., imitation in the way of action. In the former, the actor observes the rules of rhetoric and of oratory, and follows the special laws of dramatic delivery; whilst in the latter, he employs the power of music, both vocal and instrumental, as a medium of artistic and passionate expression. *Bell v. Mahn*, 121 Pa. St. 225; 6 Am. St. Rep. 786.

Although the term "theater" has an extended signification, and comprehends a variety of performances, yet it is conceived that all which it does legitimately comprehend, partake more or less of the character of the drama. *Jacko v. State*, 22 Ala. 73.

**Tumbling and Fencing.**—Neither tumbling nor fencing are theatrical entertainments. *Rex v. Handy*, 6 T. R. 286.

**Negro Minstrels.**—Theatrical performances are not confined to the pure drama, but may include negro minstrel

**II. ERECTION—1. Municipal Control.**—Cities usually have power to control the erection of theaters within their corporate limits, and may prevent the construction of insecure and unsafe buildings,<sup>1</sup> and make such regulations as may be deemed necessary to secure the safety of the audience.<sup>2</sup>

performances. *Shelby Co. Taxing Dist. v. Emerson*, 4 Lea (Tenn.) 312.

**Place of Public Entertainment.**—The room in which a dramatic piece is performed, and to which persons paying for it are admitted for the purpose of hearing it, is, for the time, a place of public entertainment, although the room is ordinarily used for different purposes. *Russell v. Smith*, 12 Q. B. 217; 64 E. C. L. 215.

A person who, being the owner of a two-story building, offers to rent, for use as a theater, a room or hall in the upper story, containing a small stage and dressing-room, which might be used for small dramatic exhibitions, but who had never used it as a theater nor let it to another to be so used, cannot be convicted of "engaging in, or carrying on the business of keeping a theater," under the provisions of the revenue law. *Gillman v. State*, 55 Ala. 248.

**Payment of Money Does Not Fix Character of Place.**—The payment of money, although a usual incident of a place of amusement and entertainment, is not necessary to give that character to a place. *Private Theatricals*, 28 Jour. Jur. 74. See *infra*, this title, *License—Construction of Statutes Requiring*.

1. See **MUNICIPAL CORPORATIONS—Regulation of Buildings**, vol. 15, p. 1176.

**Supervising Board.**—Where a given municipal body is empowered to pass upon plans of a given public building, and prohibit its erection if it finds the same unsatisfactory, it has no right to disapprove of plans, on the ground that it does not approve of the site contemplated. *Reg. v. Central Board of Health*, 15 Vict. 375.

**Restraining Erection of Stand Over-looking Ball-Grounds.**—But an injunction will not be granted to restrain the use by a landowner, of a stand on his premises from which persons are allowed to witness base-ball games on adjoining grounds. *Detroit Base Ball Club v. Deppert*, 61 Mich. 63; 1 Am. St. Rep. 566.

**Subscriptions Toward Building a Hall—Ownership.**—Subscriptions toward building a hall for the use of a

brass band, made "for the purpose of assisting such band," without any conditions whatever, amount to gifts to the members of the band, and such building when erected belongs to them as tenants in common. *Higgins v. Riddell*, 12 Wis. 587.

**2. Obstruction of Passage Ways.**—The provisions of statutes relating to obstruction of passage ways and exits in theaters, declaring that the same shall be kept free from chairs, or that persons shall not be allowed to stand therein during performances, should be construed literally. The statute is violated, even if the number allowed to stand is not so great as to prevent free egress in case of danger. It is not necessary to prove that the manager or proprietor of the theater knew of the violation in question. It is sufficient if tickets for a performance were sold by defendant's agents, after they knew that the seats in the house were filled. *Fire Department v. Stetson*, 14 Daly (N. Y.) 125.

In *Fire Department v. Hill*, 14 N. Y. Supp. 158, it appeared that the defendant was lessee of the theater, but had sublet to another the privilege of giving performances therein, defendant furnishing ticket sellers, ticket takers, and necessary ushers; that the ushers were employed and paid by defendant, though they were subject to the orders of the party giving the performances, and that it was the latter who admitted the persons who crowded the passage ways on the occasion in question; that about a week before, defendant's attention had been called by officers to the violation of the statute, and he had promised compliance with the law; but though he was afterwards in and about the theater, the infraction of the law still continued. This was held to have authorized a finding that the defendant allowed the passage ways to be obstructed as complained of.

**Doors of Theaters.**—In *Florida*, by act of June 5th, 1891, doors of theaters are required to open outwardly, and owners, managers, or lessees failing so to provide, are declared guilty of felony.

**Attendance of Officer—Unreasonable**

**2. Furnishings—Fixtures.**—The term “fixtures,” when applied to a theater, includes all the fittings up necessary to make it suitable for theatrical purposes.<sup>1</sup>

**III. LEASE—1. In General.**—In the lease of a theater the parties are bound by the covenants, as, for example, a covenant that the theater shall be used only for theatrical purposes.<sup>2</sup>

**Ordinance.**—An ordinance requiring owners of theaters to pay the city constable \$2.00 per night for his attendance at public performances therein, has been held unreasonable and void. *Waters v. Leech*, 3 Ark. 110.

**1. In *Forbes v. Howard*, 4 R. I. 364,** it was held that although chairs in the boxes might not properly come under the head of “fixtures,” yet if the defendant neglected to furnish seats, which would be necessary fixtures, the cost of chairs which the plaintiff was obliged to furnish, to supply the place of seats for the boxes, might be given in evidence to enable the jury to estimate the damages which the plaintiff suffered in consequence of the defendant's non-performance of his contract to furnish necessary fixtures. Upholstery upon the seats was considered as undoubtedly within the terms of the contract to furnish fixtures; and where a contract to furnish accommodations for a theater, on a five years' lease, in a building about to be erected, refers for the finish of the building to the specifications in a building contract, in which no provision is made for painting the theater walls, such painting cannot be claimed to be within the first contract, although the same provides for the furnishing “of scenery and fixtures for the theater;” the painting of the walls of the theater not falling within the denomination either of “scenery” or “fixtures.”

**Chairs Screwed to Floor—Mechanic's Lien.**—Where chairs were furnished for a theater, of a pattern that had to be made with special reference to the size, shape, and plan of the auditorium in which they were to be placed, and were secured to the floor, as they could not stand alone, they were held to form a part of the building, and a mechanic's lien was allowed to be filed and enforced against the building, by the one furnishing them. *Grosz v. Jackson*, 6 Daly (N. Y.) 463.

**Evidence—Experts.**—The opinions of a committee, who, after consultation with stage carpenters and artists, have fitted up a theater in one place, are inadmissible as proof of the cost of fitting up a

theater at another place, such persons not being experts. *Forbes v. Howard*, 4 R. I. 364.

**2. See *LEASE*, vol. 12, p. 1000 *et seq.***  
In *Leader v. Moody*, L. R., 20 Eq. 145, under a provision in the lease, the lessee, for a valuable consideration, sub-demised certain boxes and pit-stalls, together with free and uninterrupted admission into, and egress and regress to and from, and the full use and enjoyment of such boxes and stalls during all such nights as the theater should be open for the reception of an audience or company, to any public performance or exhibition of any opera, or any entertainment, whatsoever, of or upon the stage, except balls or masquerades, to the plaintiff for a term of years, reserving full right of access to the boxes and stalls for the purpose of repairs. The under lease contained a covenant for quiet enjoyment of the demised premises, but no covenant on the part of the grantor of the under lease to observe or perform the covenants of the original lease. Afterwards the lessee of the theater agreed to let it for a term of three months, for the purpose of holding religious meetings. In order that the theater might be converted into a convenient place for holding such meetings, the divisions between the boxes were removed and the pit (including the site of the plaintiff's stalls) was boarded over; but these alterations were not permanent, and the parties disclaimed any intention of using the theater for religious services beyond the three months. It was held that, without the plaintiff's consent, the theater could not be converted to other than theatrical purposes, nor could the original lessee, or any person claiming under him, enter on the plaintiff's boxes or stalls; but that, under the circumstances, the proper remedy was in damages, and not by way of injunction. And see *Daunev v. Chatterton*, 45 L. J., C. P. Div. 293; *Croft v. Lumley*, 5 E. & B. 648; 85 E. C. L. 647.

**Custom and Usage.**—Any usage, with reference to the leasing of a theater, may be binding, where the contract of

Either party will be liable to the other in damages for a breach of the covenants of the lease.<sup>1</sup> The lessor may obtain an injunction

leasing was entered into with reference to such usage. *American Academy of Music v. Birt*, 26 W. N. C. (Pa.) 351.

**Production of Books—Accounts.**—An agreement by the lessee of a theater, to afford the lessor every facility for ascertaining the correctness of accounts rendered by the lessee, does not import that the lessor is to exercise the check in person. He may do it by any person, as to whom the lessee can have no reasonable ground of complaint. And, under a covenant to produce books as evidences of his accounts, he is impliedly bound to keep books giving reasonable information. A court will not interfere by interlocutory injunction, where the question between the parties is one of account, and there is no allegation of the defendant's insolvency. A mere irregularity in accounts rendered under a covenant to account, unless it leads to an inference of fraud or dishonesty, is not a ground for the appointment of a receiver. *Aarons v. Lewis*, 3 Vict. 79. And see *PRODUCTION OF DOCUMENTS*, vol. 19, p. 227.

1. A notice by one party of an intention not to comply with an executory contract of a lease, may be considered an immediate breach. Thus A agreed to rent B's theater for two weeks, from February 9th. On the 9th of January, he informed B of his intention not to take or occupy the theater according to agreement, and it was held that B might treat this notice as a breach of the contract, and that the amount of the rental under the contract would be a valid set-off in an action commenced by A against B on the 13th of January. *Grau v. McVicker*, 8 Biss. (U. S.) 13.

Where the contract between the lessor and lessee of the theater, makes them in effect partners, but the theater is to be under the sole management of the lessee, the lessor to have no control, authority, or voice therein, the fact that the lessee does not personally attend to the management of the building, but is looking after the business elsewhere, is not a breach of contract justifying a re-entry by the lessor. *Leavitt v. Windsor Land, etc., Co.*, 54 Fed. Rep. 439.

**Lease of Hall to Attack Christianity Void.**—In *Pringle v. Napanee*, 43 U. C. Q. B. 285, it was held that Christianity is part of the recognized law of the

land, and that a plea that the purpose for which a hall was intended to be used was for the delivery of lectures attacking the fundamental doctrines of Christianity, was a good defense to an action for a breach of contract to let a public hall. And in *Cowan v. Milbourn*, L. R. 2 Ex. 230, it was held that a breach of contract to lease, might be justified on such ground, notwithstanding that the lessor had previously assigned a different reason.

**Breach by Owner.—Measure of Damages.**—Where the owner of a hall lets it for an entertainment, and refuses to permit it to be held, because he has failed to procure a renewal of his license to let the hall for theatrical purposes, the measure of damages is the difference between the probable profits, to be proved with reasonable certainty, and the expenses proved. *Behrens v. Miller*, 2 City Ct. (N. Y.) 427.

Where the contract is broken by notice of renunciation prior to the time of performance, it seems that the damages are such as would have arisen from the non-performance of the contract at the time appointed, subject to abatement in respect to any circumstances that may afford the means of mitigating the loss. *Grau v. McVicker*, 8 Biss. (U. S.) 13.

**Lease of Unfinished Theater.**—Where an unfinished theater is leased, with an agreement to complete the same with all due diligence, the lessee may recover damages from the lessor for a breach of such agreement, but the damages cannot include the prospective profits of performances which have been announced, but have not taken place. *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217.

**Buildings Destroyed by Fire.**—In *Taylor v. Caldwell*, 3 B. & S. 826; 113 E. C. L. 826, the defendants agreed to let to the plaintiffs, the Surry Gardens and Music Hall for certain specified days, for the purpose of holding concerts, with no express stipulation for the event of the destruction of the Music Hall by fire. A few days before the time arrived for giving the first concert, the Gardens and Music Hall were so far damaged by an accidental fire as to prevent the entertainments. The plaintiffs brought an action for damages for breach of contract, alleging a loss of



restraining the production of immoral or indecent performances likely to injure the reputation of the house.<sup>1</sup>

**2. Right of City to Lease Municipal Buildings for Theatrical Purposes.**—The owner of a hall used for theatrical and similar purposes cannot restrain the city within which it is located from letting the city hall for entertainments, because his profits are lessened thereby; the city, by its charter, having the right to control and lease its public buildings and real estate.<sup>2</sup> Nor can property owners restrain the city because the rate of insurance is thereby increased.<sup>3</sup>

divers sums of money paid for printing, advertisements, and expenses in preparing for the concerts, and otherwise in relation thereto; but it was held that both parties were excused from performance of the contract. Blackburn, J., in delivering the opinion of the court, said: "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to *Walton v. Waterhouse*, 2 Wms. Saund. 421, a (6th ed.), and is recognized as the general rule by all the judges in the much discussed case of *Hall v. Wright*, E. B. & E. 746; 96 E. C. L. 745. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the

intention of those who entered into the contract. For, in the course of affairs, men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition."

**1. Lessor Restraining Production of Immoral Plays.**—The lessor of a theater may obtain an injunction restraining the lessee from advertising, or giving a performance or entertainment of such an apparently immodest or indecent nature as to injure the reputation of the theater. The court has the power to prohibit a permanent injury to the house from such performances or from such advertisements. *Wandell's Law of the Theater* 67, citing *Walsh v. Wiggins*, 19 Chic. Leg. N. 169.

A provision in an agreement for the management of a theater, by which the lessee agrees that he will maintain it as a first-class place of amusement, and that no attraction of a questionable character, or such as would not be regarded as first class by the managers of certain theaters named, shall be booked, will be construed according to the practical interpretation put upon it by the parties before the litigation begins. *Leavitt v. Windsor Land etc., Co.*, 54 Fed. Rep. 439.

**2. *Stone v. Oconomowoc*, 71 Wis. 155; *Bell v. Platteville*, 71 Wis. 139.**

Under *Vermont Rev. Laws*, § 2751, authorizing towns to vote money for necessary incidental purposes, a town, whose town-house has been damaged by the elements, may elect to build a new one, and may fit up and rent part of it as an opera-house, if the primary object of the building is for municipal purposes, though it could not originally have built it for purposes of rental. *Bates v. Bassett*, 60 Vt. 530.

**3. *Bell v. Platteville*, 71 Wis. 139.**

**Pleadings.**—It was likewise laid down in the above case, that an allegation in a bill to restrain a city from renting its

**IV. LICENSE**—(See also LICENSE, vol. 13, p. 514; TAXATION—*Occupation, Business, and Privilege Taxes*, vol. 25, p. 479)—**1. In General.**—From early times it has been usual to require licenses from theaters. The law of the subject, and the power and its limitations, are treated largely in the articles referred to above.<sup>1</sup>

**2. Right of Legislature to Exact.**—The legislature of a state is empowered to regulate places of amusement, and to require the licensing thereof. Such legislation is sustainable as a legitimate exercise of the taxing power of the state, and as a part of its police regulations.<sup>2</sup>

hall for entertainments, "that, the city proposed to use the property as if it were a private corporation, and had erected the same with private corporate funds," was a mere conclusion from the other facts alleged, and not admitted by a demurrer to the bill. See *Pratt v. Lincoln Co.*, 61 Wis. 66; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *French v. Quincy*, 3 Allen (Mass.) 9; *Camden v. Village Corporation*, 77 Me. 530.

**1. License.**—In *Baker v. Cincinnati*, 11 Ohio St. 543, under an ordinance of the Cincinnati common council, a charge of \$63.50 was exacted from the plaintiff for a license to give theatrical exhibitions, in addition to a fee of \$1.00 for the officer issuing the license; and it was held that the amount in excess of \$1.00 was not illegally exacted, and that the exaction was not in violation of any provision in the constitution of the state, restricting the power of taxation vested in the general assembly. In delivering the opinion of the court in this case, Gholson, J., said: "Things licensed must be such as should only be permitted under the regulation or supervision of public functionaries. The tax or charge may have reference to such regulation or supervision. Such is the case of exhibitors of shows and performances. An inquiry has to be made as to those who propose to exhibit, and as to the nature of the thing to be exhibited. Then, the exhibition may require additional attention from those intrusted with the care of the public peace, to prevent disorder and disturbance. The burden thus devolved upon public officials, requiring, perhaps, an increase in their number or compensation, for the benefit of exhibitors of shows or performances, may justly authorize a charge beyond the mere expense of filling up a blank license." And see *Hodges v. Nashville*, 2 Humph. (Tenn.) 61; *Boston v. Schaffer*, 9 Pick. (Mass.) 415.

**Disposition of License Fees to Charitable Society.**—The fact that the money realized from the license fees, or fines and penalties imposed for failure to procure a license, is paid over to a society for the reformation of juvenile delinquents, does not render the ordinance levying the license void, on the ground that it is a tax on an ordinary occupation for the benefit of a private society. The municipality has power to require the license fee, which becomes its property, and may dispose of it as seems proper. *Wallack v. New York*, 5 Thomp. & C. (N. Y.) 310.

**2. Wallack v. New York**, 3 Hun (N. Y.) 84. And see *Tanner v. Albion*, 5 Hill (N. Y.) 121; *People v. Lawrence*, 41 N. Y. 137; *Bush v. Seabury*, 8 Johns. (N. Y.) 418; *Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Fire Department v. Noble*, 3 E. D. Smith (N. Y.) 452; *Ingersoll v. Skinner*, 1 Den. (N. Y.) 540; *Com. v. Colton*, 8 Gray (Mass.) 488; *Nightingale's Case*, 11 Pick. (Mass.) 168; *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *License Cases*, 5 How. (U. S.) 589; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Nathan v. Louisiana*, 8 How. (U. S.) 73; *License-Tax Cases*, 5 Wall. (U. S.) 462; *Society for Savings v. Coite*, 6 Wall. (U. S.) 611; *State v. Allmond*, 2 Houst. (Del.) 612; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Raguet v. Wade*, 4 Ohio 107; *Robertson v. Henger*, 5 Sneed (Tenn.) 257; *Mabry v. Tarver*, 1 Humph. (Tenn.) 94; *State v. Stephens*, 4 Tex. 137; 1 Dill. on Mun. Corp., §§ 357-360.

**Graduation of License According to Population.**—An act dividing the business of keeping certain places of amusement into two classes: first, in cities whose population exceeds 25,000; and second, in cities or towns having less,

3. **Delegation of Power to Municipalities.**—Municipal corporations are usually given the power to "license, regulate and tax," or to "tax, restrain and prohibit," places of amusement.<sup>1</sup>

4. **Discretion as to Granting.**—Usually it is discretionary with the mayor or city officer in whom is vested the power to grant a theatrical license, whether or not to grant it in a given instance. Unless the duty imposed on him is mandatory, the courts cannot interfere with the exercise of his discretion.<sup>2</sup>

and fixing the license in the former case at \$1,000 and in the latter at \$500, does not contravene an article in the constitution requiring the legislature to "graduate the amount" of the tax. *State v. O'Hara*, 36 La. Ann. 94; *State v. Schouhausen*, 37 La. Ann. 42.

**Tax by County in Addition to State Tax.**—The sum of \$25 imposed on each day's exhibition of a circus, is not a tax on property, but a charge for a license for an exhibition, and hence the owner of a circus is not liable to pay, in addition to the sum imposed by the statute, any other amount for county levies. *Orton v. Brown*, 35 Miss. 426.

**Annual Tax.**—In *Nurdlinger v. Irvine*, 18 W. N. C. (Pa.) 65, it was held that a statute imposing a state license tax, to be collected by the county treasurer on every theater or circus in the city or county of Philadelphia in the sum of \$200, provided that a license granted by the treasurer of any county shall entitle the party receiving the same to make such exhibitions in any part of the state for the period of one year; that the tax of \$200 thus imposed was an annual tax, and that theatrical or circus exhibitions could not be given in the city and county of Philadelphia for more than one year without paying the tax anew. And see *Downing v. Blanchard*, 12 Wend. (N. Y.) 383.

1. *Dill on Mun. Corp.*, §§ 35, 60; *Baker v. Cincinnati*, 11 Ohio St. 534. Under an act authorizing the mayor and aldermen to license theatrical exhibitions "on such terms and conditions as to them may seem just and reasonable," they may exact money for the license. *Boston v. Schaffer*, 9 Pick. (Mass.) 415.

The corporate authorities of a town, under a grant of power to "license, regulate, and restrain theatrical amusements," may exercise the taxing power as a means to effect this object. *Hodges v. Nashville*, 2 Humph. (Tenn.) 61.

In *Missouri*, a city of the fourth class cannot levy a license tax upon theatri-

cal performances held in an opera house within its limits; the prohibition of § 8193 of the Rev. Sts. of 1889 being valid. *Negrotto v. Monett*, 49 Mo. App. 286.

Under a charter giving the city council of Houston, power "to prohibit and punish keepers and inmates of variety shows, and to segregate and regulate the same, and determine such inmates and keepers to be vagrants," an ordinance is not authorized which declares any place a variety show where persons engage in music, dancing or plays, and liquor is sold, offered or given to any person present, and punishing the keeping of such show by fine. *Ex p. Bell* (Tex. Cr. App. 1893), 22 S. W. Rep. 1040.

2. *People v. Grant*, 58 Hun (N. Y.) 455. It was held in this case, that under statutes providing that an exhibition shall not take place in the city of New York until "a license for the place of such exhibition for such purpose, shall have been first had and obtained," and that "the mayor of the city of New York is hereby authorized and empowered to grant such license, to continue in force until the first day of May next ensuing the grant thereof, on receiving for each license so granted, and before the issuing, the sum of \$500," it is discretionary with the mayor whether he will grant a license or not. See also *Toole's Appeal*, 90 Pa. St. 376.

An application for a license should satisfy the mayor of the morality of the entertainment. Upon appeal to the quarter sessions, the case will not be heard *de novo*, but inquiry will be made merely as to whether the mayor exercised a fair legal discretion. *Steadman's Appeal*, 14 Phila. (Pa.) 376.

**When Issuance Mandatory.**—Under an act providing that the mayor shall, upon payment of the sum named, issue a license in certain cases, the requirement is mandatory on him. It confers upon him no discretion. *Com. v. Stokely*, 12 Phila. (Pa.) 316.

**5. Scope of License.**—Ordinarily a single license does not apply to more than one place;<sup>1</sup> but the payment of a license fee for the privilege of keeping a theater, opera house, or concert hall, where theatrical entertainments are given, will cover any and all entertainments given by companies hired by the person paying the fee.<sup>2</sup>

**6. Necessity for License.**—Failure to procure a license precludes a right of action against an actor for breach of his promise to appear at the theater.<sup>3</sup>

**7. Liability for Failure to Procure License.**—One who conducts unlicensed theatrical performances, may be liable to a criminal prosecution, where the statute so provides;<sup>4</sup> or he may be sued

1. *Nurdlinger v. Irvine*, 18 W. N. C. (Pa.) 65.

2. *Shelby Co. Taxing Dist. v. Emerson*, 4 Lea (Tenn.) 312; *Bell v. Watson*, 3 Lea (Tenn.) 328; *Rowland v. Kleber*, 1 Pittsb. (Pa.) 68.

**Agreement not to Interfere with Unlicensed Persons.**—An agreement not to interfere with a person whose application for a license has been refused, does not amount to a license. *Simpson v. Wood*, 105 Mass. 263.

**Payment of Fine not Equivalent to License.**—The payment of a fine by a party for a failure to take out a license, is not equivalent to a license, and does not bar a suit to recover the amount of license fees due. *Nurdlinger v. Irvine*, 18 W. N. C. (Pa.) 65.

**Recommendation that License Shall Be Granted.**—A recommendation that a license shall be granted to several, will not justify the granting of the same to one of them. *Batchelder v. Erb*, 47 N. J. L. 93.

3. *Gallini v. Laborie*, 5 T. R. 242.

But, in an action against a performer for not performing, at a licensed theater, pursuant to his contract, evidence that the performances had gone on without interruption, is sufficient *prima facie* evidence that the theater is duly licensed. *Rodwell v. Redge*, 1 C. & P. 220; 11 E. C. L. 374.

**Inability to Procure License.**—It has been held in *England*, that no action can be maintained on an agreement to exhibit entertainments of the stage, for gain, in a place where, by the terms of a statute, a license cannot be obtained, and that a plea showing that the intended place of exhibition was so situated was an answer to a declaration on the breach of such agreement. *Levy v. Yates*, 8 A. & E. 129; 35 E. C. L. 352.

**Recovery of Wages—Absence of License.**—An actor may maintain an action for his services in an unlicensed theatrical

exhibition, unless it appears that he knew his employer had no license. *Roy v. Johnson*, 7 Gray (Mass.) 163.

But where the plaintiff is a participant in the concern, he cannot recover money paid at the request of the defendant in the conduction of an unlicensed theater. *De Begnis v. Armistead*, 10 Bing. 107; 25 E. C. L. 47.

**4. Allegation of Indictment.**—An indictment against the proprietor of a theater, who fails to take out the license prescribed by law, sets forth enough, if it alleges that the exhibition "purported" to be an exhibition of certain performances. An allegation that the exhibition was what it purported to be, carries with it an obligation to substantiate the same by proof. *Com. v. Twitchell*, 4 Cush. (Mass.) 74. It is not necessary to allege that the exhibition was for profit. Nor is it necessary that the prosecutor should prove that fact on the trial. *Pike v. State*, 35 Ala. 419. But an indictment under the *Alabama Code* 1886, § 629, making it a misdemeanor to give a public exhibition without a license, should allege that charges are made for admission or for the use of some instrument or device, and that the entertainment was not given for a charitable purpose or in a theater whose owner or manager had taken out a license, as they are excepted by such section from the provisions of the act. *Mosby v. State* (Ala. 1893), 13 So. Rep. 148.

If there are two legislative acts in a given state requiring licenses for theaters, an indictment should allege under which act the charge was made. *Com. v. Fox*, 10 Phila. (Pa.) 204.

**One Penalty Only Recoverable.**—One penalty only, is recoverable for the violation of a statute, unless it is otherwise expressly provided, and a second action by another common informer, to recover a like penalty, is not maintain-

for the statutory penalty, where the statute has provided a penalty for keeping an unlicensed house.<sup>1</sup>

**8. Construction of Statutes Requiring Licenses.**—It has been held that the owner of a room or hall, fitted up with a stage and dressing-room, which might be used for small dramatic performances, but which has never been so used, cannot be convicted of keeping a theater,<sup>2</sup> and that a portable booth theater, which may be taken to pieces and moved about, is not a house or place of public resort for the performance of stage plays.<sup>3</sup> A license to keep a

able. *Garrett v. Messenger*, L. R., 2 C. P. 583.

**Restraining Impromptu Characterizations.**—An injunction lies to restrain impromptu characterizations if performed on successive nights in a public hall, for admission to which a price is charged, a license being required for dramatic entertainments. *Society for the Reformation of Juvenile Delinquents v. Diers*, 10 Abb. Pr. N. S. (N. Y.) 216.

1. *Wallack v. New York*, 3 Hun (N. Y.) 84.

Proof that a party was the manager of a theater, and that he paid salaries and dismissed performers, is sufficient proof that he caused unlicensed performances, and if he caused the performances, it is not material whether he did so as the agent of others or not. *Parsons v. Chapman*, 5 C. & P. 33; 24 E. C. L. 201.

In an action of debt to recover the penalty of £100, given by the Statute 25 Geo. II. ch. 36, § 2, for keeping an unlicensed house for public dancing, etc., it appeared that music, dancing, etc., had occasionally taken place at the defendant's house (a public house); that no money was taken by him for admission, but the rooms were let to persons who sold tickets, and received money for admission at the door; but there was no direct evidence that the defendant knew of this practice. It was held that upon these facts, there was evidence to go to the jury of a keeping of the house by the defendant for the purposes mentioned in the statute, and that the judge was wrong in directing a non-suit. *Marks v. Benjamin*, 5 M. & W. 565.

An action on a promise to the mayor and aldermen of a city to pay for a license, should be brought in the name of the city, the mayor and aldermen being merely its agents. *Boston v. Schaffer*, 9 Pick. (Mass.) 415.

2. *Gillman v. State*, 55 Ala. 248.

The owner of a building not in Philadelphia or Alleghany County, a part of which is fitted up with stage, etc., and occasionally let out for the holding of public meetings, local entertainments, and to traveling theatrical and operatic companies, at a variable rent or price for the use thereof, is not liable for the payment of the \$50 license fee imposed by the Act of April 16th, 1845, P. L. 532, and its supplements. *Hayes v. Coatesville Opera House Co.*, 139 Pa. St. 636.

**Private Theater.**—A private theater in which theatrical representations occasionally take place for the benefit of charity, an entrance fee being charged, is within an act setting forth that any "house or other place of public resort for the public performance of stage plays, shall be licensed." *Shelley v. Bethell*, 12 Q. B. Div. 11.

**Public Room.**—By § 2 of stat. 6 & 7 Vict., ch. 68, it shall not be lawful for any person "to have or keep any house or other place of public resort," "for the public performance of stage plays," without authority. By section 11, every person who for hire, shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage play in any place not duly licensed, is subject to a penalty. The defendant hired a public room for the public performance of stage plays for six consecutive nights; the room was not licensed. It was held that they did not "have or keep" a place for the performance of stage plays within section 2, but might be liable under section 11. *Reg. v. Strugnell*, 7 B. & S. 124.

3. *Davy v. Douglas*, 4 H. & N. 180. A portable theater or booth, consisting of two caravans or wagons drawn from place to place by horses, and when joined together forming a temporary structure for the performance thereon of stage plays, is not a "tenement" used as an unlicensed theater. *Fredericks v. Howie*, 1 H. & C. 381.

theater will not protect one who, by contract with the lessee, exhibits therein feats of legerdemain or sleight of hand.<sup>1</sup> A negro minstrel performance must be produced under a license;<sup>2</sup> and the performance of an opera is a theatrical exhibition within the meaning of an act providing that no theatrical exhibition shall be allowed without a license.<sup>3</sup> But a skating rink, to which an admission fee is charged, is not a theatrical performance or a

But it is a "place" within a statute prohibiting representations without a license in any place, etc. *Fredericks v. Payne*, 1 H. & C. 584.

**No Permanent Theater in Existence at Passage of Act.**—It has been held in *Texas*, that an act "to levy taxes," imposing a state tax of \$5 upon each representation of "theaters or dramatic representations, for which pay for admittance is demanded or received," applied to a theater named, although its owners contended that their theater was a permanent and fixed establishment, that there was no permanent theater in the state when the act was passed, and that therefore the act applied only to transient or strolling performances. *Trapp v. White*, 35 Tex. 387.

1. *Jacko v. State*, 22 Ala. 73. The declarations of the prisoner during the exhibition, tending to show that his feats of legerdemain were exhibited free of charge, while the audience was assembling to hear a musical entertainment regularly licensed, are a part of the *res gestæ*, and proper for the consideration of the jury in assessing the amount of the fine. *Pike v. State*, 35 Ala. 419.

2. *Shelby Co. Taxing Dist. v. Emerson*, 4 Lea (Tenn.) 312; *Thurber v. Sharp*, 13 Barb. (N. Y.) 627. But see *Rowland v. Kleber*, 1 Pittsb. (Pa.) 68.

**Tumbling.**—An exhibition of tumbling need not be licensed. *Rex v. Handy*, 6 T. R. 286.

3. *Bell v. Mahn*, 121 Pa. St. 225; 6 Am. St. Rep. 786. But in *Rowland v. Kleber*, 6 Pittsb. (Pa.) 68, it was held that no license could be required of an opera company under an act requiring a license for a "theater, circus, museum or other place for theatrical representations;" the act, being penal, was strictly construed.

**Orchestral Concert.**—A requirement that a license must be taken out for any "interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy or dancing," applies to orchestral concerts. *New York v. Eden Musee American*

*Co.*, 102 N. Y. 593; *Society for the Reformation of Juvenile Delinquents v. Diers*, 10 Abb. Pr. N. S. (N. Y.) 216; *State v. Bowers*, 14 Ind. 195. See statutes of *Massachusetts*, *Mississippi*, *Indiana*, and *Texas*, as to licensing concerts.

**Dramatic Entertainment or Stage Play.**

—The following was held to be a dramatic entertainment or "stage play," within the prohibition of an act requiring licenses for theatrical performances. On the rising of the curtain, there was a representation of a storm at sea, and of a man swimming, not a living person, but in theatrical phrase a "double." When the storm subsided, a drop scene was disclosed, with a lake in the background; a character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant, and a short dialogue ensued. These two were the only persons who appeared bodily on the stage, and they were twice on the stage together. There were several other characters—a king, a princess, etc., and a chorus; and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. With the exception of the two persons above mentioned (the dialogue between them was wholly subordinate to the plot of the piece), none of the characters were at any time bodily on the stage; they had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them; but by a combination of lenses and mirrors their figures were reflected upon a mirror at the back of the stage, so as to present to the spectators the appearance of persons actually upon the stage. There was dancing, music, and singing, but no change of scenery or dress during the performance. *Day v. Simpson*, 18 C. B. N. S. 680; 114 E. C. L. 680. And see *Wigan v. Strange*, L. R., 1 C. P. 175.

performance similar thereto.<sup>1</sup> An exhibition of marionettes may become a stage play if accompanied by a regular dialogue carried on by unseen living actors;<sup>2</sup> but a dancing school, even though an admission fee is charged, is not within a statute prohibiting any public show or exhibition without a license;<sup>3</sup> nor does the temporary use of a room in a public house for the purpose of dancing on a particular festival or occasion, subject the owner to a penalty for keeping a place of public dancing without a license.<sup>4</sup>

**V. THEATRICAL ADVERTISING; LITHOGRAPHS, ETC.**—A contract for the use of a fence, building, or space, for the purpose of posting theatrical advertisements, includes the right of entry upon the premises for the purpose.<sup>5</sup>

1. *Harris v. Com.*, 81 Va. 240; 59 Am. Rep. 666. In this case the accused kept a skating rink, ordinarily visited by persons for the purpose of skating, and took out no license, except when he gave a performance by professional skaters, and ordinarily charged ten cents for admission and ten cents more for the use of skates, and some visitors skated, whilst others did not; it was held that the case did not come within a statute setting forth that "no person shall, without a license authorized by law, exhibit for compensation, any theatrical performance, or any performance similar thereto, panorama, or any public performance or exhibition of any kind, lectures, literary readings and performances, except for benevolent or charitable purposes," etc. And see *Reg. v. Tucker*, 2 Q. B. Div. 417.

2. *Day v. Simpson*, 18 C. B. N. S. 680; 114 E. C. L. 680.

3. *Com. v. Gee*, 6 Cush. (Mass.) 174; *Shutt v. Lewis*, 5 Esp. 129; *Clarke v. Searle*, 1 Esp. 25. Nor is one kept for the master's scholars and subscribers, and to which persons are not indiscriminately admitted. *Bellis v. Burghall*, 2 Esp. 722.

4. *Shutt v. Lewis*, 5 Esp. 128; *Reg. v. Strugnell*, L. R., 1 Q. B. 93. But a room in a public house in which musical performances are regularly exhibited, though not used solely for that purpose, is within the meaning of a statute requiring a license in similar cases; and this, though no admission fee be taken. *Bellis v. Beall*, 2 Esp. 592.

Proof that there is nothing painted on the house, denoting that it is licensed under Statute 25 Geo. II., ch. 36, was held sufficient *prima facie* evidence that it was unlicensed. *Gregory v. Tuffs*, 6 C. & P. 271; 25 E. C. L. 393; *Brown v. Nugent*, L. R., 7 Q. B. 588.

To subject a party to the penalties of the statute for keeping a house of illegal dancing and music, it is not necessary that the party who kept the house should take money for admission. *Archer v. Willingrice*, 4 Esp. 186. The statute providing for a penalty of £100 against any person who should keep a house for public dancing, music, or other public entertainment without a license, extends to houses kept for the purpose of private dancing, not to public places only. *Clarke v. Searle*, 1 Esp. 25; *Green v. Botheroyd*, 3 C. & P. 471; 14 E. C. L. 395.

The keeper of a house with a music license only, is liable to the penalty for keeping a house without a license, if he permits public dancing in the house. *Brown v. Nugent*, L. R., 6 Q. B. 693.

**Hurdy-Gurdy Houses.**—A house kept for public dancing is not a "hurdy-gurdy" house within an act requiring such houses to be licensed. *State v. Tilley*, 9 Oregon 125.

**Ballet Divertissement.**—In *Wigan v. Strange*, L. R., 1 C. P. 175, the court decided that it could not hold, as a matter of law, that a ballet performance was an entertainment of the stage, within a statute requiring a license therefor, though the majority of the court thought that, had they been dealing with it as a matter of fact, it would be.

5. *Willoughby v. Lawrence*, 18 Chic. Leg. News 180.

**Injury from Falling Bill Boards.**—If a bill board situated near a public way or place be so negligently constructed that a person passing along the sidewalk is injured by the falling of the same, he may recover damages. And where a person passing along the sidewalk in a much traveled street is injured by the falling of a bill board, blown

It has been held that a contract for advertising in the programs of several theaters is an entire contract, terminated by impossibility of performance because of the closing of one of the theaters.<sup>1</sup>

A contract for the manufacture of theatrical advertising matter is a contract for work and labor, and not a sale, and the manufacturer may recover his compensation for such goods, although the same are destroyed by fire. Where, in such case, the manufacturer has insured the goods, he can recover the difference between the amount of the bill, and the amount received from the insurance company.<sup>2</sup>

It has been held in regard to the circulation of lithographs, that an actress cannot prevent her manager from circulating her lithographs in character costume;<sup>3</sup> and that one who photographs an

down by a strong wind, the bill board being negligently or imperfectly constructed on private property, and the officers of the city being aware that it was put up in an unsuitable and improper manner, and that it was so insecure as to endanger persons passing along the street, the city will be liable in damages, if the person injured used ordinary care and prudence to avoid the danger. *Langan v. Atchison*, 35 Kan. 318; 57 Am. Rep. 165.

**Destruction of Indecent Posters.**—It seems that any person has the right to tear down an indecent theatrical advertisement. The English court of queen's bench has practically decided that it is legal if the party is willing to pay nominal damages. *Wandell's Law of the Theater* 76, citing 7 *Gibson's Law Notes* 35.

1. *Hazzards v. Hoxsie*, 53 Hun (N. Y.) 417. This was an action brought upon a contract by which the defendant agreed to pay the plaintiff's testator the sum of \$8.50 a week for publishing his advertisement in the Fifth Avenue, Union Square, and Lyceum Theater programs, to occupy one inch on the program page, for the entire season. The season of the Fifth Avenue Theater closed the 26th day of May; the season of the Union Square Theater on the 9th day of July, and the season of the Lyceum Theater on the 16th day of July. It was held that the contract was an entire one and not susceptible of apportionment, and terminated on the 28th day of May, when the Fifth Avenue Theater closed.

2. *Central Lithographing, etc., Co. v. Moore*, 75 Wis. 170; 17 Am. St. Rep. 186. *Orton, J.*, in delivering the opinion of the court in this case, said:

"The learned counsel on both sides, and the court below, treated this transaction as a sale of personal property. It was not a sale. When the contracts were entered into, there was nothing *in solido* to be the subject of a sale. The mere paper, as the basis of this valuable work of mechanical art, was not only of insignificant value, but was not the subject of sale. The defendant did not wish to buy blank paper, and the plaintiff had none to sell. The plaintiff was to manufacture these engravings and lithographs for the especial, peculiar, and exclusive use of the defendant in his business as a theatrical manager. They were advertisements adapted to the names and characters of his theatrical performances. It was the plaintiff's work of skill that gave the property produced by it any value. It was work and labor performed according to the order and direction of the defendant, and according to the terms of the contracts. When the required works were produced and ready to be taken away by the defendant and paid for, it was then not a sale. The plaintiff did not own them, and did not wish to own them, for they were of no use or value whatever to him, and were only of use and value to the defendant."

When the order is for a certain number of lithographs "as per sketches," the work must be performed in accordance with the sketches, before recovery can be had for the printing. *Bien v. Abbey*, 13 N. Y. Supp. 286.

3. *Dis Debar v. Hoefle*, 4 N. Y. Law J. 1475, March 13th, 1891. In this case Madame Dis Debar sought to enjoin her manager from printing and circulating lithographs, photographs,



actress free of charge, agreeing to furnish her with as many copies as she may desire, is the owner of the negative, for which he may secure a copyright.<sup>1</sup>

**VI. TICKETS OF ADMISSION—1. In General.**—A theater ticket is a mere license to the purchaser to enter the house and witness the performance, and may be revoked at the pleasure of the manager. If, after such revocation, the purchaser insists upon entering, or, having entered, refuses to leave, he becomes a trespasser, and force may be used to exclude him; he can maintain no action of tort for the force used, his only remedy being an action for the price paid for the ticket, and the actual legal damages sustained.<sup>2</sup>

pictures, or other representations of herself attired in the garb of Cupid, but the injunction was denied.

1. The right of the actress does not extend to making copies of the photograph or allowing others to do so for their own benefit, and even though it were taken under such circumstances as to give her an equitable interest in the copyright, she could not allow others to make copies for their own benefit, without the consent in writing of the photographer. *Press Pub. Co. v. Falk* (U. S. Cir. Ct. So. Dist. N. Y.), 49 Alb. L. J. 317.

2. *Wood v. Ledbitter*, 13 M. & W. 838, *overruling* *Taylor v. Waters*, 7 Taunt. 373. In this case a ticket of admission to the grand stand, within the inclosure of the Doncaster races, was sold to the plaintiff, and he afterwards, upon surrendering his ticket, was permitted to enter the grounds within the inclosure. The license to him was then revoked, and upon his refusal to depart upon request, he was forcibly removed from the premises, and it was held that his removal was justifiable, because the defendant had a right to countermand the license, and the plaintiff, by remaining afterwards, was acting in an unlawful manner and could therefore maintain no action for an alleged assault and battery committed upon his person in forcibly ejecting him.

*Burton v. Scherpf*, 1 Allen (Mass.) 133; 79 Am. Dec. 717, was the case of a negro who had purchased a ticket to a concert, and, after giving up his ticket and entering the hall, was requested to leave. Upon his refusal to do so, he was forcibly put out, and the money paid for the ticket tendered him at the box office. It was held that he could maintain no action for the assault, but could only sue for breach of contract.

In *McCrea v. Marsh*, 12 Gray

(Mass.) 211; 71 Am. Dec. 745, the purchaser of a ticket, a negro, was refused admission to the theater, and force was used to prevent his entering. It was held that his only remedy was an action of contract to recover the money paid for the ticket, and damages sustained by the breach of the contract implied by the sale and delivery of the ticket.

In *Purcell v. Daly*, 19 Abb. N. Cas. (N. Y.) 301, Monell, J., in delivering the opinion of the court, said: "The proprietor of a theater is under no obligation to the public to give any performance therein. He has no duties to perform with which the public are in any legal sense concerned, or with which the public have any right to interfere. It is true that he pays a license for the privilege of giving theatrical exhibitions, but this in no way changes the character of the institution from a private to a public one. He may shut up his theater, or he may use the theater property for other purposes than theatrical entertainments, in which case he is under no obligation to pay a license. It is only when he uses his property for that purpose that a license fee is exacted. If the proprietor of a theater sees fit to discontinue performances, the public cannot complain. This being so, the proprietor of a theater has a perfect right to say who he will or will not admit to his theater, and should anyone apply at the box-office of a theater and desire to purchase tickets of admission, and be refused, there can be no question that he would have no cause of action against the proprietor of the theater for such refusal. And in the same way, if tickets are sold to a person, the proprietor may still refuse admission, in which case the proprietor would be compelled to refund only the price paid for the tickets of admission, together with such other

expense as the party might have been put to, but which expense must be directly connected with the issuing of the ticket of admission. For he could not accept money for the right of admission to his theater, and then, upon refusing that admission, seek to retain possession of the price paid for the privilege. A theater ticket is simply a license to the party presenting the same, to witness a performance to be given at a certain time, and being a license personal in its character, can be revoked. *Mendenhall v. Klinck*, 51 N. Y. 246; *Wood v. Ledbitter*, 13 M. & W. 838." And see *Rex v. Jones*, 1 Leach C. C. 204. But see *Drew v. Peer*, 93 Pa. St. 234, where the court, by Sterrett, J., said: "Whether the tickets conferred merely a license or something more, is immaterial. If they gave only a license to enter the theater and remain there during the performance, it is very clear that the agents of the defendant had no right to revoke it as they did, and summarily eject Peer and his wife from the building in such manner as to injure her. We incline to the opinion, however, that as purchasers and holders of tickets for particular seats, they had more than a mere license. Their right was more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive possession of the designated seats during the performance on that particular evening." Here, it will be observed, the judge lays some stress upon the fact that the parties had purchased reserved seats.

**Return Checks.**—The following query and answer appear in 12 Cent. L. J. 359: "A purchases a ticket entitling him to a reserved seat at a theatrical performance. He enters a theater, and, at the conclusion of the first act, leaves the house, and not being disposed to return, sells the check or pass received from the doorkeeper on leaving, together with the ticket for his seat, to B—is B entitled to admission upon the pass? Answer: The contract between the manager at the theater and the ticket holder is a contract for the use of a certain seat by some person, *i. e.*, the holder of the ticket. It is not a contract that a certain seat shall be occupied by a certain person. It is a contract for so much space, which the ticket holder may occupy by himself or by his friend, or which he may leave unoccupied. The right to use or occupy that seat or that space is,

for the time being, his property; he has bought it, and he may either exercise that right himself, or he may sell or assign it to another, provided there are no personal objections to that other. If B is a person to whom there would have been no objections had he been the original holder of the ticket, he is entitled to admission upon the pass."

In *Wandall's Law of the Theater*, p. 246, it is said: "This doctrine is founded on the assumption that a contract for a theater ticket is a lease, and the same reasoning would probably not apply if it were considered as a mere license. There is some conflict of judicial decisions on this subject, the weight of authority, perhaps, being in favor of regarding a theater ticket as a revocable license. The holder of the return check could not transfer the same if the original ticket of admission was non-transferable." And see an article on "The Law of the Theater;" 12 Cent. Law J. 393, where it is said that, "We should think that the purchaser of a reserved seat at a theater, who sells his pass on leaving the house, together with the ticket for his seat, could confer no right on the second purchaser, which would entitle him to admission; it being one of the characteristics of a license, that it is limited to the person to whom it was originally given, and cannot be susceptible of transfer or alienation. Licenses are confined to the original parties, and can neither operate for nor against third persons."

**Sale of Tickets After House is Full.**—Continuing the sale of tickets after the house is full, in the absence of evidence that such sales were in opposition to the wishes of the proprietor, will sustain a judgment in an action for the penalty provided for in an act prohibiting such sale. *Fire Department v. Stetson*, 14 Daly (N. Y.) 125.

**Duty of Ticket Holder Where all Seats Are Sold.**—If a person upon entering a theater, is told that there is room, when in fact there is not, his proper course is to leave the theater, and demand the return of his money, and such person is not justified in taking a higher priced seat than he is entitled to under his ticket, and if he does, he may be removed, by the exercise of no more force than is necessary under the circumstances. *Lewis v. Arnold*, 4 C. & P. 354; 19 E. C. L. 417.

**Assault by Party Being Removed.**—If one of a party, all being rightfully removed from a theater, strikes the pro-

**2. Transferability.**—The proprietor of a theater has a right to annex to the tickets of admission issued, the condition that they shall not be transferable, and that, if transferred, they shall be worthless;<sup>1</sup> for a license is personal to the licensee, and is not salable or transferable.<sup>2</sup>

**3. Reserved Seats.**—A theater management may sell tickets, reserving to the purchaser particular seats,<sup>3</sup> and the holder of

proprietor thereof, or his servant, all may be taken into custody, if they are acting with a common purpose. *Lewis v. Arnold*, 4 C. & P. 354; 19 E. C. L. 417.

1. *Purcell v. Daly*, 19 Abb. N. Cas. (N. Y.) 301. This action arose out of the efforts of Augustin Daly, the proprietor of Daly's Theater in New York City, to stop speculation in tickets of admission to his theater. To that end he issued a peculiar form of ticket to persons applying for admission, and caused a notice to be conspicuously displayed in the vestibule of his theater informing all persons, that tickets purchased or sold on the sidewalk were worthless, and would not be received at the door of the theater, and requesting all parties to read the notification on each slip. This notification, which was printed on each slip or ticket was to the effect that a ticket so issued was a simple license and issued to the party applying for the same by name, and was not transferable, and would be refused at the door if sold or purchased on the sidewalk. The tickets in question were purchased by one A. at the request and for the benefit of S., a ticket speculator. S. subsequently sold them to M. at an advanced price, but when presented by M. at the gate or entrance to the auditorium, they were not honored, and admission was refused. M. then presented the tickets at the box office and demanded the return of the price, which was refused. S. then repaid M. the money paid by him for the tickets, and in person presented them at the box office and demanded the return of the price, which was again refused, whereupon S. assigned his claim to the plaintiff. Monell, J., delivering the opinion of the court, said: "It is unnecessary to discuss the question whether a person to whom tickets of admission to a theater are issued has the right to transfer them to a third party, as under the peculiar form of ticket in the present case, this point is not at issue. The ticket in question was issued to A. acting for S., and en-

titled him, or possibly S., to two admissions to the theater, and contained a statement that it was a personal license, and was not transferable. The ticket itself does not form a contract, as it is not signed by either party, and consequently, can only be received as evidence of the oral contract made between the defendant and A. or S. The contract is in effect as though A. or S. had applied for admission to Daly's theater, and Daly had said, 'I will sell you the right of admission for two persons (for yourself and another) to my theater, but you must not transfer the ticket to anybody else, for I will not receive the same if it is so transferred.' That is the gist of the contract made between the parties, and as admission was not refused either to A. or S. to witness the performance on the night for which the ticket was issued, no breach of contract on the part of the defendant occurred. There was no agreement on the part of the defendant to refund the money in case the ticket so issued was not used, and hence, under any aspect of the case, the only liability on the part of the defendant would have resulted from his refusing admission to the theater, to the person to whom the ticket was issued, and as this was not done, there should be judgment for the defendant dismissing the complaint."

2. *Mendenhall v. Klinck*, 51 N. Y. 250.

3. It has been held, that a legislative act setting forth that, "No proprietor of a theater shall, after the door of such theater is open for the reception of spectators, sell tickets so as to reserve particular seats, or to mark or describe as reserved or taken, any seats which have not been reserved by the sale of tickets therefor, previous to the opening of such exhibitions," is a vexatious and unlawful interference with the rights of private property, and as such, the legislative assembly is incompetent to enact it. *Dist. of Columbia v. Saville*, 1 McArthur (D. C.) 581; 29 Am. Rep. 616.

such a ticket will be entitled to the seat called for;<sup>1</sup> but the proprietor of a theater is under no obligation to sell a chosen seat to a particular person.<sup>2</sup> The neglect of the management to have a particular seat marked "taken," can give a stranger no right to it, if already purchased by another.<sup>3</sup>

**4. Free Admission.**—The management of a theater may grant tickets of free admission at discretion, but this practice, if carried to such an extent as to become an injury to the interest of the stockholders or other interested parties, may be restrained by injunction.<sup>4</sup>

1. *Com. v. Powell*, 10 Phila. (Pa.) 180; 3 Leg. Int. 100.

**The Coupon.**—The coupon which is attached to a theater ticket and retained by the holder, is a mere voucher showing a right that has already accrued to the holder. At the moment the bearer presents his ticket for admission, his right to the seat designated by the coupon, accrues; and the coupon is, therefore, a voucher to prove a present right, rather than a contract to secure a future one. See "Tickets," 1 Harvard L. Rev. 24.

**Ejection from Reserved Seat.**—A person paying for general admission to a place of amusement, not knowing that an extra price is charged for certain seats, may rightfully occupy one of them without pay until notified by the management that a fee is charged therefor and the same demanded of him; and in the absence of improper conduct upon the part of such ticketholder, he should be allowed to remain within the auditorium, although it is necessary to remove him from the seat in question, he declining to leave the same. *McGovern v. Staples* (New York Supreme Court), cited in 7 Alb. L. J. 219.

**Mistake of Ticket Seller.**—The mistake of a ticket seller in selling a ticket of admission with reserved seat, for a day other than the day of performance, and the consequent ejection of the purchaser from the seat, no undue force or violence being used, is not a case for exemplary or punitive damages. *MacGowan v. Duff*, 12 N. Y. St. Rep. 680.

**Agreement for Private Box Does Not Run with the Land.**—An agreement that plaintiff should be paid £360 on the 31st of December, 1834, for £313 loaned by him on the 26th of April, 1834, if four persons named should be alive on the 31st of December, and that plaintiff in the meantime should have the

gratuitous use of two boxes at the Victoria Theater; but if either of the four persons should die, plaintiff should pay a reasonable sum for the use of the boxes, was held not an agreement running with the land, and, therefore, not binding as to the use of the boxes on an assignee of the theater. *Flight v. Glossopp*, 2 Scott 220; 2 Bing. N. Cas. 125; 29 E. C. L. 279.

**2. Obligation to Sell a Chosen Seat.**—The proprietor of a theater who advertises the price of reserved seats during a certain period, and that the sale of seats will begin at a given hour, is not bound to sell a chosen seat for the entire period, to the person who first presents himself, and tenders the price of it. *Pearce v. Spalding*, 12 Mo. App. 141. *Bakewell, J.*, in delivering the opinion of the court in this case, said: "Defendants advertised to sell reserved seats; but they did not advertise that the first applicant should have his choice of any seats in the parquet at \$3 for each entertainment; nor, that he should have numbers 675, 677, 679 and 681; nor, that he should have a license to use any seat during the performance for seven consecutive entertainments. By no fair construction, can any such meaning be got out of the language of the advertisements."

**3.** A visitor to a place of amusement is entitled to a seat; but the right to some extent depends upon the character of the ticket. If for a reserved seat, he has a right to that particular seat. If not reserved, to any one he may find unoccupied; and which has not previously been sold another. *Com. v. Powell*, 10 Phila. (Pa.) 180.

**4. Baker's Appeal**, 108 Pa. St. 510; 56 Am. Rep. 231. The facts in this case were these: By the charter of the Philadelphia Academy of Music, every five shares of stock entitled the holder to a free ticket of admission. Certain stockholders, holding large

amounts of stock, from time to time made transfers of small lots thereof to other persons, on the books of the company, at the beginning of the dramatic season, with the understanding that the stock should be retransferred at the end of the season, this being enforced by the transferer retaining the new stock certificate, together with an irrevocable power of attorney from the transferee to retransfer the same; the transferee retaining only the ticket of admission. A bill being filed by certain stockholders to restrain such transfers and prohibit the issuing of free tickets thereon, it was held that they were not warranted by the charter, and should be enjoined; that the word "holder" in the provision of the charter that "every five shares of stock shall entitle the holder thereof to a free ticket of admission," meant that the privilege of free admission was confined to an actual true owner and holder, and did not extend to a transferee to whom shares were temporarily transferred; and that injury to the interest of the stockholders, consisting in diminishing its revenues from the sale of tickets and hindering the legitimate stockholders in obtaining admission, by a continuous practice on the part of the directors of issuing free tickets to unauthorized persons, being irremediable in damages, was of equitable cognizance, and might be restrained by injunction.

**Account of Complimentary Tickets.**—Upon a motion for an injunction to restrain the lessee of the Victoria Academy of Music from issuing complimentary tickets to any part of the house without the consent of the plaintiff lessor, and for a receiver, where it appeared that the lessee had leased the theater at the rent of 12 per cent. of the gross receipts, and had agreed to render an account of the daily gross receipts, and, when required, to produce the books and other evidences to the lessor and to afford him every facility for ascertaining the correctness of such daily returns, the court, without deciding the power of the lessee to issue complimentary tickets, ordered that an account of those issued from day to day should be kept and furnished daily to the plaintiff. *Aarons v. Lewis*, 3 Vict. 79.

**Enforcement of Right of Free Admission.**—The owners of a theater, by deed bearing date in 1839, made for valuable consideration, covenanted to confirm to certain debenture holders, the privilege of free admission to

the theater. The petitioner was entitled, as one of the debenture holders, to the benefit of the deed of 1839, but subsequently lost his debenture. In 1851, the respondent became lessee of the theater, with notice of the deed of 1839, and it was held that the petitioner was not entitled specifically to enforce against the respondent, the privilege of free admission created by the deed of 1839. *Malone v. Harris*, 11 Ir. Ch. Rep. 33.

**Termination of License by Sub-lease.**—By lease not under seal, R and C, trustees, on behalf of themselves and other proprietors of a theater, demised it to S for three years, reserving to themselves and the other proprietors free liberty of admission to the theater. S, by lease not under seal, let the theater to the plaintiff for two nights, subject to the terms on which he held the theater, and it was held that the license was determined, and that an action of trespass might be maintained by the plaintiff against the defendant, a proprietor, who entered the theater during his tenancy. *Coleman v. Foster*, 1 H. & N. 37; 37 Eng. L. & Eq. 489.

**Covenant not to Grant Free Admission Without Lessor's Consent.**—A, in 1792, grants a lease of a theater to B, B covenanting not to grant rights of admission, except to two hundred and fifty free admissions, without the consent of A, and in case of any of the covenants being broken, the lease to be void. B then assigns his interest to trustees, to receive the profits and pay the debts etc., who leave B in the management and direction of the concern, in the course of which, in 1799, B granted a ticket of admission to C for twenty-one years. In 1800, the trustees take possession of the theater, but suffer C to exercise his privilege of admission till 1814, when the ticket is stopped, on the ground that B had no right to make such grant. It was held first, that the covenant by B with A not to grant right of admission, supposing it to have been broken, did not avoid the grant to C; second, that as the trustees had left B in the management of the theater, they must be taken to have authorized the grant, and could not afterwards disavow it; third, that this was not an interest in land, but a license to C to enjoy the privilege of admission, and therefore that it was not necessary that it should pass by deed, or that B should have been

5. **Forgery of Theater Tickets.**—Forgery may be committed by printing, as well as writing, instruments purporting to be the act of another, and hence, may be committed by printing bogus theater tickets.<sup>1</sup>

**VII. EXCLUSION OF COLORED PERSONS**—1. **Right to Exclude.**—The business of conducting a theater or place of amusement is a private business enterprise, in which, in the absence of any statute or ordinance prohibiting, any one may engage.<sup>2</sup> But states, in the exercise of the police power to license and regulate theaters, have power also to impose the condition that they shall accommodate all persons alike, without regard to race or color, and such

authorized by the trustees in writing to make such grant. *Taylor v. Waters*, 2 Marsh 551; 2 E. C. L. 374; 7 Taunt. 374.

1. *Benson v. McMahon*, 127 U. S. 457. This was a *habeas corpus* case brought by one Benson against the United States marshal for the southern district of New York, in whose custody he was, awaiting extradition by the government of Mexico on the charge of forgery. It appeared that Benson, knowing of the future engagement of Mr. Henry E. Abbey's opera company at the city of Mexico, had preceded him there, and, representing himself to be Abbey's agent, had made all the arrangements for the future production of the operas, in which Adelina Patti was to appear, had fixed the dates, arranged the prices of admission, and issued the tickets therefor, which he had sold, and had pocketed the money to the extent of some twenty-five or thirty thousand dollars, and then escaped to Europe. In affirming the judgment of the circuit court dismissing the writ of *habeas corpus*, Miller, J., said: "About the only contest made by the counsel for the prisoner is, that these are not forgeries, mainly because they are printed matter and are not in writing, and because neither the name of Mr. Abbey, nor of anybody purporting to be responsible therefor, is found in writing upon them, using the word 'writing,' as defendant's counsel does, as meaning script or signatures made by the use of a pen. It is therefore contended that these tickets are not forgeries, but the fraudulent intent for which they were issued, the actual loss and deception to the parties who bought them, and the injury to Mr. Abbey and the others concerned, are not controverted. It is said, however, that this is only a cheat at common law, and it is very strenuously argued

that the real meaning of the word 'forgery' in this treaty is to be ascertained by the definition of that offense according to the common law of England. . . . But we are not satisfied that the crime of forgery, even at common law, is limited to the production, by means of a pen, of the resemblance of some man's genuine signature which was produced with a pen. This view of the subject would exclude from the definition of this crime all such instruments as government bonds, bank notes, and other obligations of great value, as well as railroad tickets, where the signature of the officer which makes them binding and effectual, is impressed upon them by means of a plate or other device representing his genuine signature. It would also exclude from its definition all such instruments charged as forgeries, where the similitude of the signer's name is produced by a plate used by the forger. It can hardly be possible that these are not forgeries within the definition of the common law; and if they are, they show that it is not necessary that the name which appears upon the false instrument shall be placed thereon by means of a pen or by the actual writing of it in script, but that the crime may be committed as effectually if it is done by an engraved plate or type so arranged as to represent or forge the name as made by the actual use of a pen. It is difficult to perceive how the question as to whether the forgery was committed by printing, or by stamping, or with an engraved plate, or by writing with a pen, can change the nature of the crime charged." And see *Com. v. Ray*, 3 Gray (Mass.) 441; *Wheeler v. Lynde*, 1 Allen (Mass.) 402; *People v. Rhoner*, 4 Park. Cr. Rep. (N. Y.) 166.

2. *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389.

regulations have been held constitutional, and a negro refused admission solely on account of race or color has been allowed to recover damages.<sup>1</sup> All state laws which discriminate against negroes as a race, and deny them equal civil rights with other citizens, are prohibited by the constitution of the *United States*;<sup>2</sup> but as a theater is a private business enterprise, and the ticket of admission a mere license, revocable at the pleasure of the proprietor,<sup>3</sup> the proprietor may make whatever regulations for the conduct of his business he chooses, and may refuse admission to any one without assigning a reason therefor.<sup>4</sup>

**2. Right to Assign Particular Seats.**—In the absence of legislation prohibiting, it will not be considered discrimination for the manager of a theater to assign to colored persons seats in a particular locality, if such seats are as good as those assigned to white

1. *POLICE POWER*, vol. 18, p. 754, note 1; *Cooley on Torts*, 285; *Cooley's Const. Lim.* 734; *Baylies v. Curry*, 128 Ill. 287; *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389; *Drew v. Peer*, 93 Pa. St. 234; *Joseph v. Bidwell*, 28 La. Ann. 382; 26 Am. Rep. 102; *Donnell v. State*, 48 Miss. 661; 12 Am. Rep. 375.

This last decision and the whole doctrine, that a state can pass such laws, is condemned by Mr. Tiedeman (*Tiedeman's Lim. of Police Power*, § 92) as unconstitutional.

Congress, in pursuance of the 13th and 14th amendments to the *United States* constitution, attempted to regulate the equal right to enjoyment by all persons, of theaters and places of amusement, by passing the celebrated "Civil Rights Bill," providing "that all persons shall be entitled to full and equal enjoyment of the accommodations, advantages and facilities and privileges of . . . theaters and other places of public amusement . . . and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." 18 U. S. Stats. at Large, 335; but in the *Civil Rights Cases*, 109 U. S. 3, this act was declared unconstitutional, and the attempt to secure to all citizens equal accommodation at places of amusement was held not to be within the powers of Congress, the ground of the decision being that the denial of equal accommodations does not impose any badge of servitude or slavery on the person.

2. *Civil Rights Cases*, 109 U. S. 3; U. S. Constitution, XIV Amendment.

3. *Supra*, this title, *Tickets of Admission*, and cases cited.

4. *Wood v. Ledbetter*, 13 M. & W. 838; *Burton v. Scherpf*, 1 Allen (Mass.) 133; 79 Am. Dec. 717; *McCrea v. Marsh*, 12 Gray (Mass.) 211; 71 Am. Dec. 745; U. S. v. Singleton, 109 U. S. 3; U. S. v. Ryan, 109 U. S. 3 (*Civil Rights Cases*); *Purcell v. Daly*, 19 Abb. N. Cas. (N. Y.) 301.

"The states might pass such laws (requiring proprietors of theaters to admit negroes), but if a ticket to a theater is but a revocable license, they would be of little effect; as, if the theater proprietor desired to exclude colored persons, he might do so merely by revoking the license, and it would be impossible to determine whether it was revoked by reason of 'race, color, or previous condition of servitude.'" Note to *McCrea v. Marsh*, 71 Am. Dec. 749.

Theaters are not necessities of life, and the proprietors of them may manage their business in their own way. If that way is unfair or unpopular, they will suffer in diminished receipts. *Clifford v. Brandon*, 2 Camp. 358; *Pearce v. Spalding*, 12 Mo. App. 141. But see *Drew v. Peer*, 93 Pa. St. 234.

In *Bowlin v. Lyon*, 67 Iowa 536; 56 Am. Rep. 353, it was held that, as it did not appear that a skating rink was operated under a license or privilege granted by the state or by the city in which it was conducted, or that it was in any manner regulated or governed by the police regulations of the city, it must be presumed to have been conducted as a private business merely, and that no person, black or white, had a right to enter against the will of the proprietors.

people, and if all paying the same price have substantially the same comforts and privileges.<sup>1</sup>

**VIII. SUNDAY PERFORMANCES**—(See also SUNDAY, vol. 24, p. 528)  
—1. **Statutes Prohibiting.**—A statute prohibiting exhibitions and plays on Sunday is not unconstitutional, for the reason that the legislature is the sole judge of the acts proper to be prohibited with a view to maintaining the public peace, and preventing the obstruction of religious worship, and the bringing into contempt the religious institutions of the people.<sup>2</sup>

Statutes for the observance of Sunday are generally held to be remedial in their character and to be construed liberally.<sup>3</sup>

2. **Contracts with Actors for Sunday Performances.**—Contracts with

1. *U. S. v. Ryan*, 109 U. S. 3 (Civil Rights Cases); *Younger v. Judah* (Mo. 1892), 19 S. W. Rep. 1109; *West Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209; 93 Am. Dec. 744; *Houck v. Southern Pac. R. Co.*, 38 Fed. Rep. 226; *Heard v. Georgia R. Co.*, 1 Interstate Com. Rep. 428; *Logwood v. Memphis, etc., R. Co.*, 23 Fed. Rep. 318; 21 Am. & Eng. R. Cas. 256. And see *RAILROADS*, vol. 19, p. 823 and cases cited.

In *Baylies v. Curry*, 128 Ill. 287, the court refused to admit evidence to show that it was the rule of the theater that colored persons were given the same advantages for the same price, in all parts of the house, that white persons had, except that the former were assigned a particular row of seats, as it was not shown that the woman was offered a seat in a particular row or portion of the house, but that she was entirely excluded. And in *Drew v. Peer*, 93 Pa. St. 234, the decision was on the entire exclusion of the plaintiff, and the court said that if regulations had been shown setting apart a particular place in the theater for colored persons, the defendant might have cited *West Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209; 93 Am. Dec. 744; but in the absence of such regulation, a colored person refused admission, may recover damages.

2. *Lindenmuller v. People*, 21 How. Pr. (N. Y.) 156; 33 Barb. (N. Y.) 548. In this case it was laid down, that the legislature, having declared substantially that Sunday theaters are a nuisance and come within the description of acts and practices which are not protected by the constitution, the court could not, if it would, review their discretion and sit in judgment upon the expediency of their acts. And see *People v. Hoym*,

20 How. Pr. (N. Y.) 76; *Menendorff v. Duryea*, 69 N. Y. 557, *aff'g* 6 Daly (N. Y.) 276.

**Licensing Sunday Performances—New South Wales.**—It has been held in *New South Wales*, that its colonial secretary has no power to issue any license or permission to open a theater on Sunday. *Walker v. Solomon*, 11 N. S. Wales 88.

3. **Construction of Statutes.**—*Brunnett v. Clark*, Buff. Super. Ct. (N. Y.) 501; *Northrup v. Foot*, 14 Wend. (N. Y.) 248; *Smith v. Wilcox*, 24 N. Y. 353; 82 Am. Dec. 303; *Story v. Elliot*, 8 Cow. (N. Y.) 27; 18 Am. Dec. 423; *Palmer v. New York*, 2 Sandf. (N. Y.) 318; *Rigney v. White*, 4 Daly (N. Y.) 400; *Lindenmuller v. People*, 33 Barb. (N. Y.) 548; 21 How. Pr. (N. Y.) 156; *Fennell v. Ridler*, 5 B. & G. 406; 11 E. C. L. 261; *Smith v. Sparrow*, 4 Bing. 84; 13 E. C. L. 351. And see SUNDAY, vol. 24, p. 537.

The manager who sells tickets for, and superintends, an entertainment that he has caused to be given on Sunday, is guilty of "laboring on Sunday," within the meaning of Mansf. Dig. *Arkansas*, § 1883, which denounces a penalty against every person found "laboring on Sunday," except in the performance of ordinary household duties of daily necessity, comfort, or charity. *Quarles v. State*, 55 Ark. 10.

**Entrance Fee Charged to Camp Meetings.**—In *Com. v. Weidner* (Pa. Com. Pleas), 37 Alb. L. J. 148, it was held that charging and receiving compulsory prices for admission to a camp meeting on Sunday, was worldly employment or business, and not within the exception of "works of necessity and charity." The court said: "All worldly employments are allowed which in their nature consist of necessity or charity."



actors for dramatic performances on Sunday, have been held void.<sup>1</sup>

**IX. NUISANCES.**—(See also NUISANCES, vol. 16, p. 922).—Erections of every kind adapted to sports or amusements, having no useful end, and which collect, or have a tendency to collect, disorderly crowds, and all indecent exhibitions, are regarded by the common law as nuisances.<sup>2</sup>

**X. LIABILITY OF MANAGER.**—The proprietor or manager of a theater, or similar place of amusement, to which the public is invited, is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition.<sup>3</sup> He is liable, in an action of tort, for such acts and defaults of his servants, agents, or

1. *Brunnett v. Clark*, Buff. Super. Ct. (N. Y.) 500; *Lindemuller v. People*, 21 How. Pr. (N. Y.) 156; 33 Barb. (N. Y.) 548. See 13 Alb. L. J. 17; *SUNDAY*, vol. 24, p. 528.

2. *Reg. v. Saunders*, 1 Q. B. Div. 15; *Walsh v. Wiggins*, 19 Chic. Leg. N. 169; *Tanner v. Albion*, 5 Hill (N. Y.) 121; *NUISANCES*, vol. 16, p. 958.

The lessee of a theater has been held liable for obstructing the access to adjacent premises by reason of the assembling of a crowd before the doors of the theater were opened. *Barber v. Penley* (1893), 2 Ch. Div. 447.

**Rope Dances.**—1 Hawk P. C., ch. 32, § 6; *Hall's Case*, 1 Mod. 76.

**Bowling Alleys.**—*Tanner v. Albion*, 5 Hill (N. Y.) 121; *Hall's Case*, 1 Mod. 76.

**Billiard Rooms.**—A billiard room was held not to be a public nuisance, though a profit was made of it. *People v. Sergeant*, 8 Cow. (N. Y.) 139.

**Pigeon Shooting.**—In *Rex v. Moore*, 3 B. & Ad. 184; 23 E. C. L. 52, the defendant was convicted on the ground that he had collected a crowd in his own field for pigeon shooting, by which the neighborhood was annoyed, and he was held guilty of a nuisance.

**Cock-Pit.**—An indictment for a nuisance in keeping a cock-pit, was held valid at common law. *Rex v. Howell*, 3 Keb. 465; *Rex v. Higginson*, 2 Burr. 1233.

**Circus.**—A circus may become a nuisance by being conducted so close to a man's residence that he will be disturbed by the noise and crowds of disorderly persons who usually collect at such performances. *Inchbald v. Robinson*, L. R., 4 Ch. 388; 20 L. T. N. S. 259; 17 W. R. 459.

**Sparring Exhibitions.**—Unless there is a likelihood that a breach of the peace

will be committed, or that a sparring exhibition is to be in the nature of a prize fight, the police of a given municipality have no right to interfere with it. Sparring forms part of the physical education of students, and, legitimately exercised, is an innocent pastime, and assists the body as intellectual exercises assist the mind. *Behrens v. Miller*, 2 City Ct. (N. Y.) 427.

**Injunction.**—The court refused an injunction to the occupier of premises adjacent to a theater, access to which was obstructed by the assembling of a crowd previously to the opening of the theater, where such obstruction existed at the time of action brought, but had since ceased by reason of the action of the police; but gave the plaintiff costs. *Barber v. Penley* (1893), 2 Ch. Div. 447.

3. *Currier v. Boston Music Hall Assoc.*, 135 Mass. 414; *Francis v. Cockrell*, L. R., 5 Q. B. 501. And see *Pittsburgh v. Grier*, 22 Pa. St. 54; *Wendell v. Baxter*, 12 Gray (Mass.) 494; *Barnes v. Ward*, 9 C. B. 392; 67 E. C. L. 392; *Hounsell v. Smyth*, 7 C. B. N. S. 731; 97 E. C. L. 729; *Corby v. Hill*, 4 C. B. N. S. 556; 93 E. C. L. 554; *Chapman v. Rothwell*, E. B. & E. 168; 96 E. C. L. 168; *Scott v. London Docks*, 11 L. T. N. S. 383.

By a lease of a place of amusement, the tenant was permitted to make alterations, but was bound to restore the premises to the condition in which he took them. He changed a balcony, subdivided into boxes containing chairs and tables, into a place for standing room; and, when crowded with people, the balcony fell, not having strength sufficient to support their weight, and it was held that the owner of the place was not liable for the injuries received by a third person from the fall, which was caused wholly by the change in

assistants, as fall within the scope of their employment.<sup>1</sup> He is liable also in damages for his breach of a contract to produce a play.<sup>2</sup> The service of an injunction on the acting manager, in the absence of the proprietor, may be good.<sup>3</sup> The declarations of the stage manager as to the success of the theater, made in his farewell address from the stage at the close of the season, have been held evidence against the proprietor.<sup>4</sup> A manager may be discharged for improper conduct,<sup>5</sup> and, upon breach of

the use by the tenant. *Bard v. New York, etc., R. Co.*, 10 Daly (N. Y.) 520.

1. *Fowler v. Holmes*, 3 N. Y. Supp. 816; *Dickson v. Waldron* (Ind.), 34 N. E. Rep. 506; *affirmed* on rehearing 35 N. E. Rep. 1. The first of these cases was in the city court of Brooklyn, N. Y., and was an action against a theater proprietor for an assault and battery. The question was, whether one W., who perpetrated the assault, was the servant of the defendant and while engaged in his master's business was acting within the scope of his employment. It was held that the evidence on the point was sufficient to take the case to the jury. In the *Indiana* case the theater manager was held liable for an assault and battery made by a special policeman appointed for the theater at the special request of the manager, the policeman being employed as door-keeper. The *Indiana* case is made the subject of an article in the *American Law Register* for June, 1894. And see *MASTER AND SERVANT*, vol. 14, p. 740.

A discovery may be allowed of the books of the theatrical manager to show thereby his connection with, and liability for, the theatrical or amusement enterprise, where it seems probable that such books will show who is the proprietor. *Ahlymeyer v. Healy*, 12 N. Y. St. Rep. 677.

**Liability for Assault by Special Police.**—The manager is responsible for the acts of a special police appointed for the theater at his request and employed and paid by him, and where such special police, while acting as door-keeper, committed an assault and battery upon an inoffensive patron, the manager was held liable. *Dickson v. Waldron* (Ind. 1893), 35 N. E. Rep. 1; 1 *Am. Law Reg.* (N. S.) 448, *aff'g* 34 N. E. Rep. 506.

2. *Thorne v. French*, 24 N. Y. Supp. 694; 4 *Misc. (N. Y.)* 436. In this case, the defendant agreed to produce at his theater at a certain time, an opera of the plaintiffs, and to pay them a certain royalty. The plaintiffs were to furnish certain material by a certain

time previous to its production, for part of which the defendant was to advance a sum agreed upon. The opera on exhibition when the contract was made, and which the plaintiffs were to follow, exceeded the expectations of the contracting parties as to its popularity, and was continued a much longer time than was originally intended by the defendant. The plaintiffs did not furnish the materials nor did the defendant advance the sum of money agreed upon in payment of the part thereof at the time specified, but the contract was treated as a continuing one by both parties. It was held that time was not of the essence of the contract; and that the defendant could not avoid damages for a final refusal to produce the opera on that ground.

A telegram sent to the author of a play, by the agent of the proprietor of a theater, asked, "What are your terms for *Fernande*? Can I produce it May 7th?" To this the plaintiff replied, "Twenty dollars per night. You can announce it for May 7th; if you conclude, will send scene plots to-night; answer." The answer was returned: "Agreed to terms; piece announced for May 7th; send manuscripts and plots immediately." It was held that the defendant was bound to produce the play only once, and he was only liable in damages for the amount to be paid for one exhibition. *Schonberg v. Cheney*, 3 Hun (N. Y.) 677.

3. The proprietor of a theater left the state, and an injunction forbidding him, his agents, etc., from producing a certain play was served upon the acting manager, ticket agent, and leading actor. The fact that the summons was not served on the proprietor, was held not to justify them in disobeying the injunction. *Daly v. Amberg*, 38 N. Y. St. Rep. 523, *aff'g* 36 N. Y. St. Rep. 713.

4. *Lacy v. Osbaldiston*, 8 C. & P. 80; 34 E. C. L. 300.

5. If the manager, or other servant of a theater, conducts himself in such

a contract of service, may be enjoined from managing any other play.<sup>1</sup>

**XI. MANAGER AND ACTOR—1. Contracts with Actors—***a. IN GENERAL.*—Both manager and actor are bound by a duly executed contract of service,<sup>2</sup> and either may be liable for a breach thereof;<sup>3</sup> and damages may be recovered from one who maliciously induces an actor to break his contract with a manager.<sup>4</sup>

*b. CONSTRUCTION OF CONTRACTS.*—A contract for "the season" will be construed as an entire contract, even though the actor is to be paid so much for every week he shall appear, and if the actor is idle through fault of the manager, he may recover his salary;<sup>5</sup> but the proprietor or manager of a company who

an improper manner as to make it injurious to the theater to keep him, he may be lawfully dismissed by the lessee or proprietor. And an acting manager cannot, under the words "usual privileges of his situation," claim as a matter of right the use of a private box and the power of giving orders of admission, though both are usually allowed as a matter of courtesy. *Lacy v. Osbaldiston*, 8 C. & P. 80; 34 E. C. L. 300.

1. A mandatory injunction will not be granted to enforce the performance by the lessees and managers of a theater, for the use of such theater, and the services of such manager and subordinates, for a period named, in and about the production of a play contracted to be given, for the reason that the supervision of such personal services, by the officers of the court, would be impracticable. But in such case, where the contract is plain and the proposed breach not disputed, the court will enjoin the defendants from assisting, advertising, or managing any other play, or from putting their theater to any other use than the production of plaintiff's play during the period covered by the contract. *Lacy v. Heuck*, 12 W. L. Bull. (Ohio) 209.

2. **Execution of Contract.**—Where a manager offers an engagement to an actor, and sends him a contract duly executed, with a duplicate, which he requests to be returned signed, if the offer is accepted, the signing of the same and depositing thereof in the manager's letter box used for such and similar purposes, renders a contract complete, whether the duplicate ever reaches the manager or not. *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285.

3. See **MASTER AND SERVANT**, vol. 14, p. 797; *Poussard v. Spiers*, L. R.,

1 Q. B. Div. 410. And see *infra*, this title, *Injunctions Restraining Actors*.

But the place at which the actor was requested to appear, must have been duly licensed. See *supra*, this title, *Necessity for License*.

4. *Lumley v. Gye*, 2 El. & B. 216; 75 E. C. L. 216. In this case, it was held that an action lies for maliciously procuring a breach of contract, to give exclusive personal services for a time certain, equally, whether the employment is commenced, or is only *fiert*, provided the procurement is during the subsistence of the contract and produces damage; and that to sustain such an action, it is not necessary that the employer and the employed should stand in the strict relation of master and servant. See **MASTER AND SERVANT—Enticing Servant Away**, vol. 14, p. 800.

5. *Coghlan v. Stetson*, 19 Fed. Rep. 727; 22 Blatchf. (U. S. C. C.) 88; *Sterling v. Bock*, 37 Minn. 29.

Where it was alleged that defendant promised to appear in any place under the direction of plaintiff in performances described, and to attend rehearsals, it was held to bind defendant to join an establishment of the plaintiff's for equestrian purposes in *Scotland*, and a failure to comply therewith, and a refusal to assist in such performances, was held to be sufficiently alleged by setting forth the terms of the contract and alleging a breach of it. *Batty v. Melillo*, 10 C. B. 282; 70 E. C. L. 282.

*Chas. Coughlan*, by a written agreement entered into in London with John Stetson, agreed to act for seven months as leading man in the latter's theater in New York, and in such other theaters as he should direct in the *United States and Canada*; seven performances each week to constitute a

engages an actor for the season, usually may determine at what time the season shall close.<sup>1</sup> As in cases of contracts generally,

week's business, and Coughlan to receive \$100 "for each performance in which he shall appear." Coughlan acted in the theater for five weeks, when Stetson refused to allow him to act for three weeks, and refused to pay him his salary, \$2,100, for that time. Afterwards Coughlan acted for Stetson and was paid under the agreement. In a suit for the three weeks' salary, it was held that Stetson was required by the contract to permit Coughlan to act, who was entitled to his salary, although he did not appear; that he did not lose any right by afterwards acting for Stetson and being paid therefor; and that Coughlan should be allowed to amend his complaint so as to recover the \$2,100 as damages instead of wages. *Coughlan v. Stetson*, 22 Blatchf. (U. S. C. C.) 88; 19 Fed. Rep. 727.

**Condition as to Rehearsals.**—In *Bettini v. Gye*, 1 Q. B. Div. 183, the plaintiff entered into a contract with defendant, by which he undertook the part of first tenor in the "theaters, halls, and drawing-rooms" in the United Kingdom during his engagement, to begin on the 30th of March, 1875 and terminate on the 13th of July, 1875. The contract also contained a stipulation that the plaintiff should sing in concerts as well as operas, but should not sing anywhere out of the theater in the United Kingdom from the 1st of January to the 1st of December 1875 without the written permission of defendant, except at more than fifty miles from London, and out of the season of the theater, and also that he would be in London without fail "at least six days before the commencement of his engagement for the purpose of rehearsals." The plaintiff was prevented by a temporary illness from being in London before the 28th of March, on which day he arrived, but the defendant then refused to receive him into his company, alleging as a ground for the refusal, his failure to be on hand "six days before the commencement of his engagement for the purpose of rehearsals." In an action by the plaintiff for damages, it was held that the stipulation as to rehearsals was not a condition precedent, for it did not go to the root of the matter, as plaintiff was to sing in concerts at halls and draw-

ing-rooms as well as at the theater, and was also to abstain from singing within fifty miles from London from the 1st of January, previous to the commencement of his engagement on the 30th of March.

**Breach by Employer—Evidence.**—In an action brought by an actress to recover damages claimed to have been sustained by her, by reason of an alleged breach by the defendant, of a contract, by the terms of which he agreed to employ plaintiff for a given period, it is improper to admit evidence as to receipts by plaintiff, under an agreement made with a third party four or five years prior to the one with the defendant, which required the rendition by her of services similar to those to be rendered under the contract in question, on the question of damages for the breach of his contract with plaintiff; and the fact that plaintiff purchased certain costumes to be used by her in the business to be carried on under the contract between her and the defendant, it not appearing that she was under any obligation to make the purchase, or that she suffered any loss thereby, is not an element of damage. *Ellsler v. Brooks*, 54 N. Y. Super. Ct. 73.

A party contracting to furnish a troupe for a given occasion under the name of the "Redpath Lyceum Bureau," may sue in case of a breach thereof by the other party, it appearing that he did business under that name individually, and not as a corporation or copartnership. *Hathaway v. Sabin*, 61 Vt. 608.

1. "The term 'until the close of the season,' in a contract of employment of an actor, leaves much to be determined by future events, such as financial success or failure, illness, or other circumstances affecting the continuance of the enterprise. Some one has to determine when the exigencies of the situation require a limit to be put to the performances, and this person, in the nature of things, is the proprietor and responsible leader of the troupe. The serious illness of the star of a company, in the middle of the usual season, would seem to afford a sufficient reason for terminating the season when the contract contains a clause that it should be terminated and canceled in case of illness." *Wandell's Law of*

where the words employed have by usage or custom a peculiar meaning, such meaning may be shown by parol evidence.<sup>1</sup>

c. EMPLOYMENT OF CHILDREN.—A statute prohibiting the employment of children of immature years in theatrical exhibitions is held to be constitutional,<sup>2</sup> and to make out the offense it is only necessary to show that the exhibition was a theatrical performance, that the children were employed by the defendant for that purpose, and that they were under the age in question. It is not necessary to show that the exhibition endangered the health or injured the morals of the children, nor need any specific act of physical cruelty be shown.<sup>3</sup>

d. ILLNESS OF ACTOR.—Contracts for personal services, whether of the contracting party or of a third person, requiring skill, and which can be performed only by the particular person named, are not, in their nature, of absolute obligation under all circumstances; but, unless otherwise specified in the contract, are subject to the implied condition that the person named shall be able to perform at the time specified; and if he dies, or becomes unable to perform, the obligation to perform is extinguished.<sup>4</sup>

the Theater 131, citing *Strakosch v. Strakosch*, 3 N. Y. Law J. 645, June 25th, 1890.

1. *Grant v. Maddox*, 15 M. & W. 737. In this case parol evidence was admitted to show that a contract to employ an actor for three years at so much per week, meant, by the usage of the profession, that he was to be paid for the theatrical season only.

2. *People v. Ewer* (N. Y. Ct. of Appeals), 36 N. E. Rep. 4, affirming 24 N. E. Rep. 500. In this case it was held that, though the inalienable right of a child or adult to pursue a trade is indisputable, it must be not only one which is lawful, but which, as to the child of immature years, the state, as *parens patriæ*, recognizes as proper and safe. And section 202 of the *New York Penal Code* was held to apply, not only to exhibitions offending against morals and decency, or endangering life or limb, or to what is required of the child actor, but to be applicable to all public exhibitions or shows.

3. *People v. Meade*, 24 Abb. N. Cas. (N. Y.) 357.

Under the *New York Penal Code*, section 202, "relative to the licensing of children in theatrical exhibitions," as amended by Laws 1892, ch. 309, prohibiting the exhibition of a child under sixteen years of age "in singing or dancing; or playing upon musical instruments; or in a theatrical exhibition;" but allowing

the child to be employed "as a musician in any concert, or in a theatrical exhibition, with written consent of the mayor of the city," the mayor cannot consent to her appearing in a theatrical exhibition which includes singing or dancing by her, and *mandamus* will not lie to compel him. *People v. Grant*, 70 Hun (N. Y.) 233. And a consent given for a child to perform in a theatrical exhibition does not have the effect of permitting her to sing or dance in such exhibition. *In re Stevens*, 70 Hun (N. Y.) 243.

**Contract with Parent for Services of Child.**—If a parent signs a paper setting forth that "I agree that my daughter shall perform, etc., this season, and I consent that she shall enter into articles for three following seasons," an action lies—such daughter refusing to carry out the agreement—on the first part for the bare non-performance, but the latter part is a mere consent, and not an agreement. *Morris v. Paton*, 1 C. & P. 189; 11 E. C. L. 362.

4. *Hall v. Wright*, E. B. & E. 746; 96 E. C. L. 745; 29 L. J. Q. B. 43; *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164; *Robinson v. Davison*, L. R., 6 Exch. 269; *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 7. The action in this last case was brought by plaintiffs, who were the owners and managers of the Olympic Theater in St. Louis, Mo. to recover damages for an alleged breach of contract by defendants. By

**e. DAMAGES—PROSPECTIVE PROFITS.**—Where a lecturer, or public performer of any sort, contracts to appear for a certain price at a given place and fails to do so, prospective profits, as shown by the evidence, may be recovered as damages for the breach.<sup>1</sup>

the contract, defendants agreed to furnish the "Wachtel Opera Troupe" to give four performances per week at plaintiffs' theater for two weeks, commencing the 26th or 27th of February, 1872, plaintiffs to receive twenty per cent. of the gross receipts up to \$1,800 per week, and defendants the balance. Prior to the time specified in the contract, Wachtel, who was the chief singer and attraction, and who gave the name to the troupe, was taken sick, and at the time was unable to sing. Defendants, in consequence, did not furnish the troupe at the time specified. It was held in action to recover damages for breach of contract, that such sickness occurring without the fault of the defendants, constituted a valid excuse for the non-performance of the contract.

Where the plaintiff had agreed to play in a new piece about to be produced, but before the time of performance became ill and was unable to appear in many of the rehearsals, or on the opening night, or for several nights thereafter, it was held, in an action by her to recover damages for wrongful dismissal, that her inability to perform on the opening and early performances went to the root of the matter, and justified the defendants in rescinding the contract. *Poussard v. Spiers*, 1 Q. B. Div. 410.

**Notice of Illness.**—Where an actor agrees in his contract to conform strictly to the regulations "commonly in use," he is bound, with reference to his right to his salary, to give notice to the manager, in case of anticipated illness, by a certain hour on the day of performance, the existence of a general regulation to this effect being shown by the evidence. *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1.

Where a musician under contract to perform at B. on the 14th day of the month, was taken ill on the 13th, and instead of telegraphing the manager notice of that fact, which would have reached him on the same day, wrote by the afternoon post, whereby the notice was not received until midday of the 14th, and the manager consequently put to extra expense in notifying his

patrons of the postponement of the concert, it was held not to be notice within a reasonable time, and the manager was allowed to recover the extra expense thus entailed. *Robinson v. Davison*, L. R., 6 Exch. 269.

**Doctor's Certificate.**—Where it is agreed that an actor is to be excused only for sickness, when certified to by a doctor, to be appointed by the manager, the provision is binding upon the actor regardless of the school to which the doctor appointed belongs. *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1.

**Damages for Injury to Actor.**—A manager cannot recover damages from a person so injuring one of his players as to prevent his appearing. *Taylor v. Neri*, 1 Esp. 386. In this case the plaintiff, the manager of an opera house, had engaged one Breda, as a public singer during the season, at a given salary; the defendant had assaulted and beat the said Breda, whereby the plaintiff lost his service as a public performer, and it was held that an action would not lie on the part of the manager to recover damages.

1. *Savery v. Ingersoll*, 46 Hun (N. Y.) 176. In this case the defendant had agreed to visit the city of A., where the plaintiff resided, and deliver a lecture for the sum of \$250, the plaintiff to have the sale of, and money received for, the admission tickets. The defendant failed to appear and the plaintiff recovered damages. In *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205; 54 Am. Rep. 676, Earl, J., in delivering the opinion of the court, said: "When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability, because the amount of the damages which he has caused is uncertain. . . . Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits. . . . As they are prospective, they must, to some extent, be

**2. Characters and Parts.**—While the manager may use his own discretion in assigning the parts of a play to the different actors, provided there is nothing in their contracts prohibiting it, he cannot compel an actor to take a lower part than the one for which he was engaged,<sup>1</sup> nor can an actor employed for a given rôle be required to appear in another altogether different.<sup>2</sup> If the manager attempts this the actor may consider the contract broken, and sue for whatever loss he may have sustained. A manager must give an actor reasonable notice of a change in his part.<sup>3</sup>

**3. Stage Costumes.**—It is the duty of an actor who undertakes a part to dress for it properly<sup>4</sup> and in accordance with decency, and a failure in this respect will be a valid ground for discharge.<sup>5</sup>

**4. Discharge of Actor.**—The manager may discharge an actor

uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy." And see *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87; *Wood's Mayne on Damages* (1st Am. ed.) 82; 1 *Sedgwick on Damages*, § 192; *DAMAGES*, vol. 5, p. 32.

1. *Roserie v. Kiralfy Bros.*, 12 Phila. (Pa.) 209; *Warner v. Rector*, etc., of Holy Church, 1 City Ct. (N. Y.) 419; *Baron v. Placide*, 7 La. Ann. 229.

2. In *Baron v. Placide*, 7 La. Ann. 229, it was held that a ballet dancer employed as "*seconde première danseuse*" could not be compelled to dance a parlor dance, in parlor dress, with the figurantes of the theater, and that her refusal to do so constituted no just ground for dismissal, and that for such dismissal she could recover a penalty equal to the amount of salary she would have received during the unexpired term of her contract.

3. And where a performer is called on to resume, in consequence of the illness of another, a part in which, by previous performances, she has acquired celebrity, she is entitled to reasonable notice previous to the time of performance, and such notice must be proportioned to the reputation at stake. *Graddon v. Price*, 2 C. & P. 610; 12 E. C. L. 286. This was an action by Miss Graddon, the singer, to recover from the lessee of Drury Lane Theater a balance of salary withheld for a fine incurred under the following circumstances: The singer advertised to take the part of Catherine in the *Siege of Belgrade*, on a particular night, was taken ill the day before. Miss Graddon, who had previously played it, was

requested to undertake the part, but refused to do so, alleging that the notice was not sufficient, and that by undertaking it at such short notice she would injure the reputation previously acquired in the part, and it was held that the notice was not given in a reasonable time and that she could recover.

4. An actress who has agreed to appear in tights, cannot refuse to do so in cold weather and put the manager to the expense of changing the costumes of the entire company; and where, under such circumstances, an actress set up as a reason for the breach of a contract by her, that the manager refused to substitute some other costume for tights worn by her in a certain part, she claiming that the wearing of tights endangered her health, but declining to wear anything under them on the ground that to do so would "destroy her outline," it was held that she was not justified in leaving his employment. *Duff v. Russell*, 14 N. Y. Supp. 134.

5. *Wandell's Law of the Theater* 119. It is here said: "A preliminary injunction was recently granted, but afterwards dissolved, in *England*, restraining the lessee and manager of the Gaiety Theater, from preventing the plaintiff, Miss Fay Templeton, from performing the part of Fernand in the play of *Monte Christo*, in accordance with her contract; and also restraining him from employing any one else to perform the part. The affidavits disclosed that the defendant justified his dismissal of the plaintiff on the ground that she wore her dress improperly. This the plaintiff denied, and stated that the dress was supplied by the management."

for good cause, as, for example, for failure to attend rehearsals,<sup>1</sup> immoral conduct,<sup>2</sup> or incompetency.<sup>3</sup> But an actor is entitled to actual notice of discharge, and notice posted on the door of the green-room does not operate to terminate the contract, unless brought home to him.<sup>4</sup>

**1. Failure to Attend Rehearsals.**—In the absence of a sufficient excuse for failing to attend a rehearsal, a person discharged for such reason cannot recover in an action for damages for wrongful dismissal. *Fisher v. Monroe*, 12 N. Y. Supp. 273; 16 Daly (N. Y.) 461. Plaintiff in this case sought to excuse her failure to attend a rehearsal, on the ground that, when directed to do so, on the day preceding the rehearsal, she was physically exhausted; but it did not appear that, at the time of the rehearsal, she was physically unable to attend, and it was held that no sufficient excuse for non-attendance was shown.

**2. Immoral Conduct.**—Where an actress is guilty of indecent and immoral conduct, so gross as to cause the other members of the company to refuse to associate with her, and so open as to become matter of public scandal, even though she fully performs all her theatrical duties, she may be lawfully discharged. *Drayton v. Reid*, 5 Daly (N. Y.) 442.

**3. Under a contract for plaintiff's services as chorister in a spectacular play, providing that in case his services should not, "in the estimation of the" defendants, "be satisfactorily rendered, it should then be lawful for" the defendants to end the agreement, after first, however, giving "the plaintiff" two weeks' "notice," it was held that plaintiff might be lawfully discharged at any time, without the defendants giving any reason therefor, and it could not be left to the jury to say whether his services were satisfactorily rendered.** *Peverly v. Poole*, 19 Abb. N. Cas. (N. Y.) 271.

Where in a contract it was provided that, "In the event either of incompetency, or of such continued illness or decrease of physical or vocal faculties as to prevent one from doing service for a period of more than two weeks, the company may, in its discretion, cancel or annul the contract," the word "incompetency" was held to mean physical inability. *Brandt v. Godwin*, 3 N. Y. Supp. 807; *Wandell's Law of the Theater* 137, citing *Young v.*

*American Opera Co.*, N. Y. Daily Reg. May 27th, 1887.

An actor has no right to insist on taking part in the first public presentation of a play, but may be discharged during the preliminary rehearsals if he shows himself unfit for the part and unsatisfactory. *Wandell's Law of the Theater* 128, citing *White v. Henderson*, 5 Gibson's Law Notes 5. But an actor cannot be discharged upon a pretense of dissatisfaction which is neither genuine nor honest. *Grinnell v. Kiralfy*, 55 Hun (N. Y.) 422; 18 Abb. N. Cas. (N. Y.) 48.

**Two Weeks' Notice.**—A theatrical custom of dismissing on two weeks' notice cannot prevail over a specific agreement, and where an actor contracts for a certain specified period, he cannot be discharged on two weeks' notice, unless there is a provision to that effect in the contract. *Wandell's Law of the Theater* 125, citing *Hall v. Aronson*, 4 N. Y. Law J. 1499, March 16th, 1891.

If an actor entitled to two weeks' notice of discharge, is discharged without notice, he may recover as damages the amount of his salary for the two weeks, which he would have earned if the stipulated notice had been given. *Peverly v. Poole*, 19 Abb. N. Cas. (N. Y.) 271.

**4. DeGellert v. Poole**, 2 N. Y. Supp. 651. The court, in rendering the opinion in this case, said: "Notifying a lady of confessed talent that she is discharged, by posting the fact in the green-room, would hardly be an agreeable form of notification to an artist of ordinary feelings, nor do we believe that the plaintiff ever contemplated that such a form of notice should be given to her under the contract. It would be unreasonable to expect every chorister or member of the ballet to be daily scanning the walls of the green-room for notices of their discharge, when the more agreeable and easy method of personal communication was at all times present. The plaintiff was a member of the defendants' company, under their constant command and direction, and personal



For a wrongful discharge, an actor may recover damages, but he can have but one recovery,<sup>1</sup> and the manager may reduce the amount by showing that he might have obtained other employment of the same general character.<sup>2</sup>

**5. Injunctions Restraining Actors.**—A court of equity cannot enforce directly the performance of an actor's contract, by compelling him to act with a certain manager, but may enforce it indirectly by prohibiting him from acting with any one else.<sup>3</sup> But

notice was so easy of communication, that we are satisfied that both parties contemplated it. Under our construction of the contract, the notice, not having been brought home to the plaintiff, was insufficient to effect her discharge."

1. Where the action is brought before the expiration of the term of service, but the trial does not come off until after the term has expired, he may recover the same damages as if the action had not been brought until after expiration of the term. If the trial takes place before the expiration of the term, he will be entitled to such damages as the evidence shows he has actually sustained up to the time of the trial, and if at that time his loss is only probable and not actual, the recovery should be for nominal damages only. But a former recovery of part of the damages will bar a subsequent suit. *Everson v. Powers*, 89 N. Y. 527; *Parry v. American Opera Co.*, 19 Abb. N. Cas. (N. Y.) 269. In this last case, where an actor was hired for twenty-five weeks and discharged after eight weeks' service, it was held that a recovery of judgment for the damages sustained for the two weeks following his discharge, barred any further action for damages for the remaining fifteen weeks for which he was hired, although his services, had they been rendered, were to be paid for in weekly installments.

**Pleading—Declaration.**—A performer at a theater, who is to be paid for nights of performance on which he does not perform, as well as those on which he does perform, should not declare for work and labor, but "for arrears of salary as a hired performer." *Frazer v. Bunn*, 8 C. & P. 704; 34 E. C. L. 592.

**Arrears of Salary—Application of Payments.**—Where a performer at a theater has arrears of salary due him, and money is paid to him without its being stated that it is paid on any par-

ticular account, he may appropriate the payment to any part of the arrear he chooses; but if the person paying had, at the time of the payment, made an entry in a book stating it to be for a specific portion of the arrear, and had at the time shown that entry to the performer, that would have been evidence of such an appropriation by the debtor as would be binding on the other party. *Frazer v. Bunn*, 8 C. & P. 704; 34 E. C. L. 592. See also *PAYMENT*, vol. 18, p. 234.

**Singer Employed by Corporation—Laws of New York.**—The contract obligation to pay a singer employed by a corporation for a specified time, at a salary named, is a "debt" of the corporation from the time the contract goes into effect, within the meaning of the statute. *Brandt v. Godwin*, 3 N. Y. Supp. 807.

2. In an action for damages brought by an actor for not being allowed to go to work, or for wrongful discharge, it may be shown, by way of mitigation of damages, that he had opportunities to make a theatrical engagement elsewhere, which he did not accept. *Howard v. Daly*, 61 N. Y. 377; 19 Am. Rep. 285; *Everson v. Powers*, 89 N. Y. 527; 42 Am. Rep. 319.

3. *Duff v. Russell*, 14 N. Y. Supp. 134; *Fredricks v. Mayer*, 13 How. Pr. (N. Y.) 566; *Daly v. Smith*, 38 N. Y. Super. Ct. 158; *Cort v. Lassard*, 18 Oregon 221; 17 Am. St. Rep. 726; *Montague v. Flockton*, L. R., 16 Eq. 189; *Webster v. Dillon*, 3 Jur. N. S. 432. And see 2 High on Injunc., § 1164; 3 Pom. Eq. Jur., § 1343; *INJUNCTIONS*, vol. 10, p. 948.

In the earlier cases the courts held that as they could not enforce the positive part of the contract, they would not enjoin the breach of the negative part. *Kemble v. Kean*, 6 Sim. 334; *Clark v. Price*, 2 Wils. Ch. 157; *Kimberly v. Jennings*, 6 Sim. 340; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Hamblin v. Dinneford*, 2 Edw.

as the granting or refusing of an injunction rests in the sound discretion of the court, it will not be granted where it would operate oppressively,<sup>1</sup> or when it is not the fit or proper mode of redress in the circumstances,<sup>2</sup> and it will be refused, unless it

Ch. (N. Y.) 529; *Dietrichsen v. Coburn*, 2 Phila. (Pa.) 52; *Burton v. Marshall*, 4 Gill (Md.) 487; 45 Am. Dec. 171. Afterwards, an injunction was allowed where there was a negative clause in the contract prohibiting the actor from performing under any other management, but it was still refused in the absence of such negative clause. 2 High on Injunc., §§ 1163, 1164; *Lumley v. Wagner*, 1 DeG. M. & G. 604; *Caldwell v. Cline*, 8 Martin N. S. (La.) 684; *Butler v. Galletti*, 21 How. Pr. (N. Y.) 465; *Hayes v. Willio*, 11 Abb. Pr. N. S. (N. Y.) 167. For a summary of the modern doctrine on the subject, see Reporter's Note to 16 Fed. Rep. 42, 43.

**Writ of Ne Exeat.**—A theatrical manager is not entitled to a writ of *ne exeat*, on a bill for the specific performance of a contract, previous to the time at which the contract is to be performed, and before any right of action has accrued thereon, either at law or in equity, against the defendant; and further, a bill *quia timet*, upon a contract for personal services to be performed at a future time, cannot be filed for the purpose of obtaining equitable bail, although there is danger that the defendant may leave the state before the time for the performance of the contract arrives. *DeRivafinoli v. Corsetti*, 4 Paige (N. Y.) 264; 25 Am. Dec. 532. In this case it was sought to restrain an opera singer under contract to sing in New York, from departing for a foreign country. But where an injunction is granted, a writ of *ne exeat*, if necessary to carry out the injunction, will issue. *Hayes v. Willio*, 11 Abb. Pr. N. S. (N. Y.) 167.

**1. Actor Cannot Be Compelled to Remain Idle.**—An actor cannot be compared to a mere clerk, for his success depends on his being continually before the public, and a manager will not be entitled to an interlocutory injunction to prevent an actor employed by him, from appearing at a rival house, when after months have passed, he is not allowed to appear upon his employer's stage, although his salary is paid. *Fechter v. Montgomery*, 33 Beav. 22. In this case, the defendant, a provincial actor, was desirous of appearing on the

London stage, and accepted an engagement to do so at a salary much less than he received in the provinces. Though there was nothing expressed on the subject, the court inferred an engagement on the part of the plaintiff to employ the defendant for a reasonable time, and on the part of the defendant not to perform elsewhere; but the appearance of the defendant having been delayed until five months had elapsed, it was held that he had a right to seek employment elsewhere.

2. To obtain an injunction, it must be shown that the actor's artistic abilities are extraordinary and of special merit, and that the plaintiff has no adequate remedy at law. *Carter v. Ferguson*, 58 Hun (N. Y.) 569; *Bronk v. Riley* (Supreme Ct.), 3 N. Y. Supp. 446; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. Cas. (N. Y.) 419; *Cort v. Lassard*, 18 Oregon 221; 17 Am. St. Rep. 726; 3 Pom. Eq. Jur., § 1343. Where a manager makes a contract for a dramatic season, with an actor of distinction, who is a great artistic acquisition, and it was understood at the time of the making of the contract, that the same was entered into because such manager desired to secure his dramatic service, his name, and to prevent his acting elsewhere in the same place without his permission, and such manager has publicly announced such person as a member of the company, the engagement of such actor with a rival manager, and the public announcement of his appearance at another theater, presents a case of irreparable damage, although such actor may be pecuniarily able to respond to any damages that might be recovered by law. *Daly v. Smith*, 38 N. Y. Super. Ct. 58.

The person by whom the principal defendant is employed, may have himself made a party to the injunction. *Strobridge Lithographing Co. v. Crane* (Supreme Ct.), 12 N. Y. Supp. 834.

An injunction will be refused where there is a restrictive clause, without any substantial benefit therefrom to the plaintiff, as where the complainant has no theater in active operation nor is likely to have for some time to come. No custom can be withdrawn from him

appears that the contract is fair, just, and equitable to the actor as well as to the manager.<sup>1</sup>

**XII. CRITICISMS OF THE PRESS.**—The editor of a public newspaper may comment candidly on any place or species of public entertainment, but it must be done fairly, and without malice or a view to injure or prejudice the proprietor in the eyes of the public. If so done, however severe the censure, the justice of it screens the editor from legal proceedings; but if it can be

and no damage result. *De Pol v. Sohlke*, 7 Robt. (N. Y.) 280.

In *Metropolitan Exhibition Co. v. Ward* (Supreme Ct.), 9 N. Y. Supp. 779, the defendant agreed to render his services as base-ball player, during the season of 1889, the contract providing "to reserve" the defendant for the year 1890, at a salary not less than a sum named. No salary, terms, or conditions were provided for 1890. It was provided, that the contract might be terminated by the plaintiff, by giving ten days' notice. The court held, that the contract as regarded the year 1890, was not definite enough to entitle plaintiff to a preliminary injunction, pending suit to restrain the defendant from making a contract with another party for that year.

**Preliminary Injunction.**—A preliminary injunction will not be granted except in cases where there is the strongest probability that the court will ultimately decide that the plaintiff is entitled to the relief demanded. *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. Cas. (N. Y.) 393; *Hamilton Accessory v. Transit Co.*, 3 Abb. Pr. (N. Y.) 255.

**Agreement for Liquidated Damages.**—Where the parties have agreed upon liquidated damages for the violation of a covenant, it seems an injunction will not be allowed; but a mere penalty designed solely to secure the observance of a contract, will not be construed as liquidated damages, nor prevent an injunction. *McCaull v. Braham*, 16 Fed. Rep. 37; *Mapleson v. Del Puente*, 13 Abb. N. Cas. (N. Y.) 144. Where the contract provided for "the forfeiture of a week's salary, or termination of the engagement, at the manager's option, without debarring him from enforcing the contract as he might see fit," it was held that this clause was not an agreement for liquidated damages, and that an injunction would issue to restrain the threatened violation of the contract. *McCaull v.*

*Braham*, 16 Fed. Rep. 37. But where the contract provided that, in case of a breach, the defendant should forfeit and pay to the plaintiff two hundred dollars, which should be deemed forfeited by breach without any legal proceedings, it was held to be an agreement for liquidated damages, and an injunction was refused. *Hahn v. Concordia Soc.*, 42 Md. 460.

1. 2 Story's Eq., § 950; *Mapleson v. Del Puente*, 13 Abb. N. Cas. (N. Y.) 144; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. Cas. (N. Y.) 419; *Kimberly v. Jennings*, 6 Sim. 340; *Baldwin v. Society for Diffusion*, etc., 9 Sim. 393.

An actress having no business experience, made a contract to act with a certain manager for six years, she to have half the net profits after the first year, but no voice in the management of the business. Shortly before that contract expired, she entered into a new contract for a like period, in which the manager had inserted a clause that she was satisfied with the outcome of the expired contract and with his business ability and management. In an action by the manager to enjoin the actress from acting under the management of a third person during the period covered by the second contract, the court held that it was error, in view of the trust relation which existed between the parties, to exclude defendant's evidence tending to show the plaintiff's breach of the first contract, as his conduct in that respect would affect his right to equitable relief. *Hill v. Haberkorn* (Supreme Ct.), 6 N. Y. Supp. 474.

An operasinger, by agreement dated only as to the year 1870, agreed to sing at a certain theater for the whole London season, and nowhere else in the kingdom of *Great Britain* during the year 1871, without the written consent of the employer. The singer's salary did not extend beyond the season which ended on the 5th of August, 1871. On

proved that the comment is unjust, malevolent or exceeds the bounds of fair opinion, it is a libel and therefore actionable.<sup>1</sup>

**XIII. HISSING.**—The audience have a right to express their free and unbiased opinions of the merits of a play and of the performers who appear upon the stage, or to give expression to the feelings excited at the moment by the performance, and in this manner may applaud or hiss; but if parties, by a preconcerted plan, attend a theater to hiss an actor or the play, they will be liable to an action of conspiracy,<sup>2</sup> and if the disturbance is such as to render the actor entirely inaudible, though no personal violence be

motion for injunction to restrain him singing elsewhere after the season was over, but during the year 1871, it was held that the court would not, under the circumstances of the case, grant an injunction on an interlocutory application. *Mapleson v. Bentham*, 20 W. R. 176.

Closing the season, for which an actress was engaged, four weeks earlier than the time specified in the contract, whereby an actress did not receive a benefit from which she expected to realize \$500, but for which she subsequently accepted \$150, and her inability to obtain compensation for said four weeks, constitutes no defense to an application for an injunction in such a case. Nor the not permitting her, during the previous season, to appear on the stage on a sufficient number of occasions, and the casting her, when she was permitted to appear, in parts entirely subordinate to the line of business to which she was entitled, and an allegation in general terms that the manager's intentions in inducing the contract (of which the actress was not aware at the time), were not to produce the actress, but to prevent her appearance on the stage, and thus to injure her professional standing and reputation, without stating any particulars, facts, or circumstances tending to establish a motive for such a course, is wholly insufficient to raise a defense, especially when other facts in the case tend to prove the allegations. *Daly v. Smith*, 38 N. Y. Super. Ct. 158.

**Where Husband Contracts for Wife.**—Upon a contract made by a husband for himself and wife, that his wife should perform at the theater of the manager named therein, during a certain period for a certain salary, a court of equity will not enjoin the wife from performing in any other theater during the same period; nor the husband from permitting her to change her residence;

nor another manager from giving her employment within the term as an actress; neither can specific execution of such a contract, as against the husband or wife, be decreed. *Burton v. Marshall*, 4 Gill (Md.) 487; 45 Am. Dec. 171.

1. *Dibdin v. Swan*, 1 Esp. 28; 5 Revised Reports, 717; *LIBEL AND SLANDER*, vol. 13, p. 331. In an action by the manager of an opera for libel, he need not aver or prove that he had a license, the legal presumption being that he has not violated the law. *Fry v. Bennett*, 28 N. Y. 324.

2. *Gregory v. Brunswick*, 1 C. & K. 24; 47 E. C. L. 23; *King v. Mawbey*, 6 T. R. 628; 4 Bl. Com. 136; *Wright on Criminal Conspiracies* 32; *CRIMINAL CONSPIRACY*, vol. 4, p. 582.

*Tindal, C. J.*, in *Gregory v. Brunswick*, 1 C. & K. 24; 47 E. C. L. 23, said: "The law on this subject lies in a narrow compass. There is no doubt that the public who go to a theater have the right to express their free and unbiased opinions of the merits of the performers who appear upon the stage. At the same time, parties have no right to go to a theater by a preconcerted plan, to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme, probably concocted for an unworthy purpose." And in 2 *Bishop's Crim. Law*, § 308, note, the language of *Bushe, C. J.*, in *Rex v. Forbes*, 1 *Craw. & D.* 157, is thus quoted: "They (the audience) may cry down a play or other performance, which they dislike, or they may hiss or hoot the actors who depend upon their approbation or caprice. Even that privilege, however, is confined within its limits. They must not break the peace, or act in such a manner as has a tendency to excite terror or disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That

offered to any individual nor any injury done to the house, they are, in point of law, guilty of riot.<sup>1</sup>

**XIV. CARRIAGE, TRANSPORTATION, BAGGAGE, ETC.**—The damage resulting to a theatrical troupe through the delay of a train, resulting from the particular character of their business which was unknown to the railroad company, has been held too remote to be recovered.<sup>2</sup>

Stage properties, costumes, paraphernalia, advertising matter, etc., do not fall under the denomination of baggage, and in the absence of negligence, no liability can arise against a carrier for their loss or destruction, unless knowingly accepted by him as baggage.<sup>3</sup>

censure or approbation must be the expression of the feelings of the moment, for, if it be premeditated by a number of persons confederated beforehand to cry down even a performance of an actor, it becomes criminal. Such are the limits and privileges of an audience, even as to actors and authors."

1. *Rex v. Forbes*, 1 *Craw. & D.* 157.

The spectators have no right to create a disturbance, because the prices of admission are exorbitant. *Clifford v. Braddon*, 2 *Camp.* 358. Lord Mansfield, in this case, said: "Theaters are not absolute necessities of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable, the evil will cure itself. People will not go, and the proprietors will be ruined, unless they lower their demands. But the proprietors of a theater have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage."

2. *Georgia R. Co. v. Hayden*, 71 *Ga.* 518; 26 *Am. & Eng. R. Cas.* 262. In this case, a theatrical manager purchased tickets for himself and troupe, from a railroad, at the terminus of which they were to take a connecting train and proceed to a point at which a performance was to be given. Tickets had been sold to this performance to the amount of \$280. There had been a collision of other trains on the first railroad and the train taken by plaintiff was delayed so as to miss connection with the next train. Plaintiff failed to reach his destination, and the money was refunded to the purchasers of seats. At the point of delay, late at night, plaintiff first notified the com-

pany by telegraph of his arrangements, but it did not appear that the telegram was received in time to remedy the difficulty, and it was held that he could not recover damages. And see *Weed v. Louisville, etc., R. Co.*, a case decided in 1886 in the district court of Parish of Orleans, not reported, but cited in 26 *Am. & Eng. R. Cas.* 262. Here, *Isot, J.*, is reported to have said: "This is a damage suit against the defendant company for failing to bring a theatrical company into this city on schedule time. The law governing in such actions may be taken to be stated in the case of *Gordon v. R. Co.*, 52 *N. H.* 596, on the general question of liability for delays," viz., that the publication of a time-table imposes upon the company an obligation to use due care to have trains arrive and leave in accordance with the table, but not an absolute and unconditional engagement.

**Theatrical Rates.**—The interstate commerce commission held that it would not undertake to say in advance what rates railroad companies shall or shall not make to any class or organization of persons. *In re Theatrical Rates*, 1 *Int. Com. Rep.* 18.

3. They are not articles required for the pleasure, convenience, or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purpose of carrying on the theatrical business. *Oakes v. Northern Pac. R. Co.*, 20 *Oregon* 392; 23 *Am. St. Rep.* 126. And see *BAGGAGE*, vol. 1, p. 1042.

If the carrier has actual notice of the nature of the property, and receives it as baggage, he will be liable. *Butler v. Hudson River R. Co.*, 3 *E. D. Smith (N. Y.)* 571; *Haines v. Chicago, etc., R. Co.*, 29 *Minn.* 161, per Mitch-

**XV. LITERARY PROPERTY IN DRAMATIC PRODUCTIONS**—(See also COPYRIGHT, vol. 4, p. 147; LITERARY PROPERTY, vol. 13, p. 916).—The exclusive right to publicly perform a dramatic composition is dependent on the existence of a copyright therefor, and an injunction will lie to restrain the unauthorized publication of a dramatic composition.<sup>1</sup>

**THEFT**—(See LARCENY, vol. 12, p. 760; MARINE INSURANCE, vol. 14, p. 378).—Theft is synonymous with larceny.<sup>2</sup>

**THEIR**.—See note 3.

ell, J.; Texas, etc., R. Co. v. Capps (Tex. 1884), 16 Am. & Eng. R. Cas. 118; Hoeger v. Chicago, etc., R. Co., 63 Wis. 100; 53 Am. Rep. 271; 2 Wait's Act. & Def. 82.

In *Sloman v. Great Western R. Co.*, 6 Hun (N. Y.) 546, it is said that the railroad will be liable in such case, unless the agent who receives the baggage violates a regulation of the company in doing so, and the passenger has notice of the regulation. But the passenger must be aware of the regulation, for otherwise the act of the agent done within the usual scope of his employment, will bind the carrier, regardless of any private instructions. *Minter v. Pacific R. Co.*, 41 Mo. 503; 97 Am. Dec. 288.

1. *Boucicault v. Hart*, 13 Blatchf. (U. S.) 47; *Palmer v. DeWit*, 47 N. Y. 532; *Chappell v. Boosey*, 21 Ch. Div. 232. And see INJUNCTIONS, vol. 10, p. 922.

The performance of a play in public with the consent of an author, does not constitute evidence of a dedication to the public, or an abandonment of his rights, *Boucicault v. Fox*, 5 Blatchf. (U. S.) 87; but it seems that a spectator, in the absence of an understanding with the proprietor limiting the use he may make of the knowledge derived, may publish what he can remember; but he cannot make use of notes or a phonographic copy. *Keene v. Clark*, 5 Robt. (N. Y.) 38. And see *Keene v. Kimball*, 16 Gray (Mass.) 551; *Keene v. Wheatley*, 9 Am. L. Reg. 33.

2. *Bouv. L. Dict.* Blackstone uses the words "theft" and "larceny" as descriptive of one and the same offense. *Bl. Com.*, vol. 4, p. 229. See *People v. Donohue*, 84 N. Y. 441.

In *American Ins. Co. v. Bryan*, 26 Wend. (N. Y.) 563; 37 Am. Dec. 278, where the discussion of the meaning of the word "theft," as used in an in-

surance policy, arose, it was said that its "primary meaning, which is now the ordinary one, is that of secret stealing or simple larceny." But in *Taylor v. Liverpool, etc., Steam Co., L. R.*, 9 Q. B. 546, it is held that "thieves," as used in an insurance policy, must be applied to thieves external to the ship. In *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71; 36 Am. Rep. 579; *Taylor v. Liverpool, etc., Steam Co., L. R.*, 9 Q. B. 546, is disapproved, and the difference in the views of the courts of *England*, from those of the State of *New York*, as to the meaning of the words "theft" and "thieves" in policies of insurance, pointed out. And see MARINE INSURANCE, vol. 14, p. 378.

**Statutory Crime of "Theft" in Texas.**—See *Smith v. State*, 21 Tex. App. 133; *Campbell v. State*, 42 Tex. 591; *Bawcom v. State*, 41 Tex. 189; *Counts v. State*, 37 Tex. 593; *Foster v. State*, 21 Tex. App. 80; *Marshall v. State*, 4 Tex. App. 549; *Powell v. State*, 7 Tex. App. 467; *Turner v. State*, 7 Tex. App. 596; *Williams v. State*, 4 Tex. App. 5; *Dismuke v. State* (Tex. Cr. App. 1892), 20 S. W. Rep. 562; *Stegall v. State*, 32 Tex. Cr. Rep. 100; *Beckham v. State* (Tex. Cr. App. 1893), 22 S. W. Rep. 411; *Dale v. State*, 32 Tex. Cr. Rep. 78; *Taylor v. State*, 32 Tex. Cr. Rep. 110; *Brown v. State* (Tex. Cr. App. 1893), 22 S. W. Rep. 24; *Frank v. State*, 30 Tex. App. 381; *Hurley v. State*, 30 Tex. App. 333; *Massey v. State*, 31 Tex. Cr. Rep. 91; *Lawless v. State* (Tex. App. 1892), 19 S. W. Rep. 676.

**Theft (Lost by)**.—See LOST, vol. 13, p. 1058.

**Theft Bote**.—See CRIMINAL LAW, vol. 4, p. 657.

**As Distinguished from Embezzlement.**—See EMBEZZLEMENT, vol. 6, p. 455.

3. **In Policy of Insurance.**—The words "their two-story brick and gravel roof building," used in a policy of

**THEN**—(See **ISSUE**, vol. II, p. 908).—Then means at that time, in that event, or in that case.<sup>1</sup>

insurance to describe the property insured, do not necessarily import an absolute legal title in the building itself. The words "his" or "their" in a policy, as descriptive of the property of the assured, do not render the policy void if the insured has an insurable interest, although the interest may be qualified or defeasible, or even an equitable interest. *Fowle v. Springfield Ins. Co.*, 122 Mass. 194.

**In a Will.**—In *Boreham v. Bignall*, 8 Hare 131, a substitutional gift to "their children," was held conclusively to show that one wife only of the first beneficiary was in the contemplation of the testator, and that that wife must have been the one living at the date of the will.

**Read Distributively.**—In a covenant by two or more for themselves, "*their* exs., ads., and ass's," the word "*their*" is necessarily read distributively, because the parties do not anticipate that they will have the same exs., etc.; but the word will not convert a covenant otherwise joint into a separate covenant. *White v. Tyndall*, 13 App. Cas. 263.

1. As an adverb of time, "then" means "at that time," referring to a time specified, either past or future. It has no power in itself to fix a time, but simply refers to a time already fixed. *Mangum v. Piester*, 16 S. Car. 329; *Dove v. Torr*, 128 Mass. 38; *Wood v. Bullard* (Mass. 1890), 7 L. R. A. 304; *Cresson's Appeal*, 76 Pa. St. 19; *Laird's Appeal*, 85 Pa. St. 343; *Newberry v. Hinman*, 49 Conn. 130; *Farnam v. Farnam*, 53 Conn. 279; *Gibson v. Hardaway*, 68 Ga. 378; *Heasman v. Pearse*, L. R., 7 Ch. App. 660.

The word "then," although in a strictly grammatical sense an adverb of time, is nevertheless often used for the purpose of denoting an event or contingency, and is equivalent to the words "in that event," or "in that case." *Hall v. Priest*, 6 Gray (Mass.) 24; *Pintard v. Irwin*, 20 N. J. L. 505. And see *Thompson v. Ludington*, 104 Mass. 193; *Ash v. Coleman*, 24 Barb. (N. Y.) 647; *Barker v. Southerland*, 6 Dem. (N. Y.) 220; *Buzby's Appeal*, 61 Pa. St. 116; *Holloway v. Holloway*, 5 Ves. 399; *Bunting v. Speak*, 41 Kan. 424; *Wheeler v. Addams*, 17 Beav. 417. And see generally *Hinson v.*

*Pickett*, 1 Hill Eq. (S. Car.) 35; *Wightman v. Carlisle*, 14 Vt. 296.

*Thesiger*, L. J., in *Mortimore v. Slater*, 7 Ch. Div. 322; *aff'd* in H. L. nom. *Mortimore v. Mortimore*, 48 L. J. Ch. 470; 4 App. Cas. 448, in discussing the meaning of "then," where property is given upon certain events to such persons as shall "then" be next of kin or relations of the testator, said: "The cases seem to me to divide themselves into three classes. The first of those classes is the one where the word 'then,' as an adverb of time, is attached to the description of the class; and in that case, as in *Wharton v. Barker*, 4 K. & J. 483, and *Long v. Blackall*, 3 Ves. 486, it was decided that the word 'then' imported the time at which the class so described is to be ascertained. *Wheeler v. Addams*, 17 Beav. 417, is to a certain extent an exception to that rule; but I think that may be explained, because we find that in that case there is a reference in the limitation to one of the persons, who had been a tenant for life before the limitation came into force.

"The second class of cases consists of those where words of futurity, but without the adverb of time, are attached to the description of the class, and in that class of cases we find no distinction drawn, but in every one of them we find that it was held that the words must speak from the time of the testator's death. The cases cited on that point have been *Holloway v. Holloway*, 5 Ves. 399, and *Doe v. Lawson*, 3 East 292.

"The third class of cases is that where the word 'then,' the adverb of time, is used, but where you find it used not in connection with the description of the class, but in connection with the time at which the estate is to come into being. In that class of cases, also, without any exception, we find it decided that you are to look at the class at the time of the testator's death. That is to be found in *Cable v. Cable*, 16 Beav. 507, in *Bullock v. Downes*, 9 H. L. Cas. 1, and in *Day v. Day*, 4 Ir. Rep. Eq. 385; and it is to be observed that in all these cases we do not find that any distinction is drawn from the use of the additional words, 'as if he had died intestate,' but the point which has been looked at by the learned judges

# THENCE.—See note 1.

who decided those cases, has been whether the word 'then' is attached to the description of the class, or to the time when the estate is to come into possession."

"Then," used twice in the same sentence, construed in the first instance as pointing to the event, and in the second as an adverb of time. *Gill v. Barrett*, 29 Beav. 372.

"Then," construed as an adverb of time, not of contingency. *Baker v. Lucas*, 1 Molloy 481.

But "then" may be used as equivalent to "further," *e. g.*, where there is a testamentary direction for payment of debts, and "then" a demise of lands. *Willan v. Lancaster*, 3 Russ. 108.

**Then and There**—(See also **HOMOCIDE**, vol. 9, p. 637; **INDICTMENT**, vol. 10, pp. 483, 587, 592).—"Then and there" used in an indictment, refers to the time when, and place where, a thing is alleged to have been done. *Com. v. Butterick*, 100 Mass. 16; 97 Am. Dec. 65; *Baker v. State*, 25 Tex. App. 1.

They are relative and refer to some foregone averment, and their effect must be determined by the allegation to which they refer. If that is a single act done, and it is then averred that "then and there" another fact occurred, it necessarily imports that the two were precisely co-existent and the word "then" refers to a precise time. But where the antecedent averment fixes no precise time and alleges no precise single definite act, the word "then" used afterwards fixes no one definite time. *Edwards v. Com.*, 19 Pick. (Mass.) 126. See *Jeffries v. Com.*, 12 Allen (Mass.) 152.

The words "then and there" need not be repeated to an averment which merely declares a legal conclusion. *State v. Willis*, 78 Me. 74.

They are words of reference, and when the time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words. *State v. Cotton*, 24 N. H. 146.

The words "then and there" in an indictment for perjury, setting forth, "County of Lackawanna—ss.," that defendant "at the county, aforesaid, and within the jurisdiction of this court," did unlawfully and falsely swear before a certain person, judge of the

courts of Susquehanna county, "then and there" presiding, etc., do not refer to the county of Susquehanna, but to Lackawanna county, and sufficiently show the offense to have been committed in that county. *Com. v. Williams*, 149 Pa. St. 54. And see *State v. Brown*, 12 Minn. 490.

Where an information stated that the defendant defiled a girl placed under his care, by criminally knowing her, she "being then and there a female under the age of eighteen years, confided to the care and protection of said" defendant, the words "then and there" were held to refer to the female as being under the age of eighteen at her defilement; and also that she was at that time under the care and protection of defendant. *State v. Sipe*, 38 Kan. 201.

**Then in Being**.—Where, by a settlement made on his marriage, the settlor granted freehold lands to trustees upon trust for himself for life, and after his death to convey the lands and pay the rents and profits "unto or for the benefit of all and every of any one or more child or children, or any grandchild or grandchildren, or issue then in being of the said intended marriage," it was held that the words "then in being" governed only the words "grandchild or grandchildren or other issue," and not the words "child or children." *Leader v. Duffy*, L. R., 13 App. Cas. 294.

**Then Living**.—"Where life interests are bequeathed to several persons in succession, terminating with a gift to a class of objects 'then living,' the word 'then' is held to point to the period of the death of the person last named (whether he is or is not the survivor of the several legatees for life), and is not considered as referring to the period of the determination of the several prior interests." 1 Jarman on Wills, 809, n; *Archer v. Jegon*, 8 Sim. 446; *Wollaston's Settlement*, 27 Beav. 642; *Britnell v. Walton*, W. N. (69) 238; *Cooper v. Macdonald*, 42 L. J. Ch. 539; L. R., 16 Eq. 258; *Cobden v. Bagwell*, 19 L. R. Ir. 168.

1. In *Flagg v. Mason*, 141 Mass. 66, it was held that the word "thence," in a description of the boundaries of land, preceding each course given, imports that the following course is continuous with the one before it.

The expression in a deed, "thence by



**THEREAFTER**—(See also AFTERWARDS, vol. I, p. 324).—See note 1.

**THEREFORE HE BRINGS SUIT**.—An averment; usually the concluding words of a declaration.<sup>2</sup>

**THEREIN**.—See note 3.

lands" of a party, by no means indicates that the whole of the line is along those lands. If it runs partially so only, the line would answer the description. *Rieglesville Delaware Bridge Co. v. Bloom*, 48 N. J. L. 369.

"Thence" or "from," when used in policies of insurance, in reference to the intermediate ports of a voyage, are not terms of exclusion, and the policy covers the vessel while stopping at any of the intermediate ports described therein. *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708; 48 Am. Dec. 465.

1. An act provided that if the sheriff of a county should, within a prescribed time, fail to give bond with sureties, as required, his office should immediately expire and be deemed and taken to be vacant, and "if such sheriff shall thereafter presume to execute the office of sheriff, then all such acts and proceedings done under color of office" should be absolutely void. It was held that his failure to give the bond within the prescribed time, did not *per se* vacate the office, but that he was an officer with a defeasible title until judgment of forfeiture was pronounced in due form; and that the word "thereafter" should be interpreted to mean that all acts done under color of office, after the office was adjudged forfeited, by reason of the alleged default in giving the bond, should be void. *Clark v. Ennis*, 45 N. J. L. 69.

2. Originally, no plaintiff was permitted to state his complaint to the court, until he could produce responsible persons to vouch for him, that his character was such as to render it probable that his complaint was well founded, or at least not frivolous or vexatious. 4 *Minor's Inst.*, p. 654. Such persons were usually denominated his *secta*, or following, or suite. The use of the word "suit" is, therefore, a corruption of the original phrase, and does not mean that the plaintiff therefore brings his action. *Bract.* 214 b; *Com. v. Joliffe*, 7 Watts (Pa.) 585; 3 Bl. Com. 295.

The actual production of the suit has long been antiquated, though the form continues. 1 *Chitty Pl.* 437; *Steph.* on *Pl.* (5th ed.), p. 474.

3. A statute enacted that if any member of certain societies should think himself aggrieved by anything done by any such society, two justices might, on complaint of such member, hear and determine the matter of such complaint and make such orders *therein* as should seem just to them. It was held that the jurisdiction of the magistrate was confined strictly to the subject-matter of the complaint; and, therefore, where the party complained that he had been deprived of certain relief to which he was entitled, and the justices awarded not only such relief, but also that such party should be continued a member of the society, it was held that the latter part of the order was illegal, inasmuch as the expulsion of the party was no part of the complaint. *Rex v. Soper*, 3 B. & C. 857; 40 E. C. L. 253.

In *Cummings v. Tabor*, 61 Wis. 185, notice of a motion "for an order vacating and setting aside the judgment in said action and all proceedings *therein*," was construed to refer to all proceedings in the action, not merely to proceedings in or subsequent to the judgment.

Where it was provided in an antenuptial contract that, upon the death of the husband, a certain sum should be paid to the wife, "the same to be in lieu and stead of any dower or rights of inheritance therein (*i. e.*, the husband's estate) given or created by operation of law," and the wife therein agreed as follows: "I hereby agree and bind myself to receive and accept the said sum in full payment, and in entire and complete satisfaction, of all my rights of dower and inheritance as the widow and heir of the party of the first part in his said estate, both real and personal," after which comes the following clause: "and I hereby now renounce and relinquish all claim, right, title and interest therein by reason of the said relation of wife or widow of the said Mahaffy;" held that the words, "rights of dower and inheritance," used in the contract, did not include the widow's right to occupy the homestead—that not being a right

**THEREON.**—See note 1.

**THEREUPON.**—An adverb signifying without delay or lapse of time.<sup>2</sup>

**THESE.**—See note 3.

**THIEF.**—(See THEFT; LARCENY, vol. 12, p. 760; MARINE INSURANCE, vol. 14, p. 378).—One who has been guilty of larceny or theft.

**THING.**—See note 4.

**THINGS IN ACTION.**—See CHOSSES IN ACTION, vol. 3, p. 235.<sup>5</sup>

**THINK.**—To believe; to consider; to esteem.<sup>6</sup>

either of dower or of inheritance, and that the last quoted clause was added simply in the nature of a "sweeping clause," to be restricted in its meaning by the subject-matter and with no intent to limit the widow's rights further than was already done by the specific language preceding it in the contract, and that the word "therein," used in said last clause, refers to "dower and inheritance," and not to "estate." *Mahaffy v. Mahaffy*, 63 Iowa 55. Compare *Mahaffy v. Mahaffy*, 61 Iowa 679.

**Acknowledgments.**—Herein equivalent to "therein." *Davis v. Bogle*, 11 Heisk. (Tenn.) 317.

1. **Thereon.**—Under an act providing that for failure to fence its tracks a railroad shall be liable for all damage done "to any cattle and other stock thereon," it was held that the animal must be injured on the track. *Pennsylvania Co. v. Dunlap* (Ind. 1887), 13 N. E. Rep. 408.

In a policy insuring a ship "to a port on the north side of Cuba, with the liberty of a second port thereon," it was held that if a second port was used, it must be used on the same side of the island; "thereon," in that connection, having the same meaning as "on the same." *Nicholson v. Mercantile Marine Ins. Co.*, 106 Mass. 400.

For the construction of the word "thereon" in an act regulating the rates to be charged on a railroad, and whether it means the whole line of communication between the cities, water as well as rail, or whether it applies to the railroad alone, see *Camden, etc., R. Co. v. Briggs*, 22 N. J. L. 641 and 661.

Where a bequest of six thousand dollars of the money due on a bond from a legatee directed that on payment of the balance of said bond, and what-

ever interest might be due "thereon," the bond should be assigned to the legatee, "thereon" was held to refer to the balance of the principal due, and upon payment of such balance and interest thereon, the bond was ordered assigned. *Leddel v. Starr*, 20 N. J. Eq. 285.

2. *Putnam v. Langley*, 133 Mass. 204; *Hill v. Wand*, 47 Kan. 340. And see *Krumeick v. Krumeick*, 14 N. J. L. 44.

In *Bean v. Ayers*, 67 Me. 482, the word was said to be equivalent to "in consideration thereof," where the connection seemed to require such an interpretation.

3. Where an advertisement recited the destruction of sundry buildings by fire, and offered a reward for information, resulting in the conviction of "the perpetrator of these outrages," the offer was held to apply only to offenses previously committed. *Freeman v. Boston*, 5 Met. (Mass.) 56.

4. See **ARTICLE**, vol. 1, p. 776; **NOXIOUS**, vol. 16, p. 861; **EVERY**, vol. 7, p. 36.

**Things Necessary for Cultivation.**—See **CULTIVATE**, vol. 4, p. 953.

5. Things in action, in the statutory definition of personal property (Subd. 14, § 1, ch. 5, R. S. Wis.), comprise only such rights of action as may be the subject of sale and transfer, and not mere rights of action *ex delicto*, for personal wrongs; and the latter are not included in the personal property owned by a woman at the time of her marriage, which continues to be her sole and separate property after marriage. *Gibson v. Gibson*, 43 Wis. 23; 28 Am. Rep. 527.

6. *Martin v. Central Iowa R. Co.*, 59 Iowa 414. In this case, the jury in their findings, said: "We think" the horses were not struck, and it was held to

## THIRD OR THIRDS—THOROUGHLY DRIED.

**THIRD OR THIRDS.**—(See DOWER, vol. 5, p. 884.)<sup>1</sup>

**THIRD PARTY.**—(See STRANGER, vol. 23, p. 939; PRIVITY, vol. 19, p. 156; PARTIES TO ACTION, vol. 17, p. 470).—A stranger to a proceeding or transaction.<sup>2</sup>

**THIS.**—See note 3.

**THOROUGHFARE.**—A street or passage *through* which one can *fare* (pass); that is, a street or highway affording an unobstructed exit at each end into another street or public passage.<sup>4</sup>

**THOROUGHLY DRIED.**—See note 5.

sufficiently express the findings of fact sought.

An affidavit made by an appellant, setting forth that he "thinks he has sufficient cause for an appeal," and that the same is not intended for delay or vexation, has been held insufficient in *New Jersey*. *Schenck v. Ayers*, 14 N. J. L. 311. See generally, *MERITS (AFFIDAVIT OF)*, vol. 15, p. 376.

Where executors were directed to sell the testator's real estate "at such time and in such manner as they shall think most advisable," this was held not to vest a personal discretion in them, and that, therefore, an executor *de bonis non* might exercise the power. *Giberson v. Giberson*, 43 N. J. Eq. 116.

**Think Best.**—See *BEST*, vol. 2, p. 184.

1. Where a will directed that the widow, in case of a second marriage, should be "thirded," it was held that upon her second marriage, she was entitled to one-third of the estate as if there had been no will, and that the remainder should go to the heirs and distributees. *Baker v. Red*, 4 Dana (Ky.) 158. And see *Horsey v. Horsey*, 1 Houst. (Del.) 438; *O'Hara v. Dever*, 2 Abb. Pr. N. S. (N. Y.) 418; 2 Keyes (N. Y.) 558, *aff'd* 46 Barb. 609; *O'Hara v. Sullivan*, 30 How. Pr. (N. Y.) 278; *Yeomans v. Stevens*, 2 Allen (Mass.) 349.

By a settlement, a provision out of real and personal estate, was made for the wife "in lieu of dower or thirds;" held, the husband having died intestate, that the provision was in satisfaction of dower out of realty and of thirds of personalty, and that the wife could claim nothing under the Statute of Distributions. *Thompson v. Watts*, 31 L. J. Ch. 445.

2. **Third Person.**—The State of *California* is not a "third person," within the meaning of section 15 of the Act of March 3d, 1851, providing that any

patent issued under the act, shall be conclusive between the *United States* and claimants only, and "shall not affect the interests of third persons." *People v. San Francisco County*, 75 Cal. 388.

3. When "this" and "that" refer to different things before expressed, "this" refers to that last mentioned, and "that" to the thing first mentioned. *Russell v. Kennedy*, 66 Pa. St. 251.

"This," is a simple word of relation, and its ordinary grammatical meaning will not be extended so as to include something else than that to which it relates. *Byrson v. Russell*, 14 Q. B. Div. 720.

**This Cause.**—See *CAUSE*, vol. 3, p. 47.

4. *Black's L. Dict.*

For whether or not a place which is not a thoroughfare is a highway, see *HIGHWAYS*, vol. 9, p. 364.

A navigable arm of the sea was held to be a public "thoroughfare" in *Coulbert v. Troke*, 1 Q. B. Div. 1. In this case the appellant was convicted of supplying refreshment at prohibited hours to persons not being *bona fide* travelers; the statute providing that a person shall not be deemed a *bona fide* traveler unless the place he lodged the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public "thoroughfare." The appellant's licensed house was on the opposite shore of the Southampton Water from the town, and distant from it by water over a mile, and by the nearest road eight miles. The persons supplied with refreshment had lodged the night before in the town and crossed the water in their own boats.

5. The words "thoroughly dried," in a statute providing "that if any side or sides of sole leather shall vary, when thoroughly dried, so as to weigh five

## THREATS AND THREATENING LETTERS.

**THOUSAND.**—The number of ten hundred.<sup>1</sup>

**THREAD**—(See ACCRETION, vol. 1, p. 136; BOUNDARIES, vol. 2, p. 502; FILUM AQUÆ—FILUM VIÆ, vol. 7, p. 964; MAIN, vol. 14, p. 1).—A middle line; a line running through the middle of a stream or road.<sup>2</sup>

**THREATS AND THREATENING LETTERS.**—(See also ASSAULT, vol. 1, p. 778; BURGLARY, vol. 2, p. 659; CONFESSIONS, vol. 3, p. 439; DURESS, vol. 6, p. 57; FALSE IMPRISONMENT, vol. 7, p. 661; HOMICIDE, vol. 9, p. 529; ROBBERY, vol. 21, p. 414.)

### I. Threats, 1061.

1. *Definition*, 1061.
2. *Considered as Private Injuries*, 1061.
  - a. *Threats which Interfere with One's Business*, 1061.
  - b. *Threats which Interfere with One's Freedom of Will* (See also DURESS, vol. 6, p. 57), 1062.
  - c. *Threats which Interfere with One's Freedom of Person* (See also FALSE IMPRISONMENT, vol. 7, p. 661), 1063.
3. *Considered as Public Wrongs*, 1064.
  - a. *The Offense of Making Threats*, 1064.
  - b. *Extortion by Means of Threats*, 1065.
4. *Considered in Connection with Other Offenses*, 1066.
  - a. *Evidence of Threats in Trials for Homicide and Assault*, 1066.

(1) *Former Threats by the Accused* (See also HOMICIDE, vol. 9, p. 529), 1066.

(2) *Former Threats by the Deceased* (See also HOMICIDE, vol. 9, p. 529), 1066.

b. *Constructive Violence in Burglary and Robbery* (See also BURGLARY, vol. 2, p. 659; ROBBERY, vol. 21, p. 414), 1067.

c. *Confessions Forced by Threats*, 1068.

### II. Threatening Letters, 1068.

1. *Definition*, 1068.
2. *The Offense of Sending Threatening Letters*, 1069.
3. *The Indictment—Necessary Averments*, 1072.
4. *Venue*, 1072.
5. *Evidence*, 1072.
  - a. *Proof of the Sending*, 1072.
  - b. *Evidence Explanatory of the Letter*, 1073.
  - c. *Of the Intent*, 1073.

per cent. more or less than the weight marked thereon by an inspector, the inspector who inspected the same shall be subject to the payment of the whole variation at a fair valuation, to be recovered by the party injured thereby," mean that the leather is to be suitably or sufficiently dried, so as to be in a proper state for sale and use. *Tenney v. Howe*, 24 Pick. (Mass.) 335.

1. Webster: The meaning of this word, when used in its ordinary sense, is a matter of common knowledge. It may by custom or usage of trade, however, acquire a peculiar meaning. Thus in *Smith v. Wilson*, 3 B. & Ad. 728; 23 E. C. L. 169, where a lessee covenanted that at the expiration of the lease he would leave on the warren "ten thousand rabbits," parol evidence was admitted to show that by custom of the country where the lease was made, the

word "thousand," as applied to rabbits, denoted one hundred dozen. In the same case, evidence was admitted to show that "hundred-weight" meant one hundred and twelve pounds.

2. *Rapalje & Lawrence Law Dict.* *Knight v. Wilder*, 2 Cush. (Mass.) 207; 48 Am. Dec. 660.

A small line or twist of any fibrous or filamentous substance, as flax, silk, cotton or wool, particularly such as is used for weaving or sewing; a filament; a small string. There is nothing to indicate that a measure of self-sustaining strength is necessarily imported in the strict idea of a thread. *Luckemeyer v. Magone*, 38 Fed. Rep. 33.

The "thread" of a road is the monument or abutment. *Newhall v. Ireson*, 8 Cush. (Mass.) 595; 54 Am. Dec. 790; *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413.

## THREATS AND THREATENING LETTERS.

**I. THREATS**—1. **Definition.**—A threat is a menace of destruction or injury to one's life, reputation, or property.<sup>1</sup>

2. **Considered as Private Injuries**—*a.* **THREATS WHICH INTERFERE WITH ONE'S BUSINESS.**—A mere menace, or threat, unattended by actual damages, is not sufficient to sustain a civil action for damages;<sup>2</sup> but threats and menaces, through fear of which one's business is interrupted, are actionable. The remedy is an action of *trespass vi et armis* for pecuniary damages.<sup>3</sup> And in certain cases where the damage would be irremediable, a court of equity may restrain acts of violence and intimidation.<sup>4</sup>

1. **Anderson's L. Dict.**

"A threat is a menace of destruction or injury to the lives, character, or property of those against whom it is made." **Bouvier's L. Dict.**

"A menace; a declaration of one's purpose or intention to work injury to the person, property, or rights of another." **Black's L. Dict.**

"A menace or threat is a malicious declaration of an intention to do an injury unlawfully to another." **Bouvier's Inst.**, § 2234.

2. 3 **Bl. Com.** 120.

3. 3 **Bl. Com.** 120; **Bouvier's L. Dict.**, *tit.* "Menace," *citing* **Comyn's Dig.** "Battery" (D.); **Viner. Abr.** "Assault;" **Co. Litt.** 161a, 162b, 253b.

To warrant an action against one for writing a letter giving information willfully false, and with the malicious design of annoying the plaintiff, and frightening him out of town, the loss or inconvenience sustained must be the direct and reasonable result of the letter, and of a reliance upon it, and must consist of something more than mental suffering or annoyance. **Taft v. Taft**, 40 **Vt.** 229; 94 **Am. Dec.** 389. See 4 **Cruise Dig.** 406; and **Sedg. on Dam.** (8th ed.), §§ 43, 44, wherein the following is criticised: "Mental pain or anxiety, the law cannot value and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible that a jury, in estimating it, should altogether overlook the feelings of the party interested." **Lord Wensleydale in Lynch v. Knight**, 9 **H. L. Cas.** 577, 598.

Preventing persons by threats from trading with one, is a tort. **Gilbert v. Mickle**, 4 **Sandf. Ch.** (N. Y.) 357.

So also, to drive one's tenants away from their holdings by threats. 1 **Roll. Abr.** 108, pl. 21.

Damages may be recovered for pre-

venting people, by means of threats, from trading with one's vessel in foreign port. **Tarlton v. McGawley, Peake** 205.

To keep workmen and purchasers away from one's stone quarry, by means of threats, is a tort for which damages may be recovered. **Garrett v. Taylor**, **Cro. Jac.** 567.

Trades' unionists may be enjoined from posting threatening placards to keep workmen from one's premises. **Springhead Spinning Co. v. Riley**, **L. R.**, 6 **Eq. Cas.** 551.

4. Railway employes accept their places under the implied condition that they will not quit their employer's service under circumstances rendering such conduct a peril to the lives and property committed to its care, or in such a manner as to subject it to legal penalties or forfeitures; and although, in ordinary circumstances, the employer must rely upon his action at law for a breach of the condition, a court of equity has power to restrain employes from acts of violence and intimidation, and from enforcing rules of labor unions which result in irremediable injuries to their employers and the public, such as those requiring an arbitrary strike without cause, merely to enforce a boycott against a connecting line. **Toledo, etc., R. Co. v. Pennsylvania Co.**, 54 **Fed. Rep.** 746.

An injunction may be awarded to restrain the members of a labor union from preventing by force, threats, or intimidation the complainants' employes from working in a mine, where it appears that the defendants are not financially able to respond in damages for their wrongful acts. **Cœur d'Alene Min., etc., Co. v. Miners' Union**, 51 **Fed. Rep.** 260.

A court of equity will restrain by injunction discharged employes, members of a union, from gathering around their former employer's place of busi-

## THREATS AND THREATENING LETTERS.

b. THREATS WHICH INTERFERE WITH ONE'S FREEDOM OF WILL—(See also DURESS, vol. 6, p. 57).—Where one is induced, through fear of loss of life or limb, or of his liberty, by unlawful imprisonment, to pay money, make a contract, or do other acts lawful in themselves, he is said to have acted under duress *per minas*, and may, by appropriate steps, avoid the consequences of his act thus performed. The older authorities confine this species of duress within very narrow limits,<sup>1</sup> excluding threats to commit battery, to destroy property, etc., because, it is said, such threats are not sufficient to overcome the will of a firm and prudent man, and because the law affords adequate redress, if such threats are actually executed; but the tendency of modern authority in this country is to extend the doctrine so as to give relief to the victims of force and fraud in many cases wherein no relief could formerly be had.<sup>2</sup>

ness, and from following the workmen whom he has employed in their places; from gathering about the boarding-houses of such workmen, and from interfering with them by threats, menaces, intimidations, ridicule, and annoyances, on account of their working for the plaintiff. *Murdock v. Walker*, 152 Pa. St. 595.

1. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason. 1 Bl. Com. 131.

A fear of battery, or being beaten, though ever so well grounded, is no duress. Neither is fear of destruction of goods. 1 Bl. Com. 131; Bac. Abr. "Duress," A; *Sumner v. Ferryman*, 11 Mod. 203; 1 Chitty on Cont. (11th Am. ed.) 271.

So, it was said that a threat to burn one's house, or to commit a trespass to lands or goods, does not amount to duress. 1 Bl. Com. 131; Bac. Abr., "Duress," A; *Edwards v. Handley*, Hard. (Ky.) 615; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 337.

Blackstone's definition would seem to have been too narrow, even at the time it was written. Lord Coke says that fear of imprisonment is enough to constitute duress. 2 Inst. 483; Co. Litt. 253b.

2. In *Foshay v. Ferguson*, 5 Hill (N. Y.) 154, *Bronson, J.*, says: "As civilization has advanced, the law has tended much more strongly than it formerly did to overthrow everything which is built upon violence or fraud. In the time of Coke, it was said that a man could not avoid his act on the ground that it was procured by the

fear of battery, burning his house, taking away or destroying his goods, or the like; for there he may have satisfaction by the recovery of damages. 2 Inst. 483. But Mr. Chitty very justly doubts whether such be the rule at the present day, especially in regard to so serious an injury as a threat to burn a man's house. Chitty on Cont. 169 (ed. of 1839). In *Sumner v. Ferryman*, 11 Mod. 201, *Powell, J.*, said: 'A man cannot avoid his bond by duress to his goods, but only to his person.' And see *Astley v. Reynolds*, 2 Str. 915. But in *South Carolina*, it has been held that duress of goods will, under some circumstances, avoid a man's contract. *Sasportas v. Jennings*, 1 Bay (S. Car.) 470; *Collins v. Westbury*, 2 Bay (S. Car.) 211; 1 Am. Dec. 643. And see *Nelson v. Suddarth*, 1 Hen. & M. (Va.) 350. I do not intend to say that a man can avoid his bond on the ground that it was procured by an illegal distress of goods; but I entertain no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress. There is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrongdoer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction."

In *U. S. v. Huckabee*, 16 Wall. (U. S.) 414, *Clifford, J.*, said: "Duress, it must be admitted, is a good defense to a deed or any other written obligation, if it be proved that the instrument was

## THREATS AND THREATENING LETTERS.

It is well settled that money paid under duress may be recovered back.<sup>1</sup>

c. THREATS WHICH INTERFERE WITH ONE'S FREEDOM OF PERSON—(See also FALSE IMPRISONMENT, vol. 7, p. 661).—False imprisonment is a wrong, akin to the wrongs of assault and battery, and consists in imposing by force or threats an unlawful

procured by such means; nor is it necessary to show, in order to establish such a defense, that actual violence was used, because consent is the very essence of a contract, and if there be compulsion, there is no binding consent, and it is well settled that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient, in legal contemplation, to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. *Brown v. Pierce*, 7 Wall. (U. S.) 214. Unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness. *Chitty on Cont.* 217; 2 *Greenl. on Ev.* 283. Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats, it is said, are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because, in such a case, there is nothing but the form of a contract without the substance. *Foshay v. Ferguson*, 5 Hill (N. Y.) 158; *Central Bank v. Copeland*, 18 Md. 317; 81 Am. Dec. 597; *Eadie v. Slimmon*, 26 N. Y. 12; 82 Am. Dec. 395; 1 *Story Eq. Jur.* (9th ed.) 239. Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances is as utterly without the voluntary consent of the

party menaced as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury. *Baker v. Morton*, 12 Wall. (U. S.) 158."

Where the action was by a married woman to avoid her deed of real estate alleged to have been executed by her under the influence of threats by her husband, a charge to the jury "that to constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone, but if the plaintiff, the wife of Tapley, was induced to execute the deed by the threats of Tapley, her husband, that he would separate from her as her husband and not support her, it is duress, and would avoid the deed," was held correct. *Tapley v. Tapley*, 10 Minn. 448; 88 Am. Dec. 76. See also *Waller v. Parker*, 5 Coldw. (Tenn.) 476; *Mann v. Lewis*, 3 W. Va. 223; 100 Am. Dec. 147; *Mann v. McVey*, 3 W. Va. 238; *Sasportas v. Jennings*, 1 Bay (S. Car.) 470; *Collins v. Westbury*, 2 Bay (S. Car.) 211; 1 Am. Dec. 643; *Bingham v. Sessions*, 14 Miss. 22; *Nelson v. Sudarth*, 1 Hen. & M. (Va.) 350; *Crawford v. Cato*, 22 Ga. 594; *Miller v. Miller*, 68 Pa. St. 493; *Spaids v. Barrett*, 57 Ill. 293; 11 Am. Rep. 10; *Bennett v. Ford*, 47 Ind. 264; *Modlin v. North-Western Turnpike Co.*, 48 Ind. 492; *Hazelrigg v. Donaldson*, 2 Metc. (Ky.) 445; *Burr v. Burton*, 18 Ark. 233; *Cribbs v. Sowle*, 87 Mich. 340; *Meech v. Lee*, 82 Mich. 274; *Bryant v. Peck*, 154 Mass. 460; *Morrison v. Faulkner*, 80 Tex. 128; *Schultz v. Catlin*, 78 Wis. 611; *Stone v. Weiller*, 11 N. Y. Supp. 828; 57 Hun (N. Y.) 588.

1. The payment of an illegal fine is not deemed voluntary; and a person who pays such fine, being under sentence till it is paid, may recover it back. *Devlin's Case*, 12 Ct. of Cl. 266.

A payment is not to be considered compulsory, unless made to emancipate

## THREATS AND THREATENING LETTERS.

restraint upon a man's freedom of locomotion.<sup>1</sup> It is not necessary that actual force or violence should be employed in order to complete the wrong. It is sufficient if the injured party has yielded to unlawful restraint through fear of threatened and impending force or violence.<sup>2</sup>

**3. Considered as Public Wrongs—*a*. THE OFFENSE OF MAKING THREATS.**—Anyone who threatens to take the life of another, or to do him great bodily harm, or to destroy his property, may be required to give a bond to keep the peace. This requirement may be enforced by a justice of the peace when he is cognizant of the facts himself, or when the person threatened makes complaint under oath supported by a sufficient showing that he has just ground for fear.<sup>3</sup>

It seems to be well settled that the making of threats, in words not written, followed by no result more serious than the terror of the person threatened, is not an indictable offense at common law.<sup>4</sup> It is, however, an offense punishable at common law, by fine and imprisonment, to use threatening or abusive language to any judge sitting in court, or to threaten those who are under the immediate protection of the court; as to threaten one's adversary for suing, a counsellor or attorney for being employed against

the person or property from an actual or existing duress imposed upon it by the party to whom the money is paid. *Radick v. Hutchings*, 95 U. S. 210; *Baltimore v. Lefferman*, 4 Gill (Md.) 425; 45 Am. Dec. 145; *Awalt v. Eutaw Building Assoc.*, 34 Md. 435; *Elston v. Chicago*, 40 Ill. 514; 89 Am. Dec. 361; *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556.

1. *Cooley on Torts*, p. 169, citing *Bird v. Jones*, 7 Q. B. 742, 752; *Crowell v. Gleason*, 10 Me. 325.

2. It is the fact of compulsory submission which brings a person into imprisonment; and impending and threatened physical violence, which to all appearance, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not submit, cannot be regarded as arrested until his person is touched; but when he does submit, no such necessity exists. *Brushaber v. Stegeman*, 22 Mich. 267; *Pike v. Hanson*, 9 N. H. 491; *Grainger v. Hill*, 4 Bing. N. Cas. 212.

The submission to the threatened and reasonably to be apprehended force, is no consent to the arrest, detention, or restraint of the freedom of his motions; he is as much imprisoned as

if his person was touched, or force actually used. The imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease, and the means of effecting it are removed. *Johnson v. Tompkins, Baldw.* (U. S.) 601; *Wood v. Lane*, 6 C. & P. 774; 25 E. C. L. 645; *Warner v. Riddiford*, 4 C. B. N. S. 180.

3. 4 Bl. Com. 254, 255; *Bouvier's Inst.*, § 2234, citing *Hawkin's P. C. B.* 1, ch. 53, § 1; 2 *Russell on Crimes* 575; 2 *Chit. Cr. Law*, 841.

4. Whatever was once thought upon the subject, it is now well settled, that mere threats, in words not written, is not an indictable offense at common law. *Redfield, J.*, in *State v. Benedict*, 11 Vt. 236; 34 Am. Dec. 688.

In the above case (*State v. Benedict*, 11 Vt. 236; 34 Am. Dec. 688), it was held, however, under the *Vermont* statute, that threats of great bodily harm, accompanied by acts showing a formed intention to put them in execution, if intended to put the person threatened in fear of their execution, and if they have that effect, and are calculated to produce that effect upon a person of ordinary firmness, constitute a breach of the public peace, which is punishable by indictment.



## THREATS AND THREATENING LETTERS.

one, a juror for his verdict, or a ministerial officer of the court for properly doing his duty.<sup>1</sup>

Forcing a person, by means of threats, to do an act which is likely to produce his death, and which does produce it, is murder,<sup>2</sup> but the act done by the deceased which occasions his death must be done in order to avoid the immediate violence of the prisoner, and the apprehension of such violence must be well grounded from the circumstances by which the deceased was surrounded.<sup>3</sup>

b. EXTORTION BY MEANS OF THREATS.—This offense consists in maliciously threatening to accuse one of an offense, or to injure his person or property, with intent to extort money or pecuniary advantage, or with intent to compel him to do an act against his will;<sup>4</sup> but the offense does not include cases where the person threatened owes the person making the threat, the amount demanded.<sup>5</sup> In some jurisdictions, however, it appears that extortion and pecuniary advantage are not necessary ingredients of the crime.<sup>6</sup>

Threats to accuse of crime for the purpose of extorting money, are offenses for which indictment will lie at common law;<sup>7</sup> and the extortion of money by threatening to accuse one of the infamous crime against nature, is held to be robbery.<sup>8</sup>

1. 4 Bl. Com. 126; 2 Chit. Cr. Law, 149; Arch. Crim. Prac. & Pl. 1062.

2. 1 Russell on Crimes (9th ed.), p. 676; Rex v. Evans, O. B. Sept. 1812, Ms., Bayley, J.; Rex v. Hickman, 5 C. & P. 328; 1 Bishop Cr. Law, § 562; U. S. v. Freeman, 4 Mason. (U. S.) 505.

3. 1 Russell on Crimes (9th ed.), p. 677; Reg. v. Pitts, C. & M. 284.

In Reg. v. Pitts, C. & M. 284, Erskine, J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or mind; and it then became the guilty act of him who compelled the deceased to take the step.

4. Rapalje on Larceny and Kindred Offenses, § 485; State v. Bruce, 24 Me. 71.

An indictment charging the defendant with verbally threatening that "it would not be good" for the prosecutrix to institute bastardy proceedings against him, with intent to compel her against her will not to institute such proceedings, charges no crime under the Iowa Code, section 3871. State v. McGlasson (Iowa, 1893), 56 N. W. Rep. 293.

5. People v. Griffin, 2 Barb. (N. Y.) 427.

A threat to accuse another of crime, if made for the purpose of inducing payment of a just debt, is not within the statute of blackmailing. State v. Hammond, 80 Ind. 80; 41 Am. Rep. 791.

6. Extortion and pecuniary advantage are not necessary ingredients in the offense of maliciously threatening to do an injury to another, with intent thereby to compel the person threatened to do an act against his will, under section 4213 of the Revision. State v. Young, 26 Iowa 122. See also State v. Benedict, 11 Vt. 236; 34 Am. Dec. 688; Pickens v. State, 9 Tex. App. 270.

7. Rex v. Southerton, 6 East 126.

It appears that according to the principles laid down in this case (Rex v. Southerton, 6 East 126), an indictment will lie, at common law, for extorting money by actual duress, or by such threats as common firmness is not capable of resisting. 3 Russell on Crimes 178.

If a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will lie. Holt, C. J., in Reg. v. Woodward, 11 Mod. 137.

8. Jones v. alias Evan's Case, 1 Leach 139; 2 East P. C., ch. 16, § 130, p. 714; Donnelly's Case, 1 Leach 193; 2 East

## THREATS AND THREATENING LETTERS.

There are now statutes in *England*,<sup>1</sup> and most, if not all, of the *United States*, defining the offense of extortion by threats, and providing the punishment therefor.<sup>2</sup>

4. **Considered in Connection with Other Offenses**—*a. EVIDENCE OF THREATS IN TRIALS FOR HOMICIDE AND ASSAULT*—(1) *Former Threats by the Accused*—(See also HOMICIDE, vol. 9, p. 529).—In trials for murder, threats made by both the accused and the deceased are admissible in evidence where they are part of the *res gestæ*.

Former threats by the accused, are admissible to show malice and deliberation in cases of homicide; and are also admissible in trials for minor offenses, such as assault, when the *intent* is a material element in the offense.<sup>3</sup>

(2) *Former Threats by the Deceased*—(See also HOMICIDE, vol. 9, p. 529).—Former threats by the deceased against the accused may generally be given in evidence, as tending to show defendant's motive, when they were communicated to him before the killing;<sup>4</sup> and evidence of former threats by the deceased against

P. C., ch. 16, § 130, p. 728; Hickman's Case, 1 Leach 278, 2 East P. C., ch. 16, § 130, p. 728.

In Brown's Case, 2 East P. C., ch. 16, § 130, p. 715, Harold's Case, *alias* Hut-ton's Case, is mentioned as one in which the prisoner was convicted of a similar robbery.

1. 24, 25 Vict. ch. 96, §§ 44, 45, 46, 47, 49 S. W., and 24, 25 Vict., ch. 97, § 50 S. W.; Stephen's Dig. Cr. Law, p. 250; 3 Russell on Crimes, p. 177 *et seq.*

2. An indictment for threatening to accuse one of committing a crime, need not set out the exact words of the defendant. Com. v. Philpot, 130 Mass. 59.

A false statement that a warrant is issued to arrest a person for a crime, and that it will be served unless money is paid, is a threat to accuse a person of crime. Com. v. Murphy, 12 Allen (Mass.) 449.

Threatening to enter a complaint for a crime is a threat to accuse. Com. v. Carpenter, 108 Mass. 15.

It is immaterial whether the threat did or did not produce the desired effect. State v. Bruce, 24 Me. 71.

Under the *South Carolina* Act of 1791, it is swindling to obtain horses from an ignorant man by threats of a criminal prosecution, and also by threats of his life. State v. Vaughn, 1 Bay (S. Car.) 282.

For the necessary averments in an indictment for threatening to accuse of crime under the Penal Code of *Ohio*, see Elliott v. State, 36 Ohio St. 318.

Obtaining money from one under a threat to arrest, with the pretense that the threatener is a marshal, is sufficient to justify a conviction of fraudulently obtaining money by threats to do an illegal act. Williams v. State, 13 Tex. App. 285.

3. See HOMICIDE—*Acts, Threats and Declarations by Defendant*, vol. 9, p. 686; and in addition to the cases there cited, see the following: Pulliam v. State, 88 Ala. 1; Lewis v. State, 88 Ala. 11; Griffin v. State, 90 Ala. 596; Pate v. State, 94 Ala. 14; Babcock v. People, 13 Colo. 515; People v. Odell, 1 Dak. 197; Hodge v. State, 26 Fla. 11; State v. Sullivan, 51 Iowa 142; State v. Oliver, 43 La. Ann. 1003; Com. v. Holmes, 157 Mass. 233; People v. Gooch, 82 Mich. 22; State v. Harrod, 102 Mo. 590; State v. Crabtree (Mo. 1892), 20 S. W. Rep. 7; State v. Campbell, 35 S. Car. 28; Caldwell v. State (Tex. 1890), 14 S. W. Rep. 122; Frizzell v. State, 30 Tex. App. 42; State v. Henderson (Oregon, 1893), 32 Pac. Rep. 1030; State v. Bradley, 64 Vt. 466; Snodgrass v. Com. (Va. 1893), 17 S. E. Rep. 238; Painter v. People (Ill. 1893), 35 N. E. Rep. 64.

4. See HOMICIDE—*Acts, Threats and Declarations by Deceased*, vol. 9, p. 672, and in addition to the cases there cited, see the following: Brown v. State, 55 Ark. 593; King v. State, 55 Ark. 604; Hays v. Com. (Ky. 1890), 14 S. W. Rep. 833; State v. Jackson, 44 La. Ann. 160; Garner v. State, 28 Fla.

## THREATS AND THREATENING LETTERS.

the accused, even though they were not communicated to the defendant prior to the killing, may be received on behalf of the defendant, when there is a doubt as to who was the aggressor, and some evidence has been given which tends to show that the act was done in self-defense.<sup>1</sup>

b. CONSTRUCTIVE VIOLENCE IN BURGLARY AND ROBBERY—(See also BURGLARY, vol. 2, p. 659; ROBBERY, vol. 21, p. 414).—On trial for burglary, if it appears that the offender has compelled a person, by threats, to open his door, or has induced him to do so to repel attempted or threatened violence on his premises, it will amount to a burglarious breaking, if the offender then enters the house with burglarious intent.<sup>2</sup>

Robbery may be committed without actual violence, by exciting fear or terror, which is constructive violence. This may be

113; Sparks v. Com., 89 Ky. 644; State v. Harrod, 102 Mo. 590; State v. Wyse, 33 S. Car. 582; Ball v. State, 29 Tex. App. 107; Knowles v. State, 31 Tex. Cr. Rep. 383; State v. Evans, 33 W. Va. 417.

1. See HOMICIDE—*Acts, Threats and Declarations by Deceased*, vol. 9, p. 672, and in addition to the cases there cited, see the following: Babcock v. People, 13 Colo. 515; Wilson v. State, 30 Fla. 234; Levy v. State, 28 Tex. App. 203; 19 Am. St. Rep. 826; State v. Evans, 33 W. Va. 417; Pittman v. State (Ga. 1893), 17 S. E. Rep. 856; May v. State (Ga. 1893), 17 S. E. Rep. 108; Wilson v. State, 30 Fla. 234; State v. Harris (45 La. Ann.), 13 So. Rep. 199.

A general indefinite threat made by the deceased the night before he was killed, not mentioning the defendant and not shown to have reference to him, is not admissible as evidence for the defendant, who shot and killed him the next evening while gambling. King v. State, 89 Ala. 146.

Where there is positive and uncontradicted evidence by several witnesses that the prisoner made the attack, a previous uncommunicated threat of the deceased is not admissible in evidence; there being no evidence that the deceased was armed or made an attack. Vaughn v. State, 88 Ga. 731. See also Wilson v. State, 30 Fla. 234; Gardner v. State, 90 Ga. 310.

Where the prisoner had invited the deceased out to fight, and it was not shown that any threat or hostile demonstration had been made by the deceased against the defendant on the immediate occasion of the homicide, it was held that previous uncommunicated threats by the deceased were not

admissible in evidence. State v. Wilson, 43 La. Ann. 840.

And where the proof showed that the conflict was provoked by the accused and there was no foundation laid by the introduction of testimony that the deceased had made any hostile demonstration against the accused, it was held that evidence of threats by the deceased, uncommunicated to the accused, was not admissible. State v. Walsh, 44 La. Ann. 1122. See also State v. Kenyon (R. I. 1893), 26 Atl. Rep. 199; State v. Carter (45 La. Ann.), 14 So. Rep. 30.

2. 1 Hale 553; 3 Chit. Cr. L. 1106; 2 Russell on Crimes (9th ed.), p. 8; 1 Whart. Cr. L. (8th ed.), § 765; Crompt. 32 (a); 2 East P. C., ch. 15, § 2, p. 486.

Obtaining an entrance into the house, by any threat or artifice used for that purpose, or by collusion with any person in the house, is a burglarious breaking. Stephen's Dig. Cr. L., p. 254.

"Under our law as it now is, and in fact always has been, there are three modes by which the offense of burglary may be committed, which are determined and characterized by the means used, to wit: 1st, by force; 2d, by threats; and 3d, by fraud." Conolly v. State, 2 Tex. App. 412.

"Two remarks may be made on all the adjudged cases of constructive breaking: 1. There is no case, when the entry was not made immediately after the fastening was removed, or so soon thereafter as not to allow a reasonable time for shutting the door and replacing the fastening. 2. There is no case, when the artifice resorted to was not apparently and expressly for the purpose of getting the fastening removed, whereby to gain admittance

## THREATS AND THREATENING LETTERS.

done by threatening injury to one's person, property, or reputation. The fear of injury to the *person* is that which is commonly excited on the commission of this offense; and where property is obtained by this means, it will amount to robbery, though there be no great degree of terror or affright in the party robbed.<sup>1</sup>

The cases in which the offense of robbery has been committed by means of a fear of injury to the property of the party, are principally those in which the terror excited was of the probable outrages of a mob;<sup>2</sup> and where the circumstances were such as to induce a man to part with his property against his will, actual fear will be presumed.<sup>3</sup> Robbery may also be committed by obtaining property by threats of injury to one's character.

The cases of robbery in which the property has been obtained by means of a fear being excited of injury to the *character* of the party robbed, appear to be all of one description, namely, where property was obtained by threats to accuse the owner of the crime against nature.<sup>4</sup>

c. CONFESSIONS FORCED BY THREATS.—In criminal prosecutions, all confessions forced by threats of violence are inadmissible in evidence. Hence, a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.<sup>5</sup>

II. THREATENING LETTERS.—1. Definition.—A threatening letter is a letter which contains menaces or threats of destruction or injury to the person, property, or reputation of him to whom it is sent—especially when it is sent for the purpose of extorting money or other property from the recipient thereof.<sup>6</sup>

without breaking it, and so 'defraud the law of its justice by an evasion.'" 2 Arch. Cr. Prac. & Pl., p. 1082.

1. Fost. 128; 4 Bl. Com. 243, 244; U. S. v. Wood, 3 Wash. (U. S.) 440; Long v. State, 12 Ga. 203; Hughes' Case, 1 Lew. 301; Bayley, J., 2 East P. C., ch. 16, § 128, p. 711. And see ROBBERY—*Fear of Injury to the Person*, vol. 21, p. 422.

2. Rex v. Taplin, 2 East P. C. 712; Rex v. Brown, 2 East P. C. 731; Rex v. Spencer, 2 East P. C. 712; Rex v. Astley, 2 East P. C. 729; 2 Russell on Crimes (9th ed.) 115-117.

3. Com. v. Snelling, 4 Binn. (Pa.) 379; Rex v. Donally, 1 Leach 197; 2 East P. C. 713. See also ROBBERY—*Fear of Injury to Property*, vol. 21, p. 422.

4. Arch. Cr. Prac. & Pl. 1492; Britt v. State, 7 Humph. (Tenn.) 45. See ROBBERY—*Fear of Injury to Character*, vol. 21, p. 423.

5. Warwickshall's Case, 1 Leech 298,

per Eyre, C. B.; Runnels v. State, 28 Ark. 121; State v. Grant, 22 Me. 171; Com. v. Chabcock, 1 Mass. 144; Com. v. Knapp, 9 Pick. (Mass.) 496; 20 Am. Dec. 491; People v. Ward, 15 Wend. (N. Y.) 231; Moore v. Com., 2 Leigh (Va.) 701; Smith v. Com., 10 Gratt. (Va.) 734; Earp v. State, 55 Ga. 136; Boyd v. State, 2 Humph. (Tenn.) 39; Ann v. State, 11 Humph. (Tenn.) 159; Self v. State, 6 Baxt. (Tenn.) 244; Hector v. State, 2 Mo. 135; Garrard v. State, 50 Miss. 147; Territory v. McCline, 1 Mont. 394; Berry v. U. S., 2 Colo. 186; State v. Phelps, 11 Vt. 116; 34 Am. Dec. 672; Brown v. People, 91 Ill. 506; Rector v. Com., 80 Ky. 468. See also CONFESSIONS, vol. 3, p. 464.

6. Letters containing threats, especially those designed to extort money or to obtain other property, by menaces; blackmailing letters. Webster.

A threatening letter is a letter sent to a person threatening to accuse him of a crime, with a view to extort

## THREATS AND THREATENING LETTERS.

**2. The Offense of Sending Threatening Letters.**—It is said, that the dispersing of *bills of menace* threatening destruction to the lives or properties of those to whom they are addressed, for the purpose of extorting money, is, at common law, a high misdemeanor, punishable by fine and imprisonment.<sup>1</sup> But it is held that a person is not indictable at common law for sending a threatening letter for the purpose of extorting money, unless the threat is of such a nature as is calculated to overcome a firm and prudent man.<sup>2</sup>

The offense is now defined and punishable by statute in *England*; and in most, if not all, of the *United States*. Whether or not the offense includes cases where an attempt has been made to force the payment of money actually due the person sending the letter, has been variously decided in different jurisdictions.<sup>3</sup>

money, or other property. Such letters may also threaten to libel or to kill the person addressed. *Anderson's L. Dict.*

Sending threatening letters, is the name of the offense of sending letters containing threats of the kind recognized by statute as criminal. *Black's L. Dict.*

The offense of sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. 4 *Bl. Com.* 137.

1. 1 *Hawk. P. C.*, ch. 53, § 1.

There is a precedent of an indictment at common law, against the attorney of a plaintiff in a case for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury, unless the defendant gave up the benefit of the verdict. 2 *Chit. Cr. L.* 149.

2. "To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now, the threat used by the defendant, at its utmost extent, was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not, and ought not, to have resisted. . . . Then what authority is there for considering these as offenses at common law? The principal case relied on is that of *Reg. v. Woodward*, 11 *Mod.* 137, which was where the defendants, having another

man in their actual custody at the time, threatened to carry him to goal, upon a charge of perjury, and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. . . . But this is a case of threatening and not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money." *Lord Ellenborough, C. J.*, in *Rex v. Southerton*, 6 *East* 126.

Even to request one to post up a threatening notice, is an indictable misdemeanor. *Reg. v. Darcy*, 1 *Crawf. & Dix C. C.* 33.

3. An instruction to the jury that to maintain the indictment, it was not essential that the defendant was endeavoring to obtain money that was not due him, and that, if he endeavored to obtain money that was justly his due in this way, he would be guilty, was held correct in *Com. v. Coolidge*, 128 *Mass.* 55.

The *Indiana* statute against black-

## THREATS AND THREATENING LETTERS.

It has been held that it is not a crime to send a threatening letter demanding just compensation for property maliciously destroyed.<sup>1</sup>

Whether or not, in letters threatening to accuse of crime, the threatened accusation must be in a judicial tribunal, does not seem to be well settled, but the weight of authority appears to be in the affirmative.<sup>2</sup> It is not necessary that the writer of the letter shall be the one threatening to do the wrongful act, or that the threat shall be aimed at the person to whom the letter is addressed,<sup>3</sup> but it is necessary that the threat be so made as to operate on the mind of the party whom it is expected to influence, in such a manner as will tend to take away the voluntary character of his acts.<sup>4</sup>

mailing (Rev. St. 1881, § 1926) does not embrace the case of a threat to accuse of crime, made by letter, for the purpose of inducing the payment of money justly due; and where the letter claims that it is a just debt which is demanded, the indictment will be bad, unless it traverse that fact. *State v. Hammond*, 80 Ind. 80; 41 Am. Rep. 791.

The statute against sending threatening letters, with a view of extorting money, etc., is intended to embrace only cases where the intent is to obtain that which, in justice and equity, the writer of the letter is not entitled to receive. It does not extend to cases where the person threatened actually owes the writer of the letter the sum claimed by him. To support an indictment under that statute, the end, as well as the means employed to obtain it, must be wrongful and unlawful. *People v. Griffin*, 2 Barb. (N. Y.) 427.

1. It is not a crime to demand reasonable compensation for property maliciously destroyed, and at the same time, to threaten to accuse the offender of the crime of destroying it. *Mann v. State*, 47 Ohio St. 556.

2. In *People v. Brame*, 30 Mich. 459, the judges were equally divided on this question. *Graves, C. J.*, and *Campbell, J.*, held, that it must not be an accusing by way of railing or slander, or by way of bearing witness under a separate and distinct accusation made wholly by others, but the institution, or participation in the institution, of a criminal charge before some one held out as competent to entertain such a charge in lawful course; citing *State v. South*, 5 Rich. (S. Car.) 489; *State v. Nates*, 3 Hill (S. Car.) 200; *Stephenson v. Higginson*, 3 H. L. 638; *U. S. v. Freeman*, 3 How. (U. S.) 556; *Ex p. Prideaux*, 3 Myl. & C. 327, 332;

*Com. v. Murphy*, 12 Allen (Mass.) 449; *State v. Linthicum*, 68 Mo. 66.

*Cooley, J.* (Christiancy, J., concurring with him), said: "I have not been able to concur in the view that the threat of an accusation otherwise than in court, would not be within the statute. If such be the case, the statute needs amendment, for a threat of any public accusation of crime is as much within the reason of the statute, as a threat of a formal complaint." Citing *Robinson's Case*, 2 My. & Rob. 14; 2 Lew. C. C. 273; *Rosc. Cr. Ev.* 910.

3. To make out the crime of blackmailing, under the provision of the Penal Code, defining that offense (section 558), it is not necessary to show that the threat was against the person to whom the letter was directed, or that the writer was the one threatening to do the wrongful act. The offense may be committed by sending a letter conveying a threat of some other person, providing it is sent for the unlawful purpose mentioned in said provision. Nor is it necessary to constitute the crime, that the threat did, or should be calculated to inspire fear, and no precise form of words is required to convey the threat. It may be done by innuendo or suggestion. *People v. Thompson*, 97 N. Y. 313.

4. "It may be conceded that a threat, whether it be verbal, written, or printed, to be within the statute, need not be made personally to the one threatened. In order to be a 'threat,' it must be so made, and under such circumstances, as to operate, to some extent at least, on the mind of the one whom it is expected to influence. If it does not do this, how can it be said to take away the voluntary character of his acts?" *State v. Brownlee*, 84 Iowa 473.

## THREATS AND THREATENING LETTERS.

It is an offense to send a letter threatening to tar and feather one unless he quits the city.<sup>1</sup> The right to take and prosecute an appeal, is property within the meaning of a statute aimed at the extortion of property by means of threats.<sup>2</sup> But credit and reputation are not property within the meaning of such a statute.<sup>3</sup>

Threatening to keep the members of a labor union from returning to work, is a threat to do injury to one's property, and obtaining money from the employer under such threat, is extortion.<sup>4</sup> So also, it is a criminal offense for a number of men, banded together for the purpose, having their persons covered with threatening placards containing the word "boycott," to parade up and down in front of one's door, distributing printed circulars and employing threats and intimidations for the purpose of keeping the public away from the alleged wrongdoer, and thus injuring his business.<sup>5</sup>

It is an offense for one who knows the contents thereof, to assist in forwarding a letter threatening to accuse one of crime for the purpose of extorting money from him.<sup>6</sup>

If it is doubtful whether or not the letter contains the threat alleged, the intent is a question for the jury.<sup>7</sup>

It is a violation of the postal laws of the *United States*, to send through the mails a postal card upon which, or any other mailable matter upon the outside cover or wrapper of which, there is written or printed any threatening language.<sup>8</sup>

1. *State v. Compton*, 77 Wis. 460.

2. The right to take and prosecute an appeal, is property within the meaning of section 519 of the Penal Code; and a threat made for the purpose of inducing an appellant to dismiss an appeal, is a threat made with intent to extort property from another. It is a crime to send or deliver a letter containing such threats with intent to extort property from another, whether such letter be subscribed or not. *People v. Cadman*, 57 Cal. 562.

3. The sending of a letter threatening to publish a person's name in a "deadbeat" book, the effect of which will be ruinous to his credit, etc., is not an offense under section 1526, of the Revised Statutes. Credit and reputation are not property within the meaning of this statute. *State v. Barr*, 28 Mo. App. 84.

4. *People v. Barondess*, 133 N. Y. 649. (Appeal from judgment of the general term of the supreme court in the first judicial department, which reversed a judgment of the court of oyer and terminer, entered upon a verdict convicting defendant of the crime of extortion. Agreed to reverse and affirm judgment of conviction on opin-

ion of Daniels, J., below.) See opinion of Daniels, J. (dissenting), *People v. Barondess*, 61 Hun (N. Y.) 581.

5. *People v. Wilzig*, 4 N. Y. Cr. Rep. 403.

"If the attitude, conduct, and method of these men is such as to deter any of complainant's customers, even the most weak and timid, from entering his place of business, or to inspire any part of the general public with the sense of danger in ignoring their appeals, there is intimidation within the meaning of the law. The procuring of money from another, with his consent, obtained by fear induced by a threat to do or continue an unlawful injury to his property, *e. g.*, to continue a 'boycott,' constitutes the crime of extortion under sections 552, 553, Penal Code." *People v. Wilzig*, 4 N. Y. Cr. Rep. 403.

6. *People v. Wightman*, 104 N. Y. 598; 43 Hun (N. Y.) 358.

7. *Rex v. Girdwood*, 1 Leach 142; *Rex v. Abgood*, 2 C. & P. 436; *Com. v. Dorus*, 108 Mass. 488; *Rosc. Cr. Ev.* 879; *State v. Stewart*, 90 Mo. 507.

8. It was held an offense under the Act of Congress of September 26th, 1888 (25 St. U. S. 496), to send a postal card

## THREATS AND THREATENING LETTERS.

3. **The Indictment—Necessary Averments.**—The indictment must aver the sending of the letter and the person to whom it was sent;<sup>1</sup> who was the person threatened, and from whom the money or other property was demanded;<sup>2</sup> must properly describe the property demanded or obtained;<sup>3</sup> must aver the guilty knowledge of the sender of the letter;<sup>4</sup> the malicious intent of the sender to extort money or other property, or to do an unlawful act;<sup>5</sup> and the nature of the threat contained in the letter;<sup>6</sup> and the letter itself should be set out *in hæc verba* in the indictment, except in jurisdictions where that necessity has been removed by statute.<sup>7</sup>

4. **Venue.**—In an indictment for sending a threatening letter, the venue may be laid in the county where the letter was received, or in the county from which it was sent.<sup>8</sup>

5. **Evidence**—*a.* **PROOF OF THE SENDING.**—There must be some evidence of the *sending* of the letter, in order to sustain an indictment for sending a threatening letter. Proof that it is in the prisoner's handwriting, is insufficient.<sup>9</sup> Proof that he dropped a letter, directed to the prosecutor, into the prosecutor's premises, is sufficient.<sup>10</sup> So, proof that the accused left a letter at a gate, in the road near the prosecutor's house, where it was found and handed to the prosecutor, was held sufficient to go to

on which was written the following: "You owe us \$1.80, long past due. We have called several times for the amount. If it is not paid at once, we shall place the same with our lawyer for collection."

U. S. v. Bayle, 40 Fed. Rep. 664.

1. Reg. v. Jones, 1 Den. C. C. 218; 2 C. & K. 398.

2. Rex v. Dunkley, R. & M. C. C. 90.

3. Major's case, 2 Leach 772; 2 East P. C., ch. 23, § 3, p. 1118.

4. Girdwood's Case, 1 Leach 142; 2 East P. C., ch. 23, § 4, p. 1120.

Under a statute defining the offense of knowingly sending or delivering a threatening letter, it was held that an information charging that the defendant knowingly threatened, etc., by sending a threatening letter, did not charge the offense defined by the statute. Castle v. State, 23 Tex. App. 286.

5. Landa v. State, 26 Tex. App. 580.

An indictment for threatening to accuse another of a crime, "with a view and with the intent to extort money" from him, sufficiently avers that the intent was to extort money by the threat. Com. v. Moulton, 108 Mass. 307; Com. v. Dorus, 108 Mass. 488.

Where the letter is set out in the indictment, and it appears by necessary implication that the defendant threatened to indict the prosecutor with intent to extort money from him, the

criminal offense is sufficiently charged. State v. Harper, 94 N. Car. 936.

6. The character of the threat contained in the letter, should be set out in the indictment, that it may be seen whether a substantial threat was made. People v. Jones, 62 Mich. 304.

But the indictment need not set out the exact words used by the defendant. Com. v. Philpot, 130 Mass. 59.

7. Lloyd's Case, 2 East P. C., ch. 23, § 5, p. 1112; Hunter's Case, 2 Leach 631; Tynes v. State, 17 Tex. App. 123.

See State v. Stewart, 90 Mo. 507, wherein the common law, as laid down in the above cases, is recognized; but it is held that the statutes of *Mis-souri* have made it unnecessary to set out the letter *in hæc verba*.

8. Girdwood's Case, 1 Leach 142; 2 East P. C. 1120; Esser's Case, 2 East P. C. 1125; People v. Griffin, 2 Barb. (N. Y.) 427; Com. v. Blanding, 3 Pick. (Mass.) 304; 15 Am. Dec. 214; People v. Rathbun, 21 Wend. (N. Y.) 533.

But in Landa v. State, 26 Tex. App. 580, it was held that the venue of the offense of sending a threatening letter for the purpose of extorting money, should be in the county from which the letter was sent, and not in the county to which it was sent.

9. Rex v. Howe, 7 C. & P. 268.

10. Rex v. Wagstaff, R. & R. C. C. 398.



the jury on the question of sending.<sup>1</sup> So, proof that the prisoner sent the letter to another person, with the intent that such person should deliver it to the prosecutor, is sufficient.<sup>2</sup>

*b.* EVIDENCE EXPLANATORY OF THE LETTER.—The sending of the letter being proved, other letters, written by the prisoner to the prosecutor, are admissible in evidence to explain the letter upon which the indictment is found.<sup>3</sup> So, too, parol evidence is admissible to explain any obscurity or ambiguity in the letter.<sup>4</sup>

*c.* OF THE INTENT.—The intent to extort, or to do some other unlawful act, where the statute covers ground broader than that of mere extortion, must be proved. This generally appears upon the face of the letter itself; but if not, such facts as will justify the jury in finding such unlawful intent must be proved. Evidence of the truth of the threatened accusation is not admissible in behalf of the defendant,<sup>5</sup> but evidence tending to show that the letter was sent as a practical joke is admissible in defense.<sup>6</sup>

**THREE STORY.**—See note 7.

**THRESHING MACHINE.**—See note 8.

**THROAT.**—See note 9.

**THROUGH.**—See note 10.

1. *Reg. v. Grimwade*, 1 C. & K. 592; 47 E. C. L. 592.

2. *Rex v. Paddle*, R. & R. C. C. 484; *Larison v. State*, 49 N. J. L. 256; 60 Am. Rep. 606.

3. *Robinson's Case*, 2 Leach 749; 2 East P. C., ch. 23, § 2, p. 1110; *Reg. v. Ward*, 10 Cox C. C. 42.

4. *Rex v. Tucker*, R. & M. C. C. 134; *Kistler v. State*, 50 Ind. 229; *Mot-singer v. State*, 123 Ind. 498; *People v. Gillian*, 50 Hun (N. Y.) 35; *State v. Patterson*, 68 Me. 473; *State v. Linthicum*, 68 Mo. 66.

5. *Com. v. Buckley*, 148 Mass. 27.

6. *Norris v. State*, 95 Ind. 73.

7. Where property insured was described in the policy as "contained in three-story granite building," it was held that the phrase might designate a building with a granite front only, and three stories high in the front and rear, though only one story high in the middle. *Medina v. Builders' Mut. F. Ins. Co.*, 120 Mass. 225.

8. A threshing machine in *Nebraska* has been held to include the horsepower by means of which the separator is propelled. *Osborne v. McAllister*, 15 Neb. 428.

9. *Indictment.*—In *Rex v. Edwards*, 6 C. & P. 401; 25 E. C. L. 458, where an indictment for murder charged that

the offense had been committed by cutting the "throat" of the victim, it was held that the word "throat" was not to be confined to that portion of the neck scientifically so called.

"Throat Disease."—See DISEASE, vol. 5, p. 683.

10. The word "through," in an act providing that no road, street, etc., shall be laid out "through" certain grounds, was held to mean over. *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 Ill. 147. See also *Roderick v. Aston Local Board*, 5 Ch. Div. 328.

Where a right of way is granted "in, through and along" a particular way, the grantee is not justified in making a converse road across the same. *Senhouse v. Christian*, 1 T. R. 560. Compare *Wimbledon*, etc., Common Conservators *v. Dixon*, 1 Ch. Div. 362.

**Through the Elevators.**—In *Gill v. Cacy*, 49 Md. 243, it was held that when grain had been removed from vessels and taken up into elevators, and thence let down into the hoppers, and after being weighed, put into the bins of the purchasers, it had been carried "through" the elevators in the contemplation of an act exempting grain carried to the city "through" elevators from being weighed by the grain weighers of the state.

**THRUST.**—To push or drive with force, as to force anything with the hand or foot, or with an instrument; to drive, to force, to impel.<sup>1</sup>

**TICKET**—(See also TICKETS AND FARES).—See note 2.

**TICKETS AND FARES.**—(See also CARRIERS OF PASSENGERS, vol. 2, p. 738; RAILROADS, vol. 19, p. 775; SLEEPING CARS, vol. 22, p. 796; STREET RAILWAYS, vol. 23, p. 940; TIME TABLES.)

- I. Nature of Ticket, 1074.
  1. *Voucher and not Contract—Journey to be Pursued*, 1074.
  2. *As Evidence of the Passenger's Rights*, 1076.
- II. Rates of Fare—Power to Regulate, 1078.
- III. Who are Passengers, 1081.
- IV. Kinds of Tickets, 1085.
  1. *Through (Over Connecting Lines)*, 1085.
    - a. *Extent of Liability*, 1085.
    - b. *Partnership Arrangement*, 1087.
    - c. *Ultra Vires*, 1088.
  2. *Commutation*, 1088.
  3. *Non-transferable*, 1091.
  4. *Excursion*, 1091.
  5. *Limited*, 1093.
  6. *Scalpers*, 1095.
- V. Passes, 1096.
  1. *Generally*, 1096.
  2. *Condition Exempting Carrier from Liability*, 1097.
  3. *Interstate Commerce Act*, 1101.
  4. *Drovers' Passes*, 1102.
- VI. Fare Paid on Train, 1104.
- VII. Stop-over Privileges, 1109.
- VIII. Carrying Beyond Destination, 1112.
  1. *Duty of Carrier*, 1112.
  2. *Duty of Passenger*, 1115.
  3. *Measure of Recovery—Contributory Negligence, etc.*, 1116.
- IX. Exhibition and Surrender of Ticket, 1120.

**I. NATURE OF TICKET—1. Voucher and not Contract—Journey to be Pursued.**—The settled opinion is that a passage ticket, in the ordinary form, is merely a voucher, token or receipt, adopted for

**Through Grain.**—The words "through grain," in a contract between a railroad and an elevator company, providing that the elevator company should receive and discharge for the railroad "all through grain" at one cent a bushel, and that the elevator should have the handling of all "through grain" at that price per bushel, were held to mean all grain consigned through the place of terminus of the road to some point beyond by the terms of shipment, and was not to be confined to grain shipped through to the end of line of said company. *Richmond v. Dubuque, etc.*, R. Co., 26 Iowa 191.

**Through His Intervention.**—In *Mansell v. Clements*, L. R., 9 C. P. 139, plaintiffs, house agents, were instructed by defendant to offer a leasehold house for sale, for which they were to receive a certain commission if they found a purchaser, but one guinea only for their trouble if the house were sold "without their intervention." A purchaser called at plaintiff's office and

obtained a card to view the house, but thinking the price too high, declined to purchase. He afterwards resumed negotiations through a friend of defendant and purchased for a much less sum. It was held, however, that the purchase had been sold "through the intervention" of the agent, and that he was entitled to the commission.

1. *State v. Lowery*, 33 La. Ann. 1224. In this case it was held that under section 790 of the Rev. Sts. of Louisiana, "thrusting" a person may well include "thrusting" with an iron bolt, rod, or pin, whether the point be sharp or not.

2. In *Allaire v. Howell Works Co.*, 14 N. J. L. 21, it was held that the word "ticket" has no legal or other fixed and determinate meaning, and that where the legislature passed an act to prohibit the circulation or passing of "tickets," the meaning of the word, or what kind of tickets was meant, must be gathered from the terms employed in the act.

convenience, to show that the passenger has paid his fare from one place to another, and does not constitute the contract of carriage, although it may and often does, have upon it some condition or limitation which enters into and forms a part of the contract; accordingly it is admissible to prove by parol evidence, the terms of the contract in fact entered into between the carrier and the passenger.<sup>1</sup>

A passenger holding a through ticket, indicating no particular route, is bound to pursue the usual and direct route from the place of starting to the place of destination, and is not entitled to go by a circuitous route from one point to another between those places.<sup>2</sup>

And a ticket calling for passage in one direction is not good for a reverse trip; and the fact that the holder has been permitted upon former occasions, to make such reverse trip upon such tickets, and a conductor on another train at another time gave

1. *Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457; *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647; 3 Am. & Eng. R. Cas. 246; 38 Am. Rep. 617; *Frank v. Ingalls*, 41 Ohio St. 560; 21 Am. & Eng. R. Cas. 277; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 28 Am. & Eng. R. Cas. 148; 58 Am. Rep. 135; *Logan v. Hannibal, etc., R. Co.*, 77 Mo. 663; 12 Am. & Eng. R. Cas. 141; *Johnson v. Concord R. Co.*, 46 N. H. 213; 88 Am. Dec. 199; *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596; 13 Am. Rep. 97; *Hibbard v. New York Cent. R. Co.*, 15 N. Y. 455; *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469; *Williams v. Vanderbilt*, 28 N. Y. 217; 84 Am. Dec. 333; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Mauritz v. New York, etc., R. Co.*, 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543; *Elmore v. Sands*, 54 N. Y. 512; 13 Am. Rep. 617; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298; 18 Am. Rep. 220. The English courts seem to lay down a doctrine contrary to that of the text. *Henderson v. Stevenson*, L. R., 2 H. L. Sc. App. 470; *Great Western R. Co. v. Pocock*, 28 Wkly. Rep. 49; *Burke v. South Eastern R. Co.*, 5 C. P. Div. 1. In *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130; 52 Am. Rep. 620, a passenger's ticket is held to be both a receipt and a contract—the acknowledged

ment of the receipt of the passenger's fare, and of the obligation to carry him for the purpose and upon the terms specified.

**Passenger Ticket and Bill of Lading Distinguished.**—A distinction is taken between the case of a shipper receiving a bill of lading, on account of his shipment, and a traveler receiving a passage ticket for the carriage of himself and baggage over the carrier's road. In the one case the shipper is supposed to understand and know that, according to commercial usage, a bill of lading is essential to the regular and safe transportation of property, which is shipped and carried as freight, and that of necessity, it must constitute the contract of shipment and carriage. In the other case, the ticket is ordinarily regarded as a mere voucher for the money paid for it; a token or evidence of the purchaser's right to be carried, or have his baggage carried, a certain distance. *Mauritz v. New York, etc., R. Co.*, 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286.

**Not Negotiable—Antecedent Equities.**—A railroad ticket is not negotiable so as to be freed of antecedent equities. Hence, when a ticket has been fraudulently obtained from a company, a person purchasing from the holder thereof, although for value and without notice of equities, acquires no title thereto. *Frank v. Ingalls*, 41 Ohio St. 560; 21 Am. & Eng. R. Cas. 277.

2. *Bennett v. New York Cent., etc., R. Co.*, 69 N. Y. 594; 25 Am. Rep. 250, *aff'd* 5 Hun (N. Y.) 599. See also *infra*, this title, *Stop-over Privileges*.

his opinion to the holder that the ticket would be good for passage either way, does not alter the rule.<sup>1</sup>

2. **As Evidence of the Passenger's Rights.**—It may be stated as a general rule that the ticket is the only evidence, as between the conductor and passenger, of the latter's right to transportation, and he must exhibit it when demanded; if he fails to do this, and refuses to pay fare, he may be expelled from the train;<sup>2</sup> and the rule is not altered by the fact that the passenger had a ticket, but lost it.<sup>3</sup>

There is much conflict upon the question of the rights and duties of the conductor and passenger respectively, when an authorized agent sells the passenger a ticket different from what he asks and pays for, and one which does not entitle him to the passage desired. According to some authorities, the conductor cannot be expected to listen to the passenger's account of the transaction, and the latter should either pay his fare, or walk quietly off the train, and then resort to an action against the company for breach of contract; but should he attempt to retain his place without paying fare, and is expelled by the conductor, he can recover no damages for the expulsion.<sup>4</sup> Others hold that

1. **Ticket from "Portland to Boston" not Good for Reverse Trip.**—*Keeley v. Boston, etc., R. Co.*, 67 Me. 163. In this case the ticket had printed upon it the words "Portland to Boston;" it was purchased in the former place; the holder attempted to go from Boston to Portland. It was held that such a ticket purchased under no contract other than what was inferable from the ticket itself, does not entitle the holder to passage in a direction opposite to that indicated on the ticket.

2. *Willets v. Buffalo, etc., R. Co.*, 14 Barb. (N. Y.) 585; *Woods v. Metropolitan St. R. Co.*, 48 Mo. Abb. 125. See *infra*, this title, *Exhibition and Surrender of Ticket*.

In *Homiston v. Long Island R. Co.* (Super. Ct.), 22 N. Y. Supp. 738, it was held that where a passenger, whose destination makes a change of trains necessary, is unable to obtain a ticket at the station, and pays his fare to the conductor, who neglects to give him a ticket, the rule that a passenger must show a ticket or pay his fare, will not authorize an expulsion from the second train, if the conductor thereof has actual knowledge of the payment of the fare to the first conductor.

3. **Lost Ticket.**—*Duke v. Great Western R. Co.*, 14 U. C. Q. B. 377; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 347; *Crawford v. Cincinnati, etc., R.*

*Co.*, 26 Ohio St. 580; *Jerome v. Smith*, 48 Vt. 231; 21 Am. Rep. 125.

And with greater reason is this true, if the ticket contains an express condition that it should be shown to the conductor on every passage, and if not shown when called for, the regular fare should be paid. *Downs v. New York, etc., R. Co.*, 36 Conn. 287; 4 Am. Rep. 77. Compare with the above, *Pullman Palace Car Co. v. Reed*, 75 Ill. 175; 20 Am. Rep. 232. Here a passenger in a sleeping car had lost his ticket, but produced a written certificate from the agent selling it to him, to the effect that he was entitled to a berth. The conductor removed him, and he was allowed to recover the price of his ticket, and reasonable compensation for the trouble and inconvenience suffered by being deprived of his berth in the sleeping car.

4. *Peabody v. Oregon R., etc., Co.*, 21 Oregon 121; *McKay v. Ohio River R. Co.*, 34 W. Va. 65; 44 Am. & Eng. R. Cas. 395; *Weaver v. Rome, etc., R. Co.*, 3 Thomp. & C. (N. Y.) 270; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Townsend v. New York Cent., etc., R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419; *Beebe v. Ayers*, 28 Barb. (N. Y.) 275; *Pease v. Delaware, etc., R. Co.*, 101 N. Y. 367; 26 Am. & Eng. R. Cas. 185; 54 Am. Rep. 609; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342; 26 Am. Rep. 531; *Terre*

the conductor has no right to expel the passenger, and if he does so, the company is liable in damages therefor.<sup>1</sup> The latter would seem to be the better doctrine—it certainly has the support of the more recent cases.

Haute, etc., R. Co. v. Vanatta, 21 Ill. 188; 74 Am. Dec. 96; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499; Hall v. Memphis, etc., R. Co., 15 Fed. Rep. 57; 9 Am. & Eng. R. Cas. 348; Yorton v. Milwaukee, etc., R. Co., 54 Wis. 234; 6 Am. & Eng. R. Cas. 322; 41 Am. Rep. 23; Pennsylvania R. Co. v. Connell, 112 Ill. 295; 18 Am. & Eng. R. Cas. 339; 54 Am. Rep. 238; Mahoney v. Detroit City R. Co., 36 Cent. L. J. 90; Petrie v. Pennsylvania R. Co., 42 N. J. L. 449; 1 Am. & Eng. R. Cas. 258; Poulin v. Canadian Pac. R. Co., 52 Fed. Rep. 197; 32 Am. L. Reg. 153; Chicago, etc., R. Co. v. Bannerman, 15 Ill. App. 100; Rose v. Wilmington, etc., R. Co., 106 N. Car. 168.

The opinion of the court in *Frederick v. Marquette*, etc., R. Co., 37 Mich. 342; 26 Am. Rep. 531, explains the reason of the rule as follows: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of the contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. . . . As between the conductor and passenger, and the right of the latter to trav-

el, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case." (The action was trespass on the case for damages for unlawful expulsion.)

This case is followed in *Hufford v. Grand Rapids*, etc., R. Co., 53 Mich. 121. But upon a second trial of that case, the rule of conclusiveness of the ticket, as between conductor and passenger, was so far abandoned, that the court held, that if the passenger had bought a ticket of a duly authorized agent, believing in good faith that it was genuine, and that the agent had a right to sell it, and states such facts to the conductor, the latter is bound to accept the statement until the contrary is shown, regardless of any words, figures, or other marks upon the ticket. And where, upon such passenger's refusal to pay fare, the conductor lays hands upon him to eject him, he is guilty of assault and battery, for which the company must respond in damages. *Hufford v. Grand Rapids*, etc., R. Co., 64 Mich. 631.

1. *Murdock v. Boston*, etc., R. Co., 137 Mass. 293; 21 Am. & Eng. R. Cas. 268, *distinguishing* *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; 16 Am. & Eng. R. Cas. 386; 46 Am. Rep. 481; 50 Am. Rep. 307; *City*, etc., R. Co. v. Brauss, 70 Ga. 368; 18 Am. & Eng. R. Cas. 324; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358; 11 Am. St. Rep. 434; *Georgia R., etc., Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499; *Lake Erie*, etc., R. Co. v. Fix, 88 Ind. 381; 11 Am. & Eng. R. Cas. 109; 45 Am. Rep. 464; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634; *Gulf*, etc., R. Co. v. Rather, 3 Tex. Civ. App. 72; *Pennsyl-*

If the passenger's ticket is defective, and this is due solely to himself, he has no cause of action against the carrier for refusing to honor it.<sup>1</sup>

**II. RATES OF FARE—POWER TO REGULATE.**—The legislature of a state has the power to regulate and limit, within its own jurisdiction, railroad charges for the transportation of passengers, in the absence of any provision in the charter of the company whereby it relinquishes authority over the subject.<sup>2</sup> And this power is not restricted by the fact that the income of the company has been pledged to the payment of obligations incurred on the faith of

vania R. Co. v. Bray, 125 Ind. 229; Chicago, etc., R. Co. v. Conley (Ind. 1892), 32 N. E. Rep. 96; Carpenter v. Washington, etc., R. Co., 3 Mackey (D. C.) 225; 18 Am. & Eng. R. Cas. 370. See also Hufford v. Grand Rapids, etc., R. Co. (Mich. 1887), 31 N. W. Rep. 544.

In Philadelphia, etc., R. Co. v. Rice, 64 Md. 63; 26 Am. & Eng. R. Cas. 264, the conductor canceled the ticket by mistake, and afterwards tried to correct it, but did so in an improper way, and the passenger was expelled by a subsequent conductor. It was held that he had a right of action against the company for the expulsion.

But if a person receives from a ticket agent a ticket different from what he asked for, and keeps it four months, with full knowledge of its purport, without making complaint, he will be considered as having ratified the contract according to its terms, and waived such claims as he might have had, growing out of the mistake. Godfrey v. Ohio, etc., R. Co., 116 Ind. 30; 37 Am. & Eng. R. Cas. 8.

1. Thus, if the passenger engages to have his ticket stamped by the agent of the company, upon his return trip, and has ample opportunity to do so, but fails, the conductor is justified in declining to accept the unstamped ticket, and to eject the passenger, if he refuses to pay fare. Boylan v. Hot Springs R. Co., 132 U. S. 146; Mosher v. St. Louis, etc., R. Co., 127 U. S. 390.

2. Peik v. Chicago, etc., R. Co., 94 U. S. 176; Munn v. Illinois, 94 U. S. 113; Chicago, etc., R. Co. v. Iowa, 94 U. S. 155; Stone v. Wisconsin, 94 U. S. 181; Chicago, etc., R. Co. v. Ackley, 94 U. S. 179; Winona, etc., R. Co. v. Blake, 94 U. S. 180; Shields v. Ohio, 95 U. S. 319; Stone v. Farmers' L. & T. Co., 116 U. S. 307; 23 Am. & Eng. R. Cas. 577; Dow v. Beidelman, 125 U. S. 680; 34 Am. & Eng. R. Cas. 322;

Chicago, etc., R. Co. v. Wellman, 143 U. S. 339; Parker v. Metropolitan R. Co., 109 Mass. 506. As applied to fares for transportation not extending beyond the limits of the state by which the railroad is incorporated, the authority of the legislature is not affected by the decision in Wabash, etc., R. Co. v. Illinois, 118 U. S. 557; 26 Am. & Eng. R. Cas. 1.

In Munn v. Illinois, 94 U. S. 113, after affirming the doctrine that, by the common law, carriers or other persons exercising a public employment, could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum, beyond which any charge made would be unreasonable," the Chief Justice said: "To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

The charter of a railroad company granting it "the exclusive right" of transportation of passengers, with the proviso that the charges for such purpose shall not exceed certain named rates, cannot be considered a contract between the state and the company—that the latter may charge such rates as it pleases, within the limits named, but has the effect of a provision that if the company should go beyond such limits, it might operate a forfeiture of "the exclusive right." And the company is subject to the provisions of subsequent acts establishing a commission to regulate railroad rates. Georgia R., etc., Co. v. Smith, 128 U. S. 174; 35 Am. & Eng. R. Cas. 511.

its charter.<sup>1</sup> An express grant of power in the charter to fix the rates of fare, and to alter and change the same, does not confer unlimited power, but merely the right to charge reasonable rates, and what is a reasonable maximum rate may be fixed by statute.<sup>2</sup> But this power of limitation or regulation is not without bounds; the power to regulate is not a power to destroy; a limitation is not the equivalent of confiscation; accordingly, under pretense of regulating fares, the state may not require a railroad to carry persons without reward; nor can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.<sup>3</sup> A statute dividing railroad companies into classes according to the length of the roads operated, or the amount of business done, and fixing a limit for passenger fares for each class, does not deny a corporation the equal protection of the laws within the meaning of the prohibition in the federal constitution.<sup>4</sup> What the legislature may do

*West Virginia Act 1872-73, ch. 227*, fixing a reasonable maximum rate of passenger charges, is within the power of the legislature under the constitution, and applicable alike to roads whose charters were granted before and after its passage, although such charters contain provisions empowering the companies to charge a fixed rate, declared to be not reducible by the legislature. *Laurel Fork, etc., R. Co. v. West Virginia Transp. Co.*, 25 W. Va. 324; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434; 22 Am. & Eng. R. Cas. 469. See *Johnson v. Hudson River R. Co.*, 2 Sweeney (N. Y.) 298, where the power of a railroad corporation to demand fare of a passenger, is held to be not an implied or incidental power, but one derived solely from statute.

The *New York Statute (Laws 1875, ch. 600)*, reducing the rate of fare for carrying passengers on street railways in the city of Buffalo, is a valid exercise of the police power of the state, and is not rendered unconstitutional by the fact that a contract existed between two companies for the interchange of traffic at the rates of fare which existed prior to its enactment. *Buffalo East Side R. Co. v. Buffalo St. R. Co.*, 111 N. Y. 132; 37 Am. & Eng. R. Cas. 200.

**Street Railways — Municipal Control Over Rates of Fare.**—In *Sternberg v. State (Neb. 1893)*, 56 Am. & Eng. R. Cas. 424, it was held that the street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rate of fare

for passage over said railway, and may require tickets, six for twenty-five cents, to be kept for sale by each conductor of a street car. It was said: "A street railway has no depot. Its stopping places are on each street corner, and it transacts its business with the public in its cars, and its tickets should be kept for sale where it transacts its business with the public." A similar ruling was made in *Detroit v. Fort Wayne, etc., R. Co.*, 95 Mich. 456.

1. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

2. *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. R. Co. v. People*, 95 Ill. 313; 1 Am. & Eng. R. Cas. 188.

3. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; 23 Am. & Eng. R. Cas. 577; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174; 35 Am. & Eng. R. Cas. 511.

*Massachusetts Statute 1892, ch. 389*, requiring railroad companies to sell thousand-mile tickets for \$20, to redeem such tickets on presentation by any other company, and to honor all such tickets issued by any company operating within the state, is unconstitutional, in that it authorizes one company to determine the conditions on which another must carry passengers, and compels one company to carry passengers on the credit of another, thus appropriating individual property to the public use without the owner's consent. *Knowlton and Holmes, JJ.*, dissenting. *Atty. Gen'l v. Boston, etc., R. Co. (Mass. 1893)*, 35 N. E. Rep. 252.

4. *Dow v. Beidelman*, 125 U. S. 680; 34 Am. & Eng. R. Cas. 322.

directly in the matter of regulating passenger rates may be lawfully effected through the medium of a commission.<sup>1</sup> In the absence of statutory regulation upon the subject, it is necessarily implied from the character of the employment that the rates shall be just and reasonable, and the courts must decide, as they do in the case of private persons, when controversies arise, what is just and reasonable.<sup>2</sup>

In *Ruggles v. Illinois*, 108 U. S. 526; 11 Am. & Eng. R. Cas. 49, and *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541; 11 Am. & Eng. R. Cas. 55, the statute of *Illinois* of April 15th, 1871 (*Illinois Laws* of 1871, p. 640), which classified the railroads in the state according to their gross annual earnings per mile, and put different limits on the compensation of the different classes per mile for passenger carriage, was adjudged, in opinions delivered by the Chief Justice, to be constitutional and valid, in restricting to the limit of three cents per mile existing corporations, whose charters gave them power to make all by-laws, rules, and regulations, not repugnant to law, and gave their directors power to establish such rates of fare as they should by their by-laws determine. And two justices who did not assent to those opinions, concurred in the judgments, because it was not shown that the rate prescribed by legislature was unreasonable.

A similar question was presented and decided in *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155. It was there objected that a statute regulating the rate for the carriage of passengers, by different classes of railroads, according to their gross earnings per mile, was in conflict with art. 1, § 4 of the constitution of *Iowa*, which provides that "all laws of a general nature, shall have a uniform operation," and "the general assembly shall not grant to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." In answering that objection, the Chief Justice said: "The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires. . . . It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circum-

stances of the different roads; and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

1. *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347; 23 Am. & Eng. R. Cas. 597; *Stone v. New Orleans, etc., R. Co.*, 116 U. S. 352; 23 Am. & Eng. R. Cas. 606; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174; 35 Am. & Eng. R. Cas. 511. An injunction will be granted to prevent state railroad commissioners from enforcing a tariff of rates, so low as to preclude all profit to the corporation. *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., R. Co. v. Becker*, 35 Fed. Rep. 883.

In *Georgia*, regulations of the commission as to rates of passenger fare, are not applicable to passenger carriage on freight trains. *Partee v. Georgia R. Co.*, 72 Ga. 347; 27 Am. & Eng. R. Cas. 12.

2. See cases cited in note 2, p. 1078; *Munn v. Illinois*, 94 U. S. 113; *Dow v. Beidelman*, 125 U. S. 680; 34 Am. & Eng. R. Cas. 322; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10. In *Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444; 13 Am. & Eng. R. Cas. 31, it was held that, under the *Ohio Act* of March 30th, 1875 (72 Ohio L. 143), which provides that "any corporation operating a railroad in whole or in part in this state, may demand and receive for transportation of passengers on said road, not exceeding three cents per mile for a distance of more than eight miles; provided the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance," a charge of twenty-five cents for carrying a passenger a distance less than eight miles and more than six



**III. WHO ARE PASSENGERS.**—A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor.<sup>1</sup> Every person traveling in a railroad car, or other public conveyance used for passenger carriage, and not connected with the railroad company or carrier, is presumed to be there lawfully as a passenger, and the burden is on the carrier to prove that he is a trespasser.<sup>2</sup> The purchase of a ticket by a person entitling him to travel between two stations, creates the relation of carrier and passenger, with all the duties imposed by law upon each;<sup>3</sup> it is not necessary that the ticket should have been purchased from the carrier himself.<sup>4</sup> The actual purchase of a ticket before entering the train is not always necessary to constitute the relation;<sup>5</sup>

miles, will not, as a matter of law, be declared unreasonable. It will be observed in this case that, while the statute limits the fare which may be demanded when the distance is more than eight miles, it imposes no limit when the distance is not more than that. In that case the railroad company is allowed to exercise its own discretion in fixing the rate, subject always to the implied condition that it must not prescribe a rate which the law would pronounce unreasonable.

1. *Pennsylvania R. Co. v. Price*, 96 Pa. St. 267; 1 Am. & Eng. R. Cas. 234. See *CARRIERS OF PASSENGERS*, vol. 2, p. 742 *et seq.*, for a treatment of the subjects of *Passengers on Freight Trains and Servants as Passengers*.

2. **Presumption.**—*Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139; 27 Am. Rep. 693; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; 27 Am. & Eng. R. Cas. 329; 57 Am. Rep. 120.

But if a person by his own solicitation or consent is carried on a vehicle or conveyance which is not used for passenger carriage, there can be no presumption that he is a passenger, although the owner be a common carrier of passengers, by other and different means of conveyance. *Snyder v. Natchez, etc., R. Co.*, 42 La. Ann. 302; 44 Am. & Eng. R. Cas. 278.

And when a steamboat stops at one of its usual stopping places for taking on passengers and freight, it is not a presumption of law that every person who goes on board does so as a passenger, unless he notifies an officer to the contrary, so as to relieve the latter from giving to such as do not go

aboard as passengers, proper time and facilities for getting ashore. *Keokuk Packet Co. v. Henry*, 50 Ill. 264.

3. *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; 9 Am. & Eng. R. Cas. 264. And the payment and receipt of fare constitute unequivocal evidence of the existence of the relation. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221. And it has been held that the possession of a baggage check, and the testimony of the baggage master that, when required by a passenger, it was his custom to put a check on his baggage, and give a duplicate to him, was sufficient evidence that the person possessing the check was a passenger on the car. *Davis v. Cayuga, etc., R. Co.*, 10 How. Pr. (N. Y.) 330.

4. Thus, where a benefit society hired a train for an excursion, and the tickets were sold by the treasurer of the society, from whom the plaintiff bought one, it was held that this was evidence for the jury that the defendant was a passenger. *Skinner v. London, etc., R. Co.*, 5 Exch. 787. See *infra*, this title, *Kinds of Tickets; Scalpers*.

5. *Allender v. Chicago, etc., R. Co.*, 37 Iowa 264.

It is the right of every citizen *prima facie* to become a passenger on a railway train, and neither the purchase of a ticket, nor the entry into the car, is necessary to create the relation of carrier and passenger. And where a person enters the ticket office to buy a ticket, he is entitled to the protection of the passenger, even though the agent refuses to sell him a ticket. *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639.

nor is it necessary that the traveler should have paid his fare;<sup>1</sup> any one entering a carrier's vehicle in good faith to take passage thereon is a passenger.<sup>2</sup> A person who by mistake gets upon a passenger train other than the one he intended to take passage

1. Ohio, etc., R. Co. v. Muhling, 30 Ill. 1; 81 Am. Dec. 336; Rose v. Des Moines Valley R. Co., 39 Iowa 246; Hurt v. Southern R. Co., 40 Miss. 391; Buffett v. Troy, etc., R. Co., 40 N. Y. 168; Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306; Gordon v. Grand St., etc., R. Co., 40 Barb. (N. Y.) 546; Nashville, etc., R. Co. v. Messino, 1 Sneed (Tenn.) 220; Coggsell v. West St., etc., R. Co., 5 Wash. 46. A child going on a train with its mother, who has a ticket for herself, is a passenger. Beckwith v. Cheshire R. Co., 143 Mass. 68; 27 Am. & Eng. R. Cas. 192; Austin v. Great Western R. Co., L. R., 2 Q. B. 442.

**Passenger on Steamboat.**—One who, after boarding a steamer, ascertains that a certain landing where he intends to stop, is off the regular route, and that she would go there only under a special arrangement whereby the additional cost to her would be paid, and he declines to pay the extra charge, but does not change his purpose of taking passage, is a passenger from the time he goes on board, and, as such, may hold the steamer responsible for negligence whereby he is injured, although he does not prepay his way or purchase his ticket; it being the custom for the purser to collect fares on the boat. Mellquist v. The Wasco, 53 Fed. Rep. 546.

**Passenger in Car Switched on Connecting Line.**—A passenger who has been carried by a railway company in a passenger car which the company switches off on the track of a connecting road, sustains the relation of passenger to such connecting road while the car is stationary, and he remains in it where, according to the usual course of business, the latter company is accustomed to receive cars so delivered to it, to couple them onto its own train and carry them over its own road. And such connecting company is liable for injuries sustained by him through its negligence, whether at the time of the injury he has obtained a ticket or paid his fare over the connecting line or not. Chattanooga, etc., R. Co. v. Huggins, 80 Ga. 494.

2. Union Pac. R. Co. v. Nichols, 8 Kan. 337; 12 Am. Rep. 475; Cleveland

v. New Jersey Steamboat Co., 68 N. Y. 306; Buffett v. Troy, etc., R. Co., 40 N. Y. 168; Nashville, etc., R. Co. v. Messino, 1 Sneed (Tenn.) 220.

When a traveler has been invited to enter a car, or enters it in obedience to the announcement that it is ready to receive passengers, the relation of carrier and passenger is created. Hannibal, etc., R. Co. v. Martin, 11 Ill. App. 386.

In Dewire v. Boston, etc., R. Co., 148 Mass. 343; 37 Am. & Eng. R. Cas. 57, it was held that if a railroad company permits passengers to take trains at a place which is not a station, a person taking a train at such place is not a trespasser, and when he has reached in safety the inside of a passenger car, he then, if not before, becomes a passenger. Compare Georgia Pac. R. Co. v. Robinson, 68 Miss. 643.

A person who enters a passenger coach as a passenger, and on demand of the conductor refuses to pay his fare, is considered a trespasser *ab initio*, as though his entry had been unlawful, and, for his ejection, force may be used in proportion to his resistance. Moore v. Columbia, etc., R. Co. (S. Car. 1892), 16 S. E. Rep. 781.

But the mere fact that one rides on the platform of the train to avoid paying fare, does not deprive him of the right to become a passenger, if he pays the regular fare demanded and commits no breach of the peace. And where, in such case, the conductor, before making the demand for his fare, assaults and expels him from the train, the company will be liable for any injuries he may sustain. Fordyce v. Beecher, 2 Tex. Civ. App. 29.

**Persons Assisting Passengers.**—A person entering a train for the purpose of assisting a passenger, is not himself a passenger. Lucas v. New Bedford, etc., R. Co., 6 Gray (Mass.) 64; 66 Am. Dec. 406; Griswold v. Chicago, etc., R. Co., 64 Wis. 652; 23 Am. & Eng. R. Cas. 463.

In Louisville, etc., R. Co. v. Crunk, 119 Ind. 542; 41 Am. & Eng. R. Cas. 158; 12 Am. St. Rep. 443, it was held that where a passenger is so sick and enfeebled as to make it necessary for assistants to carry him from the station

on, is, nevertheless, a passenger upon the train he is on.<sup>1</sup> But one who gets upon the train after it has started, cannot be deemed to be a passenger until he reaches a place of safety inside the car.<sup>2</sup> If a person is suffered to remain on the train after a refusal to pay his fare, because of threats to resist removal by force, he is not a passenger;<sup>3</sup> if, however, the refusal is justifiable, the person does not forfeit his rights as a passenger.<sup>4</sup> A person may become a passenger before entering the car, thus, one is to be considered a passenger while going from the ticket office to take a seat in the car;<sup>5</sup> and a person waiting in the waiting-room to take the train is a passenger;<sup>6</sup> but one who enters a railway

to a seat in the train upon which he has secured passage, the company, having contracted to carry him with knowledge of his condition, is bound to allow him the required assistants, and is under an obligation to stop the train long enough to afford the persons aiding such passenger, although their services are voluntarily offered, a reasonable opportunity to leave the train, the same as if they were passengers.

But this case is disapproved in *Little Rock, etc., R. Co. v. Lawton*, 55 Ark. 428, and it is there held that a person who enters a railway coach, to assist a woman to a seat, cannot recover damages for injury sustained in leaving the train, by reason of the failure of the trainmen to hold the train a reasonable time for him to get off, unless they had notice of his intention to do so.

1. *Columbus, etc., R. Co. v. Powell*, 40 Ind. 37; *Cincinnati, etc., R. Co. v. Carper*, 112 Ind. 26; 31 Am. & Eng. R. Cas. 36; 2 Am. St. Rep. 144; *Arnold v. Pennsylvania R. Co.*, 115 Pa. St. 135; 28 Am. & Eng. R. Cas. 189; *Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 519; 26 Am. & Eng. R. Cas. 489; 2 Am. St. Rep. 542; *International, etc., R. Co. v. Gilbert*, 64 Tex. 536; 22 Am. & Eng. R. Cas. 405.

A party having a ticket for transportation on a railroad, who boards a freight train which does not carry passengers, believing the ticket good on that train, is not a trespasser, but must be treated as a passenger. *Bogges v. Chesapeake, etc., R. Co.*, 37 W. Va. 297.

But where a person who has purchased a railroad ticket for a designated station, without making any inquiries or ascertaining what trains stop at the station to which he desires to go, subsequently takes his seat in a train which does not stop at the station for which he has a ticket, and such person refuses to pay his fare on the demand of the con-

ductor, to the next station at which the train is to stop, and also refuses to leave the train when requested to do so by the conductor, after he has stopped it at a suitable place for that purpose, is a trespasser. *Atchison, etc., R. Co. v. Gantz*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; 5 Am. St. Rep. 780.

2. *Merrill v. Eastern R. Co.*, 139 Mass. 238; 52 Am. Rep. 705.

3. *Gilmer v. Higley*, 110 U. S. 47.

4. Thus, where a person entered a car which started before he had an opportunity to leave it, and the conductor failed, or refused to provide him with a seat, as required by law, his refusal to pay was justifiable and he did not forfeit any of his rights as a passenger. *Hardenburgh v. St. Paul, etc., R. Co.*, 39 Minn. 3; 34 Am. & Eng. R. Cas. 359; 12 Am. St. Rep. 610.

5. *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227; 85 Am. Dec. 700.

And a person who is injured while walking from a connecting steamboat to a railway by the customary route, is injured while traveling by public conveyance, within the meaning of a policy which insures against personal injuries, when caused by an accident while traveling "by any public or private conveyance, provided for the transportation of passengers." *Northrup v. Railway Pass. Assur. Co.*, 43 N. Y. 516; 3 Am. Rep. 724, reversing 2 Lans. (N. Y.) 166.

6. *Gordon v. Grand St., etc., R. Co.*, 40 Barb. (N. Y.) 546.

And where a woman, while waiting for a train, left the waiting-room, which was being cleaned, and by direction of the station agent entered a vacant car, standing by the station platform, it was held that such person was a passenger while in the car. *Shannon v. Boston, etc., R. Co.*, 78 Me. 52; 23 Am. & Eng. R. Cas. 511.

A person who has purchased a railroad ticket and is present at the ordi-

station intending to take a certain train, and finding it gone, waits in the station for a horse car, is not a passenger.<sup>1</sup> Travelers are ordinarily, whilst in the act of leaving the train, deemed to be passengers;<sup>2</sup> but one who leaves the train while in motion, at a

nary point of departure to take a train, is a passenger. *Central R., etc., Co. v. Perry*, 58 Ga. 461; *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494; 21 Am. & Eng. R. Cas. 331; 49 Am. Rep. 540.

Where the plaintiff entered the office or waiting-room at a depot and informed the depot agent of her desire to become a passenger, and he directed her as to the manner in which she should get on a caboose car, there is sufficient evidence to justify a finding that the relation of carrier and passenger existed. *Allender v. Chicago, etc., R. Co.*, 37 Iowa 264.

But in *Indiana Cent. R. Co. v. Hurdson*, 13 Ind. 325; 74 Am. Dec. 254, a contrary view seems to have been adopted, and it was held that where plaintiff, without having procured a ticket, was crossing a side track of a railroad to get upon a passenger train at its usual place of stopping on the main track, but by the negligence of the employes of the company a switch had been left open, and the train was thrown upon the side track, and plaintiff run over, he was not a passenger at the time of the injury, and his right to cross the side track was only the right that persons have to cross a railroad at a public street or highway.

Where, by the contract in a drover's pass, it was stipulated that its acceptance should be considered "a waiver of all claims against the company for personal injury when received on the above train," and the plaintiff was injured before entering the train, but after it had been formed and was about to start, it was held that the plaintiff was a passenger and bound by the stipulation, although not actually upon the train. *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364.

1. *Heinlein v. Boston, etc., R. Co.*, 147 Mass. 136; 33 Am. & Eng. R. Cas. 500.

2. Thus, where a policy was issued insuring against railroad accident while traveling in any carriage or any line of railway in *Great Britain*, it was held that it covered an injury received from slipping on the step of the car while standing at the station, in getting out. *Theobald v. Railway Pass. Assur. Co.*, 10 Exch. 45.

But a passenger who had reached his destination, alighted from the train, taken a position upon the sidewalk of the highway, and had started across the track, but not upon his way to the station, and was injured while so crossing, was held to have ceased to be a passenger before the accident. *Allerton v. Boston, etc., R. Co.*, 146 Mass. 241; 34 Am. & Eng. R. Cas. 563.

Plaintiff, a passenger on a street car, left it by the front platform after it had stopped. When six or eight feet from the car in the street, she was thrown down and injured by the car horses, which had been detached from the car and were turned around. It was held that when plaintiff was injured she was no longer a passenger on the defendant's car. *Platt v. Forty-Second St., etc., R. Co.*, 4 Thomp. & C. (N. Y.) 406; 2 Hun (N. Y.) 124.

Where a person left a car on the wrong side, owing to negligence of the company in not preventing passengers from leaving on that side, or notifying them not to do so, and was killed, he must be regarded as a passenger within the meaning of that word in *Massachusetts Pub. Stats.*, ch. 112, § 212, though it did not appear that he was not negligent in so leaving the car. *McKimble v. Boston, etc., R. Co.*, 139 Mass. 542; 141 Mass. 463; 21 Am. & Eng. R. Cas. 213; 24 Am. & Eng. R. Cas. 463.

A passenger on a street car who steps from the car into a public street, ceases to be a passenger the moment he leaves the car. *Creamer v. West End R. Co.*, 156 Mass. 320.

The plaintiff, a passenger on a railroad train, tendered in payment of the usual fare of five cents, a five-dollar bill. The conductor told him that he was unable to change it, but that he would get it changed at the depot. Plaintiff allowed the conductor to retain the bill. On the arrival of the train at the depot the plaintiff alighted and waited in the depot, expecting the conductor to return him the change. He waited about twenty or thirty minutes, and, when seeing that the train was about to start, jumped aboard and asked for his change. The conductor handed him back the bill, and told him to get

time and place when and where the corporation could not anticipate that he would leave it, ceases to be a passenger.<sup>1</sup> When by law, railroad companies are prohibited from issuing free passes, a person who travels upon a pass unlawfully issued to him, does not thereby become a trespasser; if the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the traveler a trespasser, nor destroy his rights as a passenger.<sup>2</sup> But if one travels upon a free pass issued to another and non-transferable, and passes himself as the person named in the pass, he is not a passenger.<sup>3</sup>

**IV. KINDS OF TICKETS—1. Through (Over Connecting Lines)—a. EXTENT OF LIABILITY.**—The conclusions as to the liability of a carrier selling a through ticket over several connecting roads, to a point beyond its own line, are by no means harmonious. The

off the train as quickly as he could. Plaintiff jumped from the train while it was in motion, and was injured. It was held that when plaintiff got upon the train, after it had moved from the station, for the exclusive purpose of receiving from the conductor the money due him, and when he jumped off at a point beyond not suitable for, nor intended for, passengers to alight, the relation of carrier and passenger did not exist between him and the railroad company. *Pittsburgh, etc., R. Co. v. Krouse*, 30 Ohio St. 222.

**Person Leaving Cars at Intermediate Stations.**—A passenger on a boat still remains a passenger while he is leaving it temporarily at a place where the boat is to remain for a period of about two hours. *Keokuk Packet Co. v. True*, 88 Ill. 608. See also *Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207; 37 Am. & Eng. R. Cas. 67; 12 Am. St. Rep. 541.

It is not necessary that a person should be on the train of a railroad in order to be regarded as a passenger. As a passenger, he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshments, and in a street alongside of the track and platforms. *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568. See also *Snow v. Fitchburg R. Co.*, 136 Mass. 552; 18 Am. & Eng. R. Cas. 161; 49 Am. Rep. 40. But in *State v. Grand Trunk R. Co.*, 58 Me. 176, it was held that when a train turns out upon a side track at an intermediate station, and there stops to await the crossing of another train out of time, and a passenger, not destined to that station, without objection made or

notice given, leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence.

1. *Com. v. Boston, etc., R. Co.*, 129 Mass. 500; 1 Am. & Eng. R. Cas. 457; 37 Am. Rep. 382.

2. *Buffalo, etc., R. Co. v. O'Hara* (Pa. 1882), 9 Am. & Eng. R. Cas. 317.

3. *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; 27 Am. & Eng. R. Cas. 88, 329; 57 Am. Rep. 120.

And if a ticket is procured by fraud, the fraud will vitiate the contract, and the person using it will not be entitled to the rights of a passenger. *Brown v. Missouri, etc., R. Co.*, 64 Mo. 536. But if the traveler is in good faith using a pass or a ticket which he believes to be available, or if his right to travel upon it is recognized, the duty which the carrier owes to him is that which a carrier owes a passenger. Accordingly, where a person was induced to believe by the conduct and language of the carrier's employes that he had a contract for a round trip, it was held that he was a passenger. *Russ v. The War Eagle*, 14 Iowa 363. See also *Great Northern R. Co. v. Harrison*, 10 Exch. 376. And where a person in good faith presented a commutation ticket which was issued to another and was not transferable, and his claim to be carried was recognized, it was held that he was entitled to the rights of a passenger. *Robostelli v. New York, etc., R. Co.*, 33 Fed. Rep. 796; 34 Am. & Eng. R. Cas. 515.

English doctrine,<sup>1</sup> and that of some of the states<sup>2</sup> is, that the carrier is liable for the performance of the contract of transportation through to the point of destination, and must therefore respond in damages, in the event of the injury or delay of a passenger before reaching that point. But the doctrine founded in reason, and best supported by authority in this country is, that, in the absence of contract making it responsible, the carrier in selling the ticket acts merely as the agent of the other lines, and there is no extra-terminal liability, the rights of the passenger, and the duty and responsibility of the several companies over whose roads he is entitled to passage, being the same as if he had purchased a ticket at the office of each company constituting the through line.<sup>3</sup>

1. *Mytton v. Midland R. Co.*, 4 H. & N. 615; *Great Western R. Co. v. Blake*, 7 H. & N. 987; *Bristol, etc., R. Co. v. Collins*, 7 H. L. Cas. 194; *Buxton v. North-Eastern R. Co.*, L. R., 3 Q. B. 549; *Kent v. Midland R. Co.*, L. R., 10 Q. B. 1.

2. *Croft v. Baltimore, etc., R. Co.*, 1 McArthur (U. S.) 492; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 337; 76 Am. Dec. 749; *Najac v. Boston, etc., R. Co.*, 7 Allen (Mass.) 329; 83 Am. Dec. 686; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. (N. Y.) 534; *Ward v. Vanderbilt*, 4 Abb. App. Dec. (N. Y.) 521; *Hart v. Rensselaer, etc., R. Co.*, 8 N. Y. 37; 59 Am. Dec. 447; *Williams v. Vanderbilt*, 28 N. Y. 217; 84 Am. Dec. 333; *Burnell v. New York Cent., etc., R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61; *Cary v. Cleveland, etc., R. Co.*, 29 Barb. (N. Y.) 35; *Candee v. Pennsylvania R. Co.*, 21 Wis. 582; 94 Am. Dec. 566; *Carter v. Peck*, 4 Sneed (Tenn.) 203; 67 Am. Dec. 604; *Wolff v. Central R. Co.*, 68 Ga. 653; 6 Am. & Eng. R. Cas. 441; 45 Am. Rep. 501; *Central R. Co. v. Combs*, 70 Ga. 533; 18 Am. & Eng. R. Cas. 298; 48 Am. Rep. 582.

3. *Pennsylvania R. Co. v. Connell*, 112 Ill. 205; 18 Am. & Eng. R. Cas. 339; 54 Am. Rep. 238; *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81; 4 Am. Rep. 587; *Knight v. Portland, etc., R. Co.*, 56 Me. 235; 96 Am. Dec. 449; *Furstenheim v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 238; *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390; *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852; *Hood v. New York, etc., R. Co.*, 22 Conn. 1; *Young v. Pennsylvania R. Co.*, 115 Pa. St. 112; 28 Am. & Eng. R. Cas. 114;

*Hartan v. Eastern R. Co.*, 114 Mass. 44; *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424; *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; *Poole v. Delaware, etc., R. Co.*, 35 Hun (N. Y.) 29; *Milnor v. New York, etc., R. Co.*, 53 N. Y. 365; *Kessler v. New York, etc., R. Co.*, 61 N. Y. 538; *Lundy v. Central Pac. R. Co.*, 66 Cal. 191; 18 Am. & Eng. R. Cas. 309; 56 Am. Rep. 100.

In *Hartan v. Eastern R. Co.*, 114 Mass. 44, the court, by Wells, J., said: "Arrangements between connecting roads, forming a continuous line, by which passengers are enabled to procure 'through tickets' at the point of starting, and to proceed to their destination, beyond the line of the first road, without changing cars, are required for the accommodation of the public, as well as the convenience of the roads themselves. Such arrangements do not imply joint interests or joint responsibility. . . . The obvious import of such a transaction is that the tickets, for passage upon roads beyond its own line, are sold by the first road as agent for the others. The obligations and responsibilities of a carrier of persons, over other roads than its own, are not thereby assumed, unless its relation to those roads, by contract or otherwise, is such as to confer, or at least to consist with, that character."

Mr. Redfield states the law thus: "As the general duty of common carriers of passengers is different from that of common carriers of goods, so the implied contract resulting from the sale of through tickets for passengers, is different. In the case of the carriers of goods and the baggage of passengers, we have seen that taking the pay and giving tickets or checks

b. PARTNERSHIP ARRANGEMENT.—Divided as opinion may be upon the question discussed in the foregoing section, it is universally agreed that if the arrangement existing between the associated lines of carriers amounts to a partnership, each will be liable to the passenger for losses or injuries occurring anywhere along the line of transportation. But the arrangement must be in reality a partnership, with the incident of community of profit and loss;<sup>1</sup> the fact that each sells through tickets, deducting its own share of the price paid for the same, and accounting to the other companies for their shares, the price being fixed according to a tariff established by each company as to its own road, will

through, binds the first company ordinarily for the entire route. But in regard to carrying passengers, the rule is different, we apprehend. These through tickets in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads, with ordinary passenger baggage, sometimes for thousands of miles in this country, import, commonly, no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned." 2 Redf. on Law of Railways (6th ed.), § 201. See also 2 Woods Railway Law 1418; Hutchinson on Carriers, § 578; 2 Beech's Law of Railways, § 1006.

In Nashville, etc., R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852, McFarland, J., in delivering the opinion of the court, said: "The theory that the company selling the ticket shall be held, from this alone, to have actually contracted to carry the passenger over roads besides its own, and that the owners of the other roads are but the agents of the first to carry out the contract, seems to us to be an arbitrary assumption, a sort of legal fiction, and contrary, in some cases, at least, to the truth of the case. Assuming that in fact the different lines of road are separate and distinct, and owned and controlled by different companies, with different agents and officers, and that there is no contract or privity between them in regard to carrying passengers, except the arrangement to sell through tickets, and that these facts appear in proof, shall the fact that the first company, with the authority of the others, issues and sells the tickets, be held of itself to estab-

lish exactly what may be contrary to the truth; *i. e.*, that the other companies are but the agents and servants of the first?"

In *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469, it was held that while one of several connecting lines may lawfully contract as principal for the carriage of passengers over the entire route, whether it does so contract is a matter to be determined by evidence.

1. *Waland v. Elkins*, 1 Stark. 272; *Laugher v. Pointer*, 5 B. & C. 547; 12 E. C. L. 311; *Fromont v. Coupland*, 2 Bing. 170; 9 E. C. L. 366; *Wylde v. Northern R. Co.*, 53 N. Y. 157; *Cobb v. Abbott*, 14 Pick. (Mass.) 289.

The leading case upon this subject in this country, is that of *Bostwick v. Champion*, 11 Wend. (N. Y.) 571; 18 Wend. (N. Y.) 175; 31 Am. Dec. 376, the facts of which were as follows: Three persons ran a line of stage coaches from Utica to Rochester, the route being divided between them into three sections, the occupant of each section furnishing his own carriages and horses, hiring drivers and paying the expenses of his own section; but the money received as fare of passengers, deducting therefrom only the tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles of the route ran by each; this was held to be such a division of the profits among the proprietors of the several sections as to make them partners as to third persons.

But Chancellor Walworth, who gave the only written opinion in the Court of Errors (*Champion v. Bostwick*, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376), said that, "The case would be entirely different, if each stage owner was to receive and retain the passage money earned on his part of the line, and to sustain all the expenses thereof, and

not constitute them partners;<sup>1</sup> nor will the mere appointment of a common agent at each end of the route to receive fares and issue through tickets, have such an effect.<sup>2</sup>

c. *ULTRA VIRES*.—It has been frequently urged that a contract by a carrier for transportation of passengers beyond its own line, is *ultra vires*. But this view has not been favorably received; the established doctrine being that a carrier may lawfully make such a contract,<sup>3</sup> and thus become liable for the acts and neglects of other carriers in no wise under its control.<sup>4</sup> And the validity of the contract is not affected by the fact that it is to be, in part, performed beyond the territorial limits of the state within which the company is incorporated.<sup>5</sup>

2. *Commutation*.—A railroad company is under no obligation to establish commutation rates for a particular locality, yet when it has done so, and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual under the same circumstances, and on the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principle of equality which the company is bound to observe in the conduct of its business.<sup>6</sup>

was only to act as agent of the others in receiving the passage money for them for the transportation of passengers over their parts of the line. In that case, there would be no joint interest, and no liability to third persons as partners."

So, where R. owned and was running one steamboat, and D. owned and was running another, and it was agreed between them that at the end of the season, if the earnings of either boat, less running expenses, should exceed those of the other, less running expenses, the excess should be divided among them, it was held that this did not constitute them partners as to third parties. *Fay v. Davidson*, 13 Minn. 523.

1. *Croft v. Baltimore, etc., R. Co.*, 1 McArthur (D. C.) 492; *Straiton v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 184; *Hartan v. Eastern R. Co.*, 114 Mass. 44.

2. *Ellsworth v. Tartt*, 26 Ala. 733; 62 Am. Dec. 749; *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222; *Bonsteel v. Vanderbilt*, 21 Barb. (N. Y.) 26.

In *Howe v. Gibson*, 3 Tex. Civ. App. 263, it was held that where two connecting roads are operated as one continuous line under one management, with the same employes, and are, so far as the public can observe, one line, and use coupon tickets compelling a continuous passage from stations on one road to stations on the

other, both are liable in damages to a passenger who purchases such a ticket and is wrongfully compelled to alight from the train at a point distant from the station to which he has paid his passage.

3. *Buffett v. Troy, etc., R. Co.*, 40 N. Y. 168; *Bissell v. Michigan, etc., R. Co.*, 22 N. Y. 258; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; 18 Am. & Eng. R. Cas. 339; 54 Am. Rep. 238. See also *Swift v. Pacific Mail S. S. Co.*, 106 N. Y. 206; 30 Am. & Eng. R. Cas. 105. See generally, *ULTRA VIRES*.

4. *Wheeler v. San Francisco, etc., R. Co.*, 31 Cal. 46; 89 Am. Dec. 147.

5. *Candee v. Pennsylvania R. Co.*, 21 Wis. 582; 94 Am. Dec. 566; *Cary v. Cleveland, etc., R. Co.*, 29 Barb. (N. Y.) 35; *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852.

6. *State v. Delaware, etc., R. Co.*, 48 N. J. L. 55; 23 Am. & Eng. R. Cas. 470; 57 Am. Rep. 543. The facts of this case were as follows: The plaintiff was the holder of a monthly commutation ticket. On one occasion during the month for which his ticket was issued, he left it at home by inadvertence, and when on the train, being asked for his ticket and not finding it, offered to the conductor a regular trip ticket, provided it should not be punched and should be returned to him the next



A person traveling on a commutation ticket must produce the same when required by the conductor, although known by the latter to be the holder of such a ticket; and refusing or failing to do so and to pay fare, may be ejected from the train.<sup>1</sup> Such a ticket, good for a specified number of miles, but by its conditions to be used within a certain time, ceases to be valid at the expiration of that time, although the number of miles has not been traveled out.<sup>2</sup>

morning on presentation of his commutation ticket, and refused otherwise to pay his fare. This the conductor refused to do, for the reason that he had no right to permit the plaintiff to ride on a ticket which should not be punched; and the plaintiff remained on the train without paying fare or surrendering the trip ticket, and without any disturbance being made. It was held that the plaintiff by such conduct rendered himself liable to be expelled from the train, and it may be to the forfeiture of the commutation ticket he then held; but that such misconduct did not justify the company in refusing to sell him commutation tickets thereafter, and that for such refusal he might have remedy by *mandamus*.

1. Ripley v. New Jersey R., etc., Co., 31 N. J. L. 388; Crawford v. Cincinnati, etc., R. Co., 26 Ohio St. 580; Bennett v. Railroad Co., 7 Phila. (Pa.) 11.

In Downs v. New York, etc., R. Co., 36 Conn. 287; 4 Am. Rep. 77, the passenger had by mistake left his commutation ticket at home and consequently was unable to show it when called for, and it was held that in conformity with an express stipulation in his contract with the company, the latter had the right to demand ordinary fare for the passage, and that upon his refusal to pay, the conductor lawfully expelled him from the cars at the next regular station. Maples v. New York, etc., R. Co., 38 Conn. 557; 9 Am. Rep. 434, differs from this case in that the plaintiff Maples had his commutation ticket on his person, but for the moment was unable to find it, and simply requested a reasonable time to find it, which was denied by the conductor; and he was ejected from the train at a place other than a regular station. The court also notes the circumstance that there was no express stipulation in his contract with the company that he should pay his fare for the trip if his ticket was not shown to the con-

ductor. And furthermore, that he was well known to the conductor as a commuter. In this case the ejection was held to be unlawful.

2. Lillis v. St. Louis, etc., R. Co., 64 Mo. 464; 27 Am. Rep. 255; Sherman v. Chicago, etc., R. Co., 40 Iowa 45; Powell v. Pittsburgh, etc., R. Co., 25 Ohio St. 70. See *infra*, this title, *Kinds of Tickets—Limited*.

**Commutation Ticket Over Two Roads.**—A person bought a commutation ticket good for one thousand miles travel upon two roads, forming one continuous line, from a company owning one road, and leasing the other—seven hundred miles to be traveled upon one road, and three hundred miles to be traveled on the other, as indicated by figures of different colors on the ticket. It was held that after the specified number of miles on one division had been exhausted, and punched out of the ticket, the holder was not entitled to travel on that division, although there yet remained on the ticket figures for the other division, representing the number of miles for which the ticket was offered. Terre Haute, etc., R. Co. v. Fitzgerald, 47 Ind. 79.

**Quarterly Commutation Ticket—Refunding of Purchase Price.**—The complainant purchased on the 13th day of June what the respondent termed a quarterly commutation ticket, specifying the number of trips that might be taken thereon as one hundred and eighty, but it provided that the term should expire on the 31st day of the following August, and this was known to the complainant when he made the purchase. It was similarly stated on each one of such quarterly tickets when it was to expire; namely, at the end of the third calendar month after it was issued. It was held that the complainant was not entitled to recover any portion of the purchase price for the thirteen days less than a full quarter. Sidman v. Richmond, etc., R. Co., Interstate Commerce Com.

A family commutation ticket, which on its face purports to be for the exclusive use of a man and family, authorizes a son who is residing with the father as a member of his family, to travel thereon, notwithstanding he may have attained his majority.<sup>1</sup>

A stipulation in a commutation ticket in coupon form that the coupons shall be void unless detached by the conductor, is reasonable and valid, and the holder violates the contract by detaching them himself.<sup>2</sup> If while detaching the coupons the conductor calls his attention to the fact that it is his duty to detach them, the passenger should desist and hand the ticket and coupons to the conductor, and it will then be the duty of the latter, if he saw the coupons detached, or could readily ascertain that they had been detached from the ticket, to accept them, but the conductor will not be bound to receive the detached coupons without seeing the ticket.<sup>3</sup> If the passenger refuses to allow the conductor to detach them, and insists upon doing it himself, he may be expelled from the train.<sup>4</sup>

Rep., April 5th, 1890; 41 Am. & Eng. R. Cas. 35, note.

**Monthly Commutation Ticket—Rescission of Contract.**—In *Smith v. Philadelphia, etc., R. Co.*, 11 Pa. Co. Ct. Rep. 555, it was held that where a person holding a monthly commutation ticket does not use the whole of it, and seeks to recover for the portion unused, the special contract evidenced thereby is rescinded, and the usual fare for the number of times that the holder used the ticket having exceeded the price of the ticket, he was entitled to recover nothing, whether the *Pennsylvania* Act of May 6th, 1863 (P. L. 582), requiring railroad companies to redeem unused tickets, applied to the case or not.

1. *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584. But it was held further, that if at the time of purchase, the purchaser was informed that a son over twenty-one years of age would not, under the regulations of the company, be allowed to ride on it, such regulations would constitute a part of the contract of purchase, and would be obligatory upon the holder of the ticket and any person attempting to travel on the same.

2. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250; 26 Am. & Eng. R. Cas. 235; *Boston, etc. R. Co. v. Chipman*, 146 Mass. 107; 34 Am. & Eng. R. Cas. 336; 4 Am. St. Rep. 293; *Houston, etc., R. Co. v. Ford*, 53 Tex. 364.

3. *Louisville, etc., R. Co. v. Harris*, 9 Lea (Tenn.) 180; 16 Am. & Eng. R. Cas. 374; 42 Am. Rep. 668.

A passenger offered detached coupons for his fare, and was arrested for fraudulently evading payment. In an action for false imprisonment, it was held that evidence that plaintiff had frequently seen the conductor accept similar coupons under similar circumstances, was inadmissible, except to prove a custom. *Marshall v. Boston, etc., R. Co.*, 145 Mass. 164; 31 Am. & Eng. R. Cas. 18.

**"Not Good for Passage if Detached."**—In *Wightman v. Chicago, etc., R. Co.*, 73 Wis. 169; 9 Am. St. Rep. 778, it was held that a round trip railroad ticket punctured for separation into two parts and having on the "going" part the words "not good for passage," and on a line therewith on the "returning" part, the words "if detached," is, nevertheless good for passage where the parts have become separated by accident, if both parts are in good faith presented to the conductor on the outward trip. The words were regarded by the court as not having the effect of a stipulation that the ticket should be deemed forfeited if such parts should be separated by any other person than the conductor, but as having been so placed upon the ticket to prevent imposition by a separation of the parts and the use of each as a single-trip ticket. Such being the case, the presentation to the conductor of the two parts, under the circumstances found, was the same in legal effect as though the parts had not been detached when so presented.

4. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250; 26 Am. & Eng. R. Cas. 235.

**3. Non-transferable.**—A carrier may restrict the use of a ticket to the original purchaser. The words "not transferable," or words of like import, printed on the ticket, will have that effect, and a third party can acquire no rights by virtue of such a ticket.<sup>1</sup> But it is held that if one, without attempting to conceal his identity, presents for his passage a non-transferable ticket issued to another, and his claim is recognized by the conductor, he is entitled to the rights of a passenger.<sup>2</sup> If a ticket, on its face not transferable, is issued in the name of the wrong party, the conductor may refuse to receive it when tendered by the person for whom it was in fact purchased.<sup>3</sup> It has been held that a stipulation in the ticket that it is not transferable and will be forfeited if found in the hands of any but the party in whose name it is issued, will render the ticket liable to forfeiture, even in the hands of the original purchaser, if he has, either intentionally or through negligence, permitted it to be used by another.<sup>4</sup> But a non-transferable ticket containing a condition that if the purchaser fails to comply with the terms of the ticket the company may refuse to accept it, does not give the conductor the right to take it up when found in the hands of a third party, but merely to refuse to honor it.<sup>5</sup> If no restriction is put upon a ticket by the carrier, before or at the time of the original purchase, it is transferable, being regarded as evidencing a contract to carry bearer.<sup>6</sup>

**4. Excursion.**—The holder of an excursion ticket, which contains a stipulation that it shall be good only on a certain day, or on a specified train, cannot, by virtue of such ticket, lawfully claim passage at any other time,<sup>7</sup> than upon the day named in the ticket,

Especially when he also refuses to exhibit the book to enable the conductor to ascertain whether the coupons had been recently detached and the passenger had the right to travel on them. *Louisville, etc., R. Co. v. Harris*, 9 Lea (Tenn.) 180; 16 Am. & Eng. R. Cas. 374; 42 Am. Rep. 668.

1. *Langdon v. Howells*, 4 Q. B. Div. 337; *Way v. Chicago, etc., R. Co.*, 64 Iowa 48; 52 Am. Rep. 431; *Cody v. Central Pac. R. Co.*, 4 Sawy. (U. S.) 114; *Post v. Chicago, etc., R. Co.*, 14 Neb. 110; 9 Am. & Eng. R. Cas. 345; 45 Am. Rep. 100.

In *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, it was held that the fact that the ticket was not signed by the original purchaser, made no difference, since in accepting a ticket where the contract was set out in full, he accepted the terms of the contract and was bound thereby.

2. *Robostelli v. New York, etc., R. Co.*, 33 Fed. Rep. 796; 34 Am. & Eng. R. Cas. 515.

3. Where appellee's husband bought

a non-transferable thousand-mile ticket, and told the agent to issue it to E. Bannerman, and the agent, thinking it was intended for a man, inserted "Mr." before the name, and the ticket was presented by the husband to pay his wife's fare, he stating at the time to the conductor that it was bought for his wife, Elsa Bannerman, and the conductor refused to receive such ticket in payment of the wife's fare, and upon a refusal to pay her fare, put her off at the next station, using no unnecessary force; it was held that the appellee could not recover damages from the railroad company for such expulsion. *Chicago, etc., R. Co. v. Bannerman*, 15 Ill. App. 100.

4. *Friedenrich v. Baltimore, etc., R. Co.*, 53 Md. 201.

5. *Post v. Chicago, etc., R. Co.*, 14 Neb. 110; 9 Am. & Eng. R. Cas. 345; 45 Am. Rep. 100.

6. *Hudson v. Kansas Pac. R. Co.*, 3 McCrary (U. S.) 249.

7. *McElroy v. Railroad Co.*, 7 Phila. (Pa.) 206.

or by any other train.<sup>1</sup> And it has been held that if the ticket calls for a "continuous trip only," between two points, it is not valid for passage to an intermediate point on a train which does not make the whole trip.<sup>2</sup> A round-trip excursion ticket, not limited by its terms, is good until used, unless the purchaser was notified to the contrary at the time of purchase.<sup>3</sup> And the company has no right to expel a passenger traveling on such a ticket after the original date of limitation where the time has been extended by a duly authorized agent.<sup>4</sup> If a railroad company

A railroad excursion ticket which contains a special contract, is conclusive, and advertisements of the tour are inadmissible in evidence to vary its terms. If such ticket provides that it is exchangeable for another, good for the day and train designated in the latter, the holder of the exchange ticket cannot travel on a later train and day. *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194; 18 Am. & Eng. R. Cas. 313.

A regulation that the holder of the ticket must present himself for identification at the office of the company at the terminal station, and that the ticket shall be valid only for a certain time after such identification, is valid. *Rawitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47.

In *State v. Campbell*, 32 N. J. L. 309, a passenger purchased an excursion ticket on the face of which it was declared that it was good for one passage on the day sold, only. A passenger returning upon a subsequent day bought an ordinary ticket, and entered the train; being called on by the conductor for his ticket he tendered the return coupon of the spent excursion ticket, keeping the one he had just bought out of view. The coupon was refused and his fare demanded, and not complying with the demand, nor intimating that he had a better ticket, he was put off at a regular station after considerable resistance, which occasioned delay and inconvenience to the train and passengers. After his expulsion and before the train started, he exhibited his valid ticket to the conductor and attempted to re-enter the train, but was prevented by force. It was held that the conductor had the right to exclude him.

See *infra*, this title, *Kinds of Tickets—Limited*.

1. In *Nolan v. New York, etc., R. Co.*, 41 N. Y. Super. Ct. 541, the plaintiff bought an excursion ticket containing the stipulation "good this day on

all trains except the Boston express train," and with it attempted to ride on the Boston express, from which he was ejected for non-payment of fare after the refusal of the conductor to honor the ticket. It was held that the expulsion was justifiable.

The manager of an excursion from Wilmington to Washington, contracted with the defendant company for a train of cars at a certain sum, and after advertising the time, etc., sold card tickets for the round trip. After the departure of the train, and when it had proceeded a few miles, the defendant's conductor passed through the cars and took up the card tickets, and in lieu thereof gave coupon tickets, in order that the connecting roads might hold vouchers to obtain their *pro rata* share of excursion money, in settling with the defendant. There was a regulation of the company that excursion passengers were entitled to ride in the excursion train only. The coupon tickets contained nothing about the right to use them on a regular train—on the contrary, they bore internal evidence that they were to be used on the excursion train, and no other. It was held that the plaintiff excursionist could not return on a regular train even at an earlier day than that advertised for the excursion train. *McRae v. Wilmington, etc., R. Co.*, 88 N. Car. 526; 18 Am. & Eng. R. Cas. 316; 43 Am. Rep. 745.

2. *Johnson v. Philadelphia, etc., R. Co.*, 63 Md. 106; 18 Am. & Eng. R. Cas. 304.

3. *Pennsylvania R. Co. v. Spicker*, 105 Pa. St. 142; 23 Am. & Eng. R. Cas. 672. And in this case it was held that evidence was not admissible to show that by the regulations of the company such tickets were not good after a certain date, and that public notice thereof was given by posters, circulars, etc.

4. *Randall v. New Orleans, etc., R. Co.*, 45 La. Ann. 778. See also *Spell-*

advertises to run an excursion train on a certain day, giving the rate of fare for the round trip, etc., and a person duly presents himself at the ticket office to purchase a ticket therefor, but is unable to do so through the fault of the company, he may take passage on such train, and will be entitled to the special excursion rate of fare.<sup>1</sup>

5. **Limited.**—A passenger carrier has the right to impose limitations as to the time within which its tickets may be used, but in all cases such limitations must be reasonable or they will have no validity.<sup>2</sup> Subject to this qualification of reasonableness, when upon its face the ticket is issued available for a limited time only, the holder thereof will not be entitled to passage by virtue of it after the expiration of the time specified.<sup>3</sup> A ticket containing a condition that it will not be good unless "used" on or before a certain day, requires the holder to enter upon the journey before

man *v.* Richmond, etc., R. Co., 35 S. Car. 475.

1. Chicago, etc., R. Co. *v.* Graham, 3 Ind. App. 28. In this case complainant alleged that the defendant railroad company advertised to run an excursion train on a certain day to a certain place, giving the time of its arrival and departure at the various stations and the fare for the round trip; that plaintiff went to one of the small stations and sought to procure a round-trip excursion ticket, but there were no such tickets for sale at that station; that plaintiff paid more than the fare for the round trip at the excursion rate to conductor and took his receipt, and demanded that he be carried the round trip; that returning on the same train the same conductor demanded a return fare, and on his refusal to pay, expelled the plaintiff from the train. It was held that the complaint showed sufficient compliance on the part of the plaintiff with the defendant company's regulation, to entitle him to the excursion rate, and further, that it was no defense that the ticket office had been discontinued at this station, as the plaintiff had a right to expect the company to furnish reasonable facilities for procuring tickets.

2. Thus, if a ticket is issued from A to B and return, "good for this day only," and there is no train which leaves B on the return trip to A after the arrival of the train, the condition is unreasonable, and the holder will be entitled to a return passage to A on the first train leaving B for A on the next day. 2 Wood's Ry. Law, 1403.

3. Farewell *v.* Grand Trunk R. Co.,

15 U. C., C. P. 427; Briggs *v.* Grand Trunk R. Co., 24 U. C., Q. B. 510; Elmore *v.* Sands, 54 N. Y. 512; 13 Am. Rep. 617; Hill *v.* Syracuse, etc., R. Co., 63 N. Y. 101; Barker *v.* Coffin, 31 Barb. (N. Y.) 556; Pier *v.* Finch, 24 Barb. (N. Y.) 514; Boice *v.* Hudson River R. Co., 61 Barb. (N. Y.) 611; Wentz *v.* Erie R. Co., 3 Hun (N. Y.) 241; Nelson *v.* Long Island R. Co., 7 Hun (N. Y.) 140; Gale *v.* Delaware, etc., R. Co., 7 Hun (N. Y.) 670; Boston, etc., R. Co. *v.* Proctor, 1 Allen (Mass.) 267; Shedd *v.* Troy, etc., R. Co., 40 Vt. 88; State *v.* Campbell, 32 N. J. L. 309; Pennington *v.* Philadelphia, etc., R. Co., 62 Md. 95; 18 Am. & Eng. R. Cas. 310; McClure *v.* Philadelphia, etc., R. Co., 34 Md. 532; 6 Am. Rep. 345; Heffron *v.* Detroit City R. Co., 92 Mich. 406; Powell *v.* Pittsburgh, etc., R. Co., 25 Ohio St. 70; Terre Haute, etc., R. Co. *v.* Fitzgerald, 47 Ind. 79; Howard *v.* Chicago, etc., R. Co., 61 Miss. 194; 18 Am. & Eng. R. Cas. 313; McRae *v.* Wilmington, etc., R. Co., 88 N. Car. 526; 18 Am. & Eng. R. Cas. 316; Lillis *v.* St. Louis, etc., R. Co., 64 Mo. 464.

The reasonableness of a regulation of this character is obvious. It enables the carrier to provide requisite car-room for all holders of tickets who are entitled to ride within a particular period or upon a particular train. Such limitations are generally printed upon the ticket, and may then be said to constitute a part of the contract rather than a rule governing the rights of the parties. State *v.* Campbell, 32 N. J. L. 309. It is said, however, that the ignorance of a passenger that his ticket

midnight of the last day, yet having done so, he will be entitled to passage to his destination, though the time expires while *en route*.<sup>1</sup>

If a railroad company sells a limited ticket over its own and connecting roads, and such ticket is the joint contract of the several carriers, a passenger who is delayed by the fault of one of the roads, is entitled to complete his journey upon such ticket, although the time expires before he reaches the last of the connecting lines; but if the ticket is in coupon form, and expressly provides that the carrier selling it is merely the agent of the connecting roads, and is not responsible beyond its own line, the passenger is not entitled to be carried over the last road after the time has expired, although he is delayed by the fault of one of the other companies.<sup>2</sup> When, however, the last day of the limitation falls on Sunday, and the last line runs no train on that day, the passenger will be entitled to transportation if he presents himself for the first train of the next day.<sup>3</sup> It has been held that the words, "good this trip only," upon a ticket, will not have the effect of limiting the undertaking of the company to any particular day, as they do not relate to time but to a journey, and if the ticket has not been previously used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date.<sup>4</sup> The

is, by the rules of the company, limited to a particular day, makes no difference, because it is his duty to inform himself as to that matter. *Johnson v. Concord R. Co.*, 46 N. H. 213; 88 Am. Dec. 199.

In *Rawitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47; 31 Am. & Eng. R. Cas. 129, a return ticket from New Orleans to Toronto, good for thirty days, was issued. The ticket contained a condition that on leaving Toronto the purchaser would call at the company's office there, and for the purpose of identification, sign the ticket in the presence of the agent; and return to New Orleans within fifteen days from the date of the signing. On July 14th, the purchaser signed the condition at Toronto. The limit of the ticket, the end of the thirty days, was August 8th. On August 3d the purchaser, while on his return journey, was expelled from the train, the conductor alleging that the fifteen days having expired, the ticket was not available. The purchaser alleged that until the conductor refused to take the ticket he did not know of the condition. It was held that the passenger was bound by the condition, and the fifteen days having expired, could not travel on the ticket.

1. *Evans v. St. Louis, etc., R. Co.*,

11 Mo. App. 463; *Auerbach v. New York Cent., etc., R. Co.*, 89 N. Y. 281; 6 Am. & Eng. R. Cas. 334; 42 Am. Rep. 290; *Lundy v. Central Pac. R. Co.*, 66 Cal. 191; 56 Am. Rep. 100; 18 Am. & Eng. R. Cas. 309; *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219.

In *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, the condition on a ticket that it would not be good for return passage unless the holder identified himself to the agent of the connecting road at a named station, "on or before January 20th, 1888, and when officially signed . . . by such agent, this ticket shall be good only three days after such date," was construed to mean that the journey was to be completed within the three days, and not merely commenced within that time.

2. *Gulf, etc., R. Co. v. Looney* (Tex. 1892), 52 Am. & Eng. R. Cas. 197; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276. See *supra*, this title, *Kinds of Tickets—Through (Over Connecting Lines)*.

3. *Little Rock, etc., R. Co. v. Dean*, 43 Ark. 529; 21 Am. & Eng. R. Cas. 279; 51 Am. Rep. 584.

4. *Pier v. Finch*, 24 Barb. (N. Y.) 514. But this case seems to be doubted by Judge Redfield, 1 Redf. on Railways (6th ed.), p. 93, n. 5.

fact that the passenger has on other occasions been permitted to ride on an expired ticket, or even on the particular ticket in question, does not establish a custom of the company to that effect, and so entitle the passenger to transportation;<sup>1</sup> nor will the checking of baggage on such ticket have that effect.<sup>2</sup> A mere verbal declaration by an agent of the company that a ticket, expressed to be good only for a limited time, is good after that time, is of no force or effect against the company, unless the agent is vested with express authority to make such a statement.<sup>3</sup>

A statute making all railway tickets available for a specified time from date, has no force beyond the territorial limits of the state; hence, it would not apply to the case of a ticket calling for passage from a point within, to a point without the state, while being used beyond the limits of the state.<sup>4</sup>

6. **Scalpers.**—In some of the states statutes have been enacted making the business of ticket brokerage or ticket scalping unlawful, and requiring railroad companies to redeem unused tickets.<sup>5</sup> A person who buys a ticket from an unauthorized agent of a railroad in a state where such sale is lawful, is entitled to transportation into another state over the railroad by which the ticket was issued, although a statute of the latter state makes the sale unlawful.<sup>6</sup> The regular fare may be collected of a person who attempts to travel on a scalper's ticket containing a stipulation that it shall be void in the hands of any other than the original purchaser, notwithstanding he bought it on the assurance of an unauthorized agent of the company that it would be accepted.<sup>7</sup> A statute making it unlawful for any person other than a duly authorized agent of the company "to sell or deal in" tickets, has no application to the sale of a single ticket by a person not a dealer therein.<sup>8</sup>

1. *Johnson v. Concord R. Co.*, 46 N. H. 213; 88 Am. Dec. 199; *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Sherman v. Chicago, etc., R. Co.*, 40 Iowa 45; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711.

2. *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241.

3. *Boice v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532; 6 Am. Rep. 345. But see *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.) 140.

4. *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388; 3 Am. & Eng. R. Cas. 432; 39 Am. Rep. 340; *Boston, etc., R. Co. v. Trafton*, 151 Mass. 229.

5. See *North Dakota Laws* 1893, ch. 104, p. 228; *Minnesota Gen. Laws* 1893, ch. 66, p. 102; *Texas Laws* 1893, ch. 73, p. 97.

The *Indiana Law* (1 Rev. St. *Indiana*, 1876, ch. 249), prohibiting general brokerage business in the buying and selling of unused portions of railroad tickets, except under certain well-defined restrictions, is a police regulation, and, whatever may be said either for or against the justice thereof, the legislature in its enactment did not exceed its legitimate power under the state constitution. *Fry v. State*, 63 Ind. 553. Similar rulings have been made in other states. *Com. v. Wilson*, 37 Leg. Int. (Pa.) 484; 56 Am. & Eng. R. Cas. 230; *Burdick v. People* (Ill. 1894), 36 N. E. Rep. 948.

6. *Sleeper v. Pennsylvania R. Co.*, 100 Pa. St. 259; 9 Am. & Eng. R. Cas. 291; 45 Am. Rep. 380.

7. *Drummond v. Southern Pac. R. Co.*, 7 Utah 118. See *supra*, this title, *Kinds of Tickets—Non-Transferable*.

8. *State v. Clarke*, 109 N. Car. 739;

**V. PASSES—1. Generally.**—One who receives and uses a pass to procure free transportation, is held to have consented to the conditions indorsed thereon as fully as though he had signed the same.<sup>1</sup> A pass for life, given without valid consideration, may be revoked, notwithstanding it was issued in pursuance of a vote of the stockholders of the company;<sup>2</sup> and it has been held that the leasing of the railroad operates the revocation of a pass issued without consideration.<sup>3</sup> But a contract based upon a good consideration to grant a life pass, is valid and binding upon the company, and for its refusal to perform the same, may be held liable in damages.<sup>4</sup> Receivers of a railroad cannot make an agreement for a free life pass which will bind subsequent owners of the road.<sup>5</sup> When the company makes it a rule to issue no free passes, it is its duty to inform the conductors of the rights of parties who are entitled to be carried free of charge, and to instruct them to allow the same.<sup>6</sup> The holder of a free pass is entitled to the

*State v. Ray*, 109 N. Car. 736. In this latter case the court, by Merrimon, C. J., said: "These words ('sell or deal,' etc.), imply not simply the sale of a single such ticket as a person may have or obtain, not of purpose to sell the same, but the practice or business of selling such tickets for others, or buying and selling them as is ordinarily done by 'ticket dealers or ticket brokers.' If the purpose had been to forbid the sale of a single ticket that a person might have and could not use himself, the appropriate terms used would have been 'No person shall sell any ticket issued by a railroad company,' or 'It shall be unlawful for any person to sell any ticket issued,' etc., or the like, broad and sweeping terms. The phrases 'to sell tickets,' 'to deal in tickets,' imply, in business parlance, the business of selling, or buying and selling such tickets; they imply not particulars—simply a sale—but a multiplicity of such sales in the sense of a business. The buying and selling of tickets issued by railroad companies to persons traveling over their roads, by 'ticket dealers,' is a common and serious grievance to such companies, and the purpose of the statute is to remedy that evil. It does not extend to the simple sale of a ticket an individual may happen to have that he cannot use. Such sale does not come within the mischief to be remedied."

**Indiana Statute.**—In *State v. Fry*, 81 Ind. 7; 6 Am. & Eng. R. Cas. 340, it was held that by virtue of section 8 of the act of March 9th, 1875 (1 Rev. Stat. Indiana, 1876, p. 259), regulating the issuing of

railroad tickets and coupons, all special tickets are exempted from the operation of said act, whether they are half fare, excursion ticket, or tickets special in any other respect.

1. *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640; 26 Am. & Eng. R. Cas. 274.

2. *New York, etc., R. Co. v. Ketchum*, 27 Conn. 170.

3. *Turner v. Richmond, etc., R. Co.*, 70 N. Car. 1.

4. *Erie, etc., R. Co., v. Douthet*, 88 Pa. St. 243; 32 Am. Rep. 451.

5. *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109; 12 Am. & Eng. R. Cas. 448.

6. *Grimes v. Minneapolis, etc., R. Co.*, 37 Minn. 66; 31 Am. & Eng. R. Cas. 123.

**Renewal.**—An agreement made by a railroad company to furnish to a firm "a ticket entitling either one" of the partners of the firm, "but only one on any train, to occupy one seat and travel on the passenger trains" of the railroad company, confers a right of passage on only one member of the firm at a time, and the evidence of that right is a ticket which must be presented to the conductor of any train upon which a partner of the firm should take passage, and under such a contract it is a question for the jury to decide whether upon the practical construction of the contract adopted by the parties themselves, it was the duty of the firm to apply to the company for the renewal of an annual pass issued by the company, or whether it was the duty of the company to furnish such renewal without any application therefor. *Knopf v.*



same measure of care from the company as a passenger paying full fare.<sup>1</sup>

**2. Condition Exempting Carrier from Liability.**—There is a great contrariety of opinion in this country as to the validity of a stipulation in a free pass exempting the carrier from liability for injury occasioned by the negligence of himself or servants, the question having been much confused and embarrassed by imperfect and unsuccessful attempts to maintain the theory of degrees of negligence, and to distinguish between the different grades of officers and servants of the corporation.<sup>2</sup>

Richmond, etc., R. Co., 85 Va. 769; 37 Am. & Eng. R. Cas. 140.

1. Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125; 18 Am. Rep. 360; Todd v. Old Colony, etc., R. Co., 3 Allen (Mass.) 18; 80 Am. Dec. 49; 7 Allen (Mass.) 207; 83 Am. Dec. 679; Rose v. Des Moines Valley R. Co., 39 Iowa 246; Abell v. Western Maryland R. Co., 63 Md. 433; 21 Am. & Eng. R. Cas. 503. See also Philadelphia, etc., R. Co. v. Derby, 14 How. (U.S.) 468. See *supra*, this title, *Who are Passengers*, and *infra*, this title, *Condition Exempting Carrier from Liability*.

**2. Reasoning of the Courts That Favor the Validity of the Exemption.**—As there is so much conflict of opinion upon the question under consideration, it may be interesting to note the course of reasoning adopted by the courts in arriving at the conclusions set out in the text. Those upholding the validity of the exemption from liability for negligence contend, that the arrangement between the parties should not be regarded as a contract with the railroad company in its character as common carrier; that it drops such character and becomes a mere private carrier, whose liabilities are to be determined by the same rules which are applicable to the ordinary class of gratuitous bailments, or of persons rendering an unbought service; that the definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying passengers for hire, does not apply under such circumstances, and therefore the stipulated exemption is no abdication of that rigid responsibility which the law imposes upon common carriers; that the service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties, and such being the case, there is no sound reason to prevent the

carrier from prescribing as a condition, that he shall not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of his servants. They maintain that the gratuitous accommodation concerns only the immediate parties, except, perhaps, in a very indirect way, by making the fare of other passengers higher; that if fares are unreasonable, however, they may be subject to governmental regulation, but that the remote and indirect effect alluded to cannot make the exemption void on the ground of public policy; that many other gratuities and charities might be named, which, though conceded to be commendable, would have a similar effect. Furthermore, it is well known that with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, besides the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price, on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities or limit the obligations which it imposes upon him. See cases cited in succeeding notes to this section.

**Reasoning of the Courts That Deny the Validity of the Exemption.**—The following is substantially the line of argument of the courts opposed to the validity of such contracts, and it would

In *England*, it is well established that the carrier has full power thus to provide against liability, and a condition in the pass that the passenger travels "at his own risk" will exclude everything for which the company would otherwise have been responsible.<sup>1</sup>

seem to be well-nigh unanswerable. While the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier is dependent upon the contract.

The essential and imperative duty inherent in the very nature of the employment of a common carrier, is that of care, vigilance, and skill in providing suitable and safe means for, the carriage of those who intrust themselves to him for transportation, and of safely carrying them to their destination. A stipulation that the carrier shall not be bound to the exercise of care and diligence, is in effect an agreement to absolve him from one of the essential duties of his employment.

While with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts.

The general laws, and the charters of such corporations, make their employment that of common or public carriers of passengers, etc. This employment they voluntarily assume, and in recognition of the public nature of their business, the law bestows upon them many privileges and benefits which it does not confer upon private persons or strictly private corporations, which often operate as a burden on individuals and communities, and could not be lawfully conferred on a mere private carrier. And the law will not permit a railroad company thus to abandon its obligation to the public, and to lay down its public character as a passenger carrier which the law, as well as the nature of the employment in which it engages, fixes upon it, and become a mere private carrier.

The rules governing gratuitous bailments, in reference to the degree of care incumbent on the bailee, can have but little, if any, application in cases in which, in any manner, the relation of carrier and passenger is established, for behind any contract by which this may be created, stands a public policy

which even the parties may not be permitted to thwart—no stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can be permitted to stand.

The interest of the state in the safety of the citizens is obviously the same, whether the case be one of a passenger for hire or a merely gratuitous passenger. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability, naturally, and it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence on the part of the carrier. It is said, however, that "It is unreasonable to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers, because there may be a few on board for whom they are not responsible." To this it may be answered that while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and vigilance, it still remains true that the greater the sense of responsibility, the greater the care; and that any relaxation of responsibility is dangerous. Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises, do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule, imposing stringent obligations upon him. It is the enforcement of the rule and of the liability imposed thereby—the mulcting of the carrier for his negligence—which brings home to him in the most practical, forcible, and effectual way, the necessity of strictly fulfilling his obligations. See cases cited in succeeding notes to this section.

1. *McCawley v. Furness R. Co.*, L. R., 8 Q. B. 57; *Gallin v. London, etc., R. Co.*, L. R., 10 Q. B. 212; *Hall v. North Eastern R. Co.*, L. R., 10 Q. B. 437.

And this view is sanctioned by the courts of some of the states.<sup>1</sup> Others, while conceding the right to make such exemption in cases of ordinary negligence, refuse to apply the principle in cases of gross negligence.<sup>2</sup> Still others hold that such a stipulation will protect the carrier against the negligence of any of its servants and agents other than its managing officers or directors, the latter being regarded as identical with the corporation itself.<sup>3</sup>

But, by the prevailing doctrine, all fine discriminations in regard to degrees of negligence<sup>4</sup> and grades of agents<sup>5</sup> are

1. *Griswold v. New York, etc., R. Co.*, 53 Conn. 371; 26 Am. & Eng. R. Cas. 280; 55 Am. Rep. 115; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365; 40 Am. & Eng. R. Cas. 693; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369, reversing 29 Barb. (N. Y.) 602. And it is held that a stipulation exempting the carrier from liability, is not abrogated by the purchase of a ticket for a drawing-room car. *Ulrich v. New York Cent. R. Co.*, 108 N. Y. 80; 34 Am. & Eng. R. Cas. 350; 2 Am. St. Rep. 369.

2. *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; 87 Am. Dec. 260; *Toledo, etc. R. Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125; 18 Am. Rep. 360; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 532; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46; 27 Am. & Eng. R. Cas. 102; 58 Am. Rep. 848. In this case it was held that the carrier may stipulate for exemption from liability, for injury arising from want of ordinary care, unless the same is expressly made a crime.

3. *Welles v. New York Cent. R. Co.*, 26 Barb. (N. Y.) 64; 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; 82 Am. Dec. 281. In both of these cases, however, there was a divided court. *Kinney v. New Jersey Central R. Co.*, 32 N. J. L. 407; 34 N. J. L. 513.

4. *Steamboat New World v. King*, 16 How. (U. S.) 474. See NEGLIGENCE, vol. 16. p. 426.

The rule, its application and foundation, are thus clearly stated by an elementary writer: "We have already seen that an agreement that a carrier shall not be liable for negligence, is void as against the policy of the law. There is no reason why this principle should not apply to cases of free, as well as of paid, carriage. If 'confidence,' as has just been stated, is a sufficient consideration, then no passage

voluntarily tendered and accepted, is gratuitous. But, independently of this, it is against public policy that a person using the high and dangerous agency of steam, in any case on which human life depends, should act with a diligence less than a good and capable expert should employ in wielding such an agency. If diligence be proportioned to remuneration, steam service would be graded in diligence according to the degree of pay: first-class diligence for first-class cars; second-class diligence for second-class cars; minimum diligence to those who pay but little, or who do not pay at all. But the law knows no such gradations; when the work is undertaken, then, so far as safety is concerned, the same precautions must be taken for all who are permitted to take passage." *Wharton on Negligence*, 641.

5. In regard to the distinction attempted to be drawn in the *New York* and *New Jersey* cases, between the negligence of the corporation acting through its managing officers, and the negligence of other servants of the company, the court in *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640; 26 Am. & Eng. R. Cas. 274, says: "In the nature of things, every corporation must act solely through agents, and that their powers and duties may differ in degree, it seems to us, should make no difference, in so far as duties and liabilities to passengers, whether free or paying full fare, are concerned. The true inquiry, at last, is, did the injury result from the negligence of any agent of the corporation, while acting within the scope of his employment? If a corporation may relieve itself from liability to a passenger for the negligence of one or more classes of agents, why may it not for the negligence of another class? All of a corporation's employes, from the highest official to the humblest laborer, are but agents. Some of them are necessarily clothed

discarded, and such stipulations held to be contrary to public policy and therefore void.<sup>1</sup> And this rule is wholesome, demanded by the nature of the carrier's employment, embraces a policy which no state having a due regard for the safety of the lives of its

with extensive powers, to make contracts which will bind the corporation in reference to many matters, and to control its operations, while others have but simple labors to perform; yet, none of them are the corporation, clothed with its full power, or responsible for all its acts. We are of the opinion, that the distinction sought to be made in the *New York* and *New Jersey* cases, to which we have referred, has no solid foundation in reason or in public policy, when considered with reference to the right of a corporation pursuing the business of a common or public carrier, to limit, by contract, its liability to a passenger for injury resulting from the negligence of any class of its agents. That, in the nature of things, the negligence of the agent, of whatsoever grade, as to matters within the scope of his employment, with reference to passengers, is the negligence of the corporation itself, which, all the American cases agree, fixes a liability which the carrier cannot be permitted to avoid by contract." The distinction is also denied in *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; 87 Am. Dec. 260. And in *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, Mr. Justice Bradley made the following observation upon the same point: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties, an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at lib-

erty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms. Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law."

And in *Welsh v. Pittsburgh, etc., R. Co.*, 10 Ohio St. 75; 75 Am. Dec. 490, the court says: "This doctrine, when applied to a corporation, which can only act through its agents and servants, would secure complete immunity for the neglect of every duty."

1. *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640; 26 Am. & Eng. R. Cas. 274; *Buffalo, etc., R. Co. v. O'Hara* (Pa. 1882), 9 Am. & Eng. R. Cas. 317; *Knowlton v. Erie R. Co.*, 19 Ohio St. 260; 2 Am. Rep. 395; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126; *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228; *McElwain v. Erie R. Co.*, 21 N. Y. Wkly. Dig. 21; *Rope v. Des Moines Valley R. Co.*, 39 Iowa 246. This case, however, was based upon the following statute: "Every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents, or by mismanagement of the engineers or other employes of the corporation, to any person sustaining such damage, all contracts to the contrary notwithstanding." See also *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. This was a case of a drover's pass, but supports the principle contended for. *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 469; *Steamboat New World v.*

people can abandon, for it discourages negligence by holding the carrier to strict accountability, and yet imposes upon him no responsibility that he does not voluntarily assume when he engages in the employment.<sup>1</sup>

**3. Interstate Commerce Act.**—The Interstate Commerce act in effect prohibits carriers of passengers subject thereto, from giving free passes to particular persons; and the exception allowed in favor of the officers and employes of the company, does not extend to the families of such persons.<sup>2</sup> Free transportation issued in the form of an annual pass to a person not in the regular and stated service of the carrier, nor receiving any pay under a contract of employment, but requested by him as a return "for throwing in its way what business he conveniently could," is illegal.<sup>3</sup> But where a free pass was given to a discharged employe of the company, upon the assumption that he might still be regarded as an employe, and it affirmatively appeared that it was never used, and that it expired in the hands of the party by a limitation contained on its face, there was held to be no violation of the law.<sup>4</sup> The issuing of passes to persons on account of their high social, business or official position is in contravention of the act, it being adjudged that the language of the act, "under substantially similar circumstances and conditions," has no reference to the relative standing of individuals in the community, but to the nature of the service performed by the carrier.<sup>5</sup>

King, 16 How. (U. S.) 469; Grand Trunk R. Co. v. Stevens, 95 U. S. 655. In this case it was held that the carrier could not lawfully stipulate against liability for negligence where the transportation, although not paid for in money, was not a mere matter of gratuity, and the court strongly intimated that it would not have come to a different conclusion had the passage been a mere gratuity.

And in *Indiana Cent. R. Co. v. Mundy*, 21 Ind. 48; 83 Am. Dec. 339, the pass contained the following: "It is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property, while using the same on the trains of the company." It was held that such a stipulation does not cast upon the passenger any risks arising from the gross negligence of the servants of the railroad company in running the train, and it would seem that it does not cast upon the passenger any risks arising from any negligence of the servants of the railroad company in running the train. The court, while intimating that the weight of American authorities is opposed to allowing the carrier to

exempt himself from liability for the consequence of his negligence, refrained from expressing any opinion on the question either way.

1. The following is the testimony of an authoritative witness, as to the operation and effect of the decisions upholding the validity of the stipulations under consideration: "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations, and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction, upon the power to make this kind of contracts." *Stimson v. New York Cent. R. Co.*, 32 N. Y. 337; 88 Am. Dec. 332.

2. *Ex p. Koehler*, 1 Interstate Commerce Com. Rep. 317; 29 Am. & Eng. R. Cas. 44.

3. *Slater v. Northern Pac. R. Co.*, 2 Interstate Commerce Com. Rep. 359.

4. *Griffie v. Burlington, etc., R. Co.*, 2 Interstate Commerce Com. Rep. 301.

5. In *Harvey v. Louisville, etc., R. Co.*, 3 Interstate Commerce Com. Rep. 793, the defendant gave free transportation to the city council of

**4. Drovers' Passes.**—When stock is transported upon a railroad it is usual for the company to give the shipper a ticket termed a "drover's pass," entitling him to accompany the stock to their destination and return. The pass ordinarily stipulates that the drover assumes all risk of accident, and releases the carrier from liability for all injuries, whether occasioned by the negligence of the company or its servants or otherwise. There is some conflict of authority as to the *status* of such a passenger and consequently the effect of such a stipulation. The English courts,<sup>1</sup> and those of *New York*,<sup>2</sup> regard the drover as a gratuitous passenger, and bound by the release. But the prevailing doctrine in this country is, that the contract of shipment and the pass are to be construed

New Orleans and its clerk on its interstate lines, on account of their official positions, and it was held to be a violation of the act. So where a railroad company issues passes to persons occupying high positions under the *United States*, and state, government, and to persons whose good will was claimed to be of consequence to it, entitling them to transportation over the road, which extended into several states, it was held that giving passes under such circumstances was illegal. *In re Boston, etc., R. Co.*, 3 Interstate Commerce Com. Rep. 717.

Section 2 of the Interstate Commerce act provides: "That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons, a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

1. *McCawley v. Furness R. Co.*, L. R., 8 Q. B. 57; *Gallen v. London, etc., R. Co.*, L. R., 10 Q. B. 212; *Duff v. Great Northern R. Co.*, L. R., 4 Ir. 178.

2. *Boswell v. Hudson River R. Co.*, 5 Bosw. (N. Y.) 699; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369, reversing 29 Barb. (N. Y.) 602. In this case the pass ex-

pressly stipulated that the company should not be liable, under any circumstances, "whether of negligence by their agents or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The supreme court held that gross negligence, whether of servants or principals, cannot be excused by contract in reference to carriage of passengers for hire, and such a contract is against policy of the law, and void. This judgment, however, was reversed by the court of appeals by a vote of four judges against three, Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the pass was a free pass, as it purported to be, and therefore that the case was governed by *Welles v. New York Cent. R. Co.*, 26 Barb. (N. Y.) 641; 24 N. Y. 181; but whether so or not, the contract was founded on a valid consideration, and the passenger was bound by it, even to the assumption of the risk rising from the gross negligence of the company's servants.

The late case of *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364, is in all essential respects similar to this, and a similar result was reached.

Though it may now be considered as settled law in this state that a person riding on such a pass, is not to be considered as a passenger for hire, yet in the first case of the kind that arose,

as a single contract, the consideration of which is the charges made for the transportation of the stock, and that the drover is a passenger for hire and the exemption is void.<sup>1</sup>

*Smith v. New York Cent. R. Co.*, 29 Barb. (N. Y.) 132; 24 N. Y. 222, a contrary view was held. In this case the drover's pass contained a stipulation that "the persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause." The damage arose from a flattened wheel in the car, which caused it to jump the track. The supreme court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree, from the consequences of his own negligence, or that of his servants. But to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such case. Of course this remark was extra-judicial. The judgment was affirmed by the court of appeals by a vote of five judges to three. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the state; yet the state has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not only the party who is carried. Judge Sutherland agreed in substance with this view. Two other judges held that if the party injured had been a gratuitous passenger, the company would have been discharged, but in their view, he was not a gratuitous passenger. One judge was for affirmance, on

the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

1. The leading case upon this subject in this country is *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, in which it was held, first, that a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law. Second, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. Third, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. Fourth, that a drover traveling on a pass such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

In *Cleveland, etc., R. Co. v. Curran*, 16 Ohio St. 1; 2 Am. Rep. 362, the carrier in making a contract for the shipment of live stock at a specified rate, delivered to the shipper, without any additional consideration, a "drover's pass," entitling him to go with the stock and to return on a passenger train. In the written agreement for transporting the stock, the holder of the ticket was referred to as "riding free to take charge of the stock." On the pass was an indorsement that it was a "free ticket," and that the holder assumed all risk of accident, and agreed that the company should not be liable under any circumstances, whether of negligence by the company's servants or otherwise, for any injury to his person or property, and that he would not consider the company as common carriers, or liable as such. It was held that the pass and the agreement for transporting the stock, constituted together a single contract, and that the holder, both while going with his stock and returning, was not a gratuitous passenger, but a passenger for hire. The stipulation exempting the company from liability for negligence, was

**VI. FARE PAID ON TRAIN.**—A railroad company may establish a rate of fare for passengers failing to provide themselves with tickets before entering the train, higher than the ticket rate, the extra charge being regarded as a compensation to the company for the additional inconvenience to which it is subjected by being compelled to receive the fare by the hands of the conductor.<sup>1</sup> In some states such extra charge is expressly authorized by statute.<sup>2</sup> But the car rate can, in no case, exceed the maximum

held to constitute no defense to an action brought by the shipper for personal injury, caused by negligence of servants of the company in the management of the trains. The court regarded the expressions "riding free," and "free ticket," as meaning only that the holder was to be subjected to no additional charge, and that he was to pass free of the usual fare exacted of passengers.

And in full accord with these two cases are the following: *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409; 37 Am. & Eng. R. Cas. 46; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298; 13 Am. & Eng. R. Cas. 10; 48 Am. Rep. 10; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; 26 Am. & Eng. R. Cas. 268; 57 Am. Rep. 382; *Indianapolis, etc., R. Co. v. Beaver*, 41 Ind. 493; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Flinn v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 469; *Virginia, etc., R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

1. *St. Louis, etc., R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353; *Stephen v. Smith*, 29 Vt. 160; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 469; *Jeffersonville, etc., R. Co. v. Rogers*, 38 Ind. 116; *Indianapolis, etc., R. Co. v. Rinard*, 46 Ind. 293; *Sage v. Evansville, etc., R. Co.* (Ind. 1893), 33 N. E. Rep. 771; *Hilliard v. Goold*, 34 N. H. 230; 66 Am. Dec. 765; *Du Laurens v. St. Paul, etc., R. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *State v. Chovin*, 7 Iowa 204; *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.) 579; *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505; *State v. Goold*, 53 Me. 279; *Lane v. East Tennessee, etc., R. Co.*, 3 Lea (Tenn.) 124; 2 Am. & Eng. R. Cas. 278; *Indianapolis, etc., R. Co. v. Kennedy*, 77 Ind. 507; 3 Am.

& Eng. R. Cas. 467; *Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511; 26 Am. & Eng. R. Cas. 258; *Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444; 13 Am. & Eng. R. Cas. 31; *Poole v. Northern Pac. R. Co.*, 16 Oregon 261; 8 Am. St. Rep. 289; *McGowen v. Morgan's etc., R., etc., Co.*, 41 La. Ann. 732; 39 Am. & Eng. R. Cas. 460. Or the company may make a deduction from the regular or advertised fare in case of those buying tickets at the station. *Swan v. Manchester, etc., R. Co.*, 132 Mass. 116; 6 Am. & Eng. R. Cas. 327; 42 Am. Rep. 432; *State v. Goold*, 53 Me. 279. Or the company may adopt a regulation that passengers who fail to procure tickets before entering the train must pay an additional charge of ten cents, which they may have refunded to them upon presentation at any ticket office of a draw-back check given them by the company. Such a regulation is fair and impartial in its operation, because it provides that passengers entering the train at stations where there is no ticket office and passengers traveling on trains where, on account of the excessive rush of business, it is impossible to issue the refunding checks, shall not be required to pay the additional charge. *Reese v. Pennsylvania R. Co.*, 131 Pa. St. 422; 41 Am. & Eng. R. Cas. 31; 17 Am. St. Rep. 818; *McGowen v. Morgan's etc., R., etc., Co.*, 41 La. Ann. 732; 39 Am. & Eng. R. Cas. 460.

2. *Atchison, etc., R. Co. v. Hogue*, 50 Kan. 40.

In *South Carolina*, where there is a ticket office, and it is kept open for the sale of tickets to passengers for thirty minutes before the train leaves, if the passenger neglects to purchase a ticket, he is liable to pay the ordinary fare and 25 cents additional; and if he refuses to do this, he is not entitled to transportation for any distance. If his neglect to purchase was intended as a fraud upon the rights of the corporation, he is also liable to a forfeiture.



allowed the company by its charter,<sup>1</sup> or a statute fixing rates,<sup>2</sup> and in the absence of such limitation the rate must be reasonable.<sup>3</sup> It is held that if a passenger pays only from one station to another, without a ticket, he may be compelled to pay an extra charge at each station, as a new contract between him and the company is thus made at each station.<sup>4</sup>

To justify this discrimination, every reasonable and proper facility and accommodation must be afforded the passenger to procure a ticket. The duty of the company in this respect may be stated thus: It must furnish a convenient and accessible place for the sale of tickets, with a competent person in attendance ready to sell them, which place should be open and accessible to all passengers for a reasonable time before the departure of each train, so that the passenger's failure to obtain a ticket shall really be a case of neglect on his part and not the fault of the company.<sup>5</sup> Reasonable time, in this connection, is held to mean up to the time fixed by the published rules of the company for

Moore v. Columbia, etc., R. Co., 38 S. Car. 1.

1. Lane v. East Tennessee, etc., R. Co., 5 Lea (Tenn.) 124; 2 Am. & Eng. R. Cas. 278; Louisville, etc., R. Co. v. Guinan, 11 Lea (Tenn.) 98; 13 Am. & Eng. R. Cas. 37; 47 Am. Rep. 279.

2. Cincinnati, etc., R. Co. v. Skillman, 30 Ohio St. 444; 13 Am. & Eng. R. Cas. 31.

If a railroad company fixes two rates of passenger fare, namely, a ticket rate and a car rate, the former within and the latter beyond the limits of its authority, and the conductor of a train, under the direction of the company, refuses to accept from the passenger less than the illegal and unauthorized rate, it is not necessary, to entitle the passenger to remain on the train, to tender more than the ticket rate, although the company might have fixed such ticket rate at a higher sum. Smith v. Pittsburg, etc., R. Co., 23 Ohio St. 10.

But an extra charge required of passengers not providing themselves with tickets before taking passage, to be refunded upon presentation of a drawback coupon, is not a charge for transportation within the meaning of a statute limiting the rate of fare for passenger transportation. Reese v. Pennsylvania R. Co., 131 Pa. St. 422; 41 Am. & Eng. R. Cas. 31; 17 Am. St. Rep. 818.

3. White v. Chesapeake, etc., R. Co., 26 W. Va. 800.

4. Chicago, etc., R. Co. v. Parks, 18 Ill. 464.

But where a passenger buys a ticket from A to B, and on arriving at the latter station decides to go to C, the next station beyond, and there is no ticket office at B, he may not be compelled to pay an additional charge; it is sufficient that he tender the amount of the regular fare. In such a case, the fact that he is without a ticket is not due to any fault of his own, but the company has not afforded him an opportunity to purchase one. Phettipiece v. Northern Pac. R. Co., 84 Wis. 412.

5. Chicago, etc., R. Co. v. Parks, 18 Ill. 460; St. Louis, etc., R. Co. v. Dalby, 19 Ill. 352; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364; Jeffersonville R. Co. v. Rogers, 38 Ind. 116; 10 Am. Rep. 103; Indianapolis, etc., R. Co. v. Rinear, 46 Ind. 293; St. Louis, etc., R. Co. v. South, 43 Ill. 176; 92 Am. Dec. 103; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438; 92 Am. Dec. 81; Wilsey v. Louisville, etc., R. Co., 83 Ky. 511; 26 Am. & Eng. R. Cas. 258; Chase v. New York Cent. R. Co., 26 N. Y. 523; Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; Illinois Cent. R. Co. v. Cunningham, 67 Ill. 316.

If the company has provided a station at which its passenger trains stop, but at which there is no ticket office, it is not affording a passenger a reasonable opportunity to obtain a ticket. Poole v. Northern Pac. R. Co., 16 Oregon 261; 8 Am. St. Rep. 289.

*Kansas* Gen. Stats. 1889, par. 1325, authorizes railroad companies to collect fares in excess of the ticket rate, from passengers who have no tickets, but provides that the act shall not apply to any passenger taking passage from a station where the office was not kept open thirty minutes before the starting of the train. It was held that the company could not charge fare in excess of the ticket rate, where a passenger, deciding to continue his journey, got off at a station to buy a ticket and waited at the window until the conductor shouted all aboard; the agent, in the meanwhile, being busy on the platform handling baggage. *Atchison, etc., R. Co. v. Hogue*, 50 Kan. 40, following *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394.

In *Central R., etc., Co. v. Strickland*, 90 Ga. 562, it was held that the company need not keep a ticket office open each and every minute up to the time it may lawfully close the same, provided a reasonable opportunity to purchase tickets is given to all persons desiring to do so; nor, on the other hand, is a passenger bound to wait at the office an unreasonable time for the appearance of the ticket agent, or to call again and again at the office to obtain a ticket, provided in the exercise of good faith and due diligence he endeavors to do so before the time for closing the office; and in each case, it is a question for the jury whether the parties have respectively performed the corresponding duties devolving upon them.

In *Gulf, etc., R. Co. v. Fox* (Tex. 1887), 33 Am. & Eng. R. Cas. 543, it was held that the failure of the company to give a reasonable time after the opening of the office, for a passenger to purchase a ticket and board the train in safety, is negligence.

**A Contrary View—Comments Thereon.**—In *Crocker v. New London, etc., R. Co.*, 24 Conn. 249, it was held that a regulation making a discrimination in fares, was a mere proposal, and could be withdrawn by the company at any time before being actually accepted by the passenger, and that the closing of the ticket office for the night, before the passenger applies for a ticket, is a withdrawal of the offer to discriminate in favor of those purchasing tickets. But upon this point the court were divided in opinion. This view was sanctioned in a recent case before the supreme court of *New York*. *Bordeaux v. Erie*

*R. Co.*, 8 Hun (N. Y.) 579. But to the contrary is the language of the court of appeals, in an earlier case, where the train left at an hour in the night at which the company was not required to keep its ticket office open. "To compel a passenger to pay a penalty because the company had deprived him of the power to travel for the regular fare, would be so oppressive and unjust that it would require a positive provision of a legislative act to induce any tribunal to sanction it. The statute is open to no such construction. The extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket office that is open. If it is not open, no ticket can be procured, and no right exists to demand the extra fare." *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505. And the *Connecticut* case has also been considered by other tribunals, but failed to receive their approval. *DuLaurans v. St. Paul, etc., R. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 352; *Jeffersonville, etc., R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; *Swan v. Manchester, etc., R. Co.*, 132 Mass. 116; 6 Am. & Eng. R. Cas. 327; 42 Am. Rep. 432. In 1 Redf. on Railways (6th ed.) 99, it is stated that the more reasonable view in regard to the mode of enforcing a discrimination between fares paid in the cars and at the stations, is that such a regulation, however proper in itself, cannot legally be enforced by the company, unless it has afforded every proper and reasonable facility to the passenger for procuring his ticket at the station.

#### **Sufficiency of Effort to Procure Ticket.**

—A passenger does not make a sufficient effort to obtain a ticket if he merely goes to the window of the ticket office, and not finding the agent there, immediately enters the cars without making any effort to see if the agent was within the office, and without making any effort to attract his notice. *Indianapolis, etc., R. Co. v. Kennedy*, 77 Ind. 507; 3 Am. & Eng. R. Cas. 467.

**Passenger Late at Station.**—The fact that a passenger reaches a station too late to buy a ticket before taking the train, will not relieve him of the liability to pay the extra charge required by the company's regulations of those failing to provide themselves with tickets. *Lake Erie, etc., R. Co. v. Mays*, 4 Ind. App. 413.

the departure of the train, and not up to the time of actual departure.<sup>1</sup> But under a statutory provision that the ticket office shall be kept open "at least one hour prior to the departure" of each passenger train, the actual departure of the train is meant.<sup>2</sup>

1. In *Swan v. Manchester, etc., R. Co.*, 132 Mass. 116; 6 Am. & Eng. R. Cas. 327; 42 Am. Rep. 432, the ticket seller was in his office until the time advertised for the departure of the train. He left it after that time and while the train was approaching, in order to aid the station agent, as he was accustomed to do, in loading the baggage upon the train. The plaintiff did not approach the ticket office to find it vacant until after the time had expired for the departure of the train as advertised. There was sufficient time for him to have procured his ticket before the train actually started from the station, if the ticket seller had then been in the office. The court held that the company was not liable for expelling the passenger, for refusing to pay the extra fare demanded of passengers not provided with tickets, and said: "Delays must necessarily from time to time arise in the progress of a train from a variety of incidental circumstances, but at the station everything must be definitely arranged with reference to the time when, by the schedule, the train is to depart. . . . The delay of the train did not enlarge his (the plaintiff's) rights, nor could it entitle him to insist that at the station whence he was to start, the office of the ticket seller should not be closed until its arrival."

In *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, and *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353, it was held to be the duty of the company to keep the ticket office open "for a reasonable time before the departure of each train, and up to the time of its actual departure." But in *St. Louis, etc., R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103, Mr. Justice Breese, in commenting upon these cases, said: "In speaking, then, of the time of the actual departure of a train, up to which the ticket office must be kept open, the court, unquestionably, meant to be understood as referring to the published fixed time, which everybody knew. The presumption being that trains will arrive and depart on their schedule time, which time is notorious, no rule should be established that should apply, without much hardship and great inconvenience, to the departure of

trains not on time. We do not recognize any right in any person to apply at a railroad ticket office, after the time fixed and published for the departure of a train, and demand the same rights and privileges accorded to those who come at the proper time for their tickets. It is well known that trains are sometimes delayed for hours, and that it is unavoidable. Would it not be going too far to require the companies controlling them to keep an agent at his post during all this delayed time? Tickets are not usually applied for by passengers after the time fixed for the departure of a train. The companies have a right to presume that they will not be applied for after that time, and therefore their agents can close the ticket office and go about their other business."

In *Everett v. Chicago, etc., R. Co.*, 69 Iowa 15; 27 Am. & Eng. R. Cas. 98, it was held that the requirement of a reasonable time before the departure of the train does not mean that the office shall remain open up to the very instant the train moves off; and it was held that what is a reasonable time depends principally upon the requirements, convenience, and demands of the public at each particular station.

Nor does it mean that the office shall be kept open within such time, before the departure of a train, that a person cannot procure a ticket and get upon the train before it begins to move. Indeed, a railroad company should not sell tickets within that time. As a matter of public policy, no one except those operating a railroad train ought to be permitted to get upon it while in motion. *State v. Hungerford*, 39 Minn. 6; 34 Am. & Eng. R. Cas. 265.

In *Du Laurans v. St. Paul, etc., R. Co.*, 15 Minn. 49; 2 Am. Rep. 102, it was held that the matter of a reasonable time was a question for the jury.

2. *Porter v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 353; *Chase v. New York Cent. R. Co.*, 26 N. Y. 523; *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505. These cases are not at variance with the proposition of the text numbered 7, as they depend upon a statute of the State of *New York* applicable to the *New York Central*

A passenger who properly applies for a ticket, and is unable to obtain one from any cause attributable to the company or its agents, is entitled to transportation at the ticket rate; he may pay under protest the excess demanded, and recover the same by suit; but he is not obliged to do this—he has the alternative of insisting upon his right to be carried at the ticket rate, and holding the company responsible in damages for a refusal to carry him.<sup>1</sup>

Circumstances may arise under which the tender by the passenger of the ticket fare, as full fare to his place of destination, and the receipt and retention of the same by the conductor, will amount to a waiver by the latter (assuming that he has the right to waive), of the right to require the passenger to still pay the difference between the ticket rate and the car rate. Thus, if the conductor should receive and retain it without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for non-payment, the latter would have the right to assume that the amount paid was satisfactory.<sup>2</sup> But if the sum is received through mistake, the conductor has a reasonable time in which to demand the proper fare, and a refusal to pay the same will justify the passenger's expulsion from the train.<sup>3</sup> And while the conductor may retain out of the money in his hands the proper fare for the distance traveled,<sup>4</sup> yet he must return the residue to the passenger before

Railroad Company alone, which requires it to keep its ticket offices open "at least one hour prior to the departure of each passenger train from each station." This is held to mean its actual departure, and that road is necessarily governed by this positive provision of law.

And in *Missouri Pac. R. Co. v. McClanahan*, 66 Tex. 530; 27 Am. & Eng. R. Cas. 82, the same construction was given to a similar statute. And it was further held that if the company failed to observe the statute, it could not demand the higher rate, even though the passenger did not apply at the office for a ticket within the time specified; the court regarding the provision of the statute as an absolute rule, the operation of which was in no wise dependent upon the attempt or intent of the passenger to buy a ticket.

So the language "immediately prior to the starting of the train," in a statute, means the actual departure, and not the advertised time of departure. *Atchison R. Co. v. Dwell*, 44 Kan. 394; 44 Am. & Eng. R. Cas. 402.

If there is no one in attendance to sell tickets, the office is not open within the meaning of the statute. *Fordyce*

*v. Manuel*, 82 Tex. 527; *Porter v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 353.

**Indictment of Agent for Failure to Keep Office Open.**—It is a good defense to an indictment of a ticket agent, under the new Code of *Tennessee*, section 2359, for failing to keep open his office for one hour before the departure of a particular passenger train, that the company, with notice to the public, had, by its rules, dispensed with the sale and purchase of tickets for that train, and required the passengers to pay the regular ticket fare on that train. *Brady v. State*, 15 Lea (Tenn.) 628.

1. *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; *Indianapolis, etc., R. Co. v. Rinard*, 46 Ind. 293.

2. *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514; 47 Am. & Eng. R. Cas. 482; 24 Am. St. Rep. 246.

3. *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514; 47 Am. & Eng. R. Cas. 482; 24 Am. St. Rep. 246, *qualifying* *DuLaurans v. St. Paul, etc., R. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *Lake Erie, etc., R. Co. v. Mays*, 4 Ind. App. 413.

4. *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514; 47 Am. & Eng. R. Cas. 482; 24 Am. St. Rep. 246, *overruling*

expelling him.<sup>1</sup> He cannot retain a greater sum than the proper fare for the distance traveled and still eject the passenger.

**VII. STOP-OVER PRIVILEGES.**—It may be stated, as a general rule, that in the absence of a statute<sup>2</sup> or agreement<sup>3</sup> to the contrary, the obligation created by the sale of an ordinary passage ticket is for one continuous trip, neither the passenger nor the carrier having the right to compel the other to split it up in parts and perform it piecemeal; and if the passenger voluntarily leaves the train at an intermediate station, while the company is engaged in performing its part of the contract in a reasonable manner, he thereby releases it from further performance by another train or at another time.<sup>4</sup> Should the passenger attempt to resume his journey by virtue of the same ticket, the conductor may demand the regular fare, but before doing this, or expelling him for refusing to

DuLaurans v. St. Paul, etc., R. Co., 15 Minn. 49; 2 Am. Rep. 102.

1. Wardwell v. Chicago, etc., R. Co., 46 Minn. 514; 47 Am. & Eng. R. Cas. 482; Bland v. Southern Pac. R. Co., 55 Cal. 570; 3 Am. & Eng. R. Cas. 285; 36 Am. Rep. 50.

2. In *Maine*, there is a statute (Pub. Laws 1871, ch. 223) prohibiting railroad companies from denying to passengers stop-over privileges. But the statute has no extra territorial operation. Carpenter v. Grand Trunk R. Co., 72 Me. 388; 3 Am. & Eng. R. Cas. 432; 39 Am. Rep. 340; Boston, etc., R. Co. v. Trafton, 151 Mass. 229. Though it applies to a foreign corporation while acting as a carrier in that state. Dryden v. Grand Trunk R. Co., 60 Me. 512.

3. The agreement, of course, must be made by competent authority, otherwise it will not avail the passenger. On some roads it seems that the train agent alone is authorized to bind the company by such an agreement, the conductor not having power to do so. In Petrie v. Pennsylvania R. Co., 42 N. J. L. 449; 1 Am. & Eng. R. Cas. 258, the facts were as follows: The plaintiff, having a ticket good for a continuous passage, stopped over at an intermediate station. Upon boarding a subsequent train, he presented his ticket, which was refused; he stated to the train agent that the conductor of the former train had allowed him the stop-over privilege, and in token thereof had written his initials upon the ticket. He was, however, expelled from the train and thereupon brought suit. On the trial, he testified that the stop-over privilege was really given him by the train agent. The court held that he must stand or fall by his statement to

the train agent, and that failing to show sufficient authority to stop over, judgment was entered for the plaintiff.

But in Tarbell v. Northern Cent. R. Co., 24 Hun (N. Y.) 51, the company was held bound by the grant of the stop-over privilege by a conductor. It will not avail the passenger that he stopped over on the faith of representations made by an agent at a way station, the presumption being that such an agent has no authority to vary the regulations of the company, and the onus of rebutting this presumption is on the passenger. McClure v. Philadelphia, etc., R. Co., 34 Md. 532; 6 Am. Rep. 345.

Nor has a freight agent authority to bind the company by assurances that one traveling on a drover's ticket may stop over at an intermediate station—he having nothing to do with the selling of the tickets. Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432; 10 Am. Rep. 711. As to the effect of declarations made by the ticket agent at the time of purchase of the ticket, in regard to the right to stop over, see Burnham v. Grand Trunk R. Co., 63 Me. 298; 18 Am. Rep. 220.

4. Churchill v. Chicago, etc., R. Co., 67 Ill. 390; Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432; 10 Am. Rep. 711; VanKirk v. Pennsylvania R. Co., 76 Pa. St. 66; Stone v. Chicago, etc., R. Co., 47 Iowa 82; 29 Am. Rep. 458; Hamilton v. New York Cent. R. Co., 51 N. Y. 100; Cheney v. Boston, etc., R. Co., 11 Met. (Mass.) 121; Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457; State v. Overton, 24 N. J. L. 435; 61 Am. Dec. 671; Johnson v. Concord R. Corp., 46 N. H. 213; 88 Am. Dec. 199; Beebe v. Ayres, 28 Barb. (N.

Y.) 275; *Drew v. Central Pac. R. Co.*, 51 Cal. 425; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510; *Craig v. Great Western R. Co.*, 24 U. C. Q. B. 504; *Barker v. Coffin*, 31 Barb. (N. Y.) 556; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Gale v. Delaware, etc., R. Co.*, 7 Hun (N. Y.) 670; *Oil Creek, etc., R. Co. v. Clark*, 72 Pa. St. 231; *Terry v. Flushing, etc., R. Co.*, 13 Hun (N. Y.) 359; *Dunphy v. Erie, etc., R. Co.*, 42 N. Y. Super. Ct. 128; *Hatten v. Railroad Co.*, 39 Ohio St. 375; 13 Am. & Eng. R. Cas. 53; *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210; 22 Am. & Eng. R. Cas. 402; *Gulf, etc., R. Co. v. Henry*, 84 Tex. 78.

But it is held that a passenger on a steamboat may go ashore at points where the steamboat stops, and resume travel on the same boat and trip without forfeiting his right to use his ticket. *Dice v. Willamette Transp. Co.*, 8 Oregon 60; 34 Am. Rep. 575.

A ticket marked "good for one seat from Philadelphia to Pittsburg," means "one seat" in the same train on which the holder takes passage, and that he is to be carried by that train only, and not by train after train, and by broken stages day after day. *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711. Of course, if the ticket expressly provides that the trip shall be continuous, the stipulation is binding, and the passenger, having stopped over, cannot resume the journey by a subsequent train—such a stipulation simply expresses the general rule of law on this subject. *Barker v. Coffin*, 31 Barb. (N. Y.) 556.

**The Words "Continuous Passage"** on a ticket, mean the continuous passage of the person to whom the ticket was issued, and not that of the train. If the latter were the meaning, as many men could station themselves along the company's line as there are stopping places between the point where such ticket is issued to the passenger, and the point for which the ticket has been purchased. The first holder of the ticket might get off at the first stopping place with his baggage and hand the ticket to the man there in waiting, who may repeat the operation, and so on from man to man until the whole transit is completed, in the course of which fifty different persons may be carried over fifty segments of the route and the company's baggagemen may be obliged to handle baggage a hundred times. *Walker v. Wabash, etc., R.*

*Co.*, 15 Mo. App. 341; 16 Am. & Eng. R. Cas. 380.

The law on this subject, with the reasons therefor, is clearly stated in the following extracts from leading cases:

In *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532; 6 Am. Rep. 345, the court, by Grason, J., said: "The contract between the parties is that upon the payment of the fare the company undertakes to carry the passenger to the point named, and he is furnished with a ticket as evidence that he has paid the required fare, and is entitled to be carried to the place named. When the passenger has once elected the train on which he is to be transported, and entered upon his journey, he has no right, unless the contract has been modified by competent authority, to leave a train at a way station and then take another train on which to complete his journey, but is bound by the contract to proceed directly to the place to which the contract entitled him to be taken. Having once made his election of the train and entered upon the journey, he cannot leave that train while it is in a reasonable manner in the undertaking of the carrier, and enter another train without violating the contract he has entered into with the company."

"A contrary doctrine," says the court in *Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457, "would necessarily impose upon the carrier additional duties, the removal of baggage, as well as the passenger, from one train to another, and the consequent additional attention on the part of the company; also an increased risk of accidents and a hindrance and delay not contemplated by a reasonable interpretation of their undertaking."

"Time in these contracts is usually an important element, because inasmuch as the carrier is required to furnish accommodation for all persons who apply for passage on any day, it is of importance to know how many are to be carried, and this cannot be known if there are persons holding tickets who have the right to apply for passage along the route in numbers entirely unknown." *Dykman, J.*, in *Terry v. Flushing, etc., R. Co.*, 13 Hun (N. Y.) 359.

And in *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82; 29 Am. Rep. 458, the court said: "When plaintiff left the train . . . he voluntarily and without the defendant's consent violated

pay the same, must return to him the ticket which he has declined to honor.<sup>1</sup> The above rule has no application when the continuity of the journey is interrupted by misfortune or accident, without fault on the part of the passenger; in such a case he would undoubtedly be entitled to continue his journey by another train.<sup>2</sup> Some railroads grant stop-over privileges, but annex thereto certain conditions precedent; for instance, requiring the passenger to obtain from the conductor, or other train officer, his indorsement of the ticket,<sup>3</sup> or a check,<sup>4</sup> evidencing the right; and if such condition is not observed, the company may refuse to honor the ticket for the remainder of the trip. The privilege is exhausted by the expiration of the time for which it was granted,<sup>5</sup> or by one exercise thereof;<sup>6</sup> and when the passenger again takes the train, he resumes his original status, with all its rights and obligations, and subject to the existing rules of the company. Although it has been customary for the company to permit passengers to stop over at intermediate stations without forfeiting their right to resume travel on the same ticket, yet it may, at any time, make a regulation to the contrary, and it is held that passengers will be bound thereby, whether they have actual notice of it or not.<sup>7</sup>

Tickets in coupon form, calling for transportation over connecting lines, are not within the operation of the foregoing principles.

the contract, and he had no right to be carried on any of the defendant's trains until a new contract had been entered into. The old contract was at an end through his fault, and he could claim nothing thereunder."

1. *VanKirk v. Pennsylvania R. Co.*, 76 Pa. St. 66.

2. *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711. And if the train is delayed *en route* by accident or other cause, it seems that the passenger may leave it and take a different train without paying additional fare. *Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511; 39 Am. & Eng. R. Cas. 418.

3. *Beebe v. Ayres*, 28 Barb. (N. Y.) 275.

4. *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Dunphy v. Erie, etc., R. Co.*, 42 N. Y. Super. Ct. 128; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234; 6 Am. & Eng. R. Cas. 234; 41 Am. Rep. 23. In this case the passenger requested of the conductor, a lay-over check but was given by mistake a trip check; upon presentation of this to the conductor of a subsequent train, it was refused, and the passenger ejected. The ejection was held lawful, but the company liable for the error of the first conductor.

But in *Palmer v. Charlotte, etc., R. Co.*, 3 S. Car. 580, under somewhat similar circumstances, the railroad was held liable for the expulsion. See also *New York, etc., R. Co. v. Winter*, 143 U. S. 60.

The conductor's check will not avail the passenger, unless it contains a clause expressly authorizing the privilege, such check, in the ordinary form, being regarded as a mere certificate of the fact of payment of fare or surrender of the regular ticket. *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671; *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82; 29 Am. Rep. 458; *Cheney v. Boston, etc., R. Co.*, 11 Met. (Mass.) 121; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210; 22 Am. & Eng. R. Cas. 402.

5. Thus, a conductor's check authorizing a lay-over for 30 days, must be presented within that time, in order to be available. *Churchill v. Chicago, etc., R. Co.*, 67 Ill. 390. See also *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241.

6. *Denny v. New York Cent., etc., R. Co.*, 5 Daly (N. Y.) 50.

7. *Johnson v. Concord R. Co.*, 46 N. H. 213; 88 Am. Dec. 199.

Each coupon is held to constitute a separate contract on the part of the company named therein, and entitles the holder to stop over at terminal points between the connecting lines, but he has no right to stop over at stations intermediate such terminal points.<sup>1</sup>

**VIII. CARRYING BEYOND DESTINATION—1. Duty of Carrier.**—It is the duty of a railroad company to stop its train at the passenger's point of destination a sufficient length of time to allow him to leave it with safety to his life and person; and if he is carried beyond by no fault of his own, but by failure of the company's agent to do his duty in this respect, the company is liable in damages.<sup>2</sup> But it is not the conductor's duty to arouse a

1. *Auerbach v. New York Cent., etc.*, R. Co., 89 N. Y. 281; 6 Am. & Eng. R. Cas. 334; 42 Am. Rep. 290; *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332; *Hamilton v. New York Cent. R. Co.*, 51 N. Y. 100; *Nichols v. Southern Pac. R. Co. (Oregon, 1892)*, 31 Pac. Rep. 206; *Little Rock, etc., R. Co. v. Dean*, 43 Ark. 529; 21 Am. & Eng. R. Cas. 279; 51 Am. Rep. 584.

It seems that an express provision in such a ticket, that passage must be continuous to the point of destination, would be binding on the passenger, and it would take away his right to stop over at terminal points. *Hutchinson on Carriers*, § 578. But provisions on this subject must be clear, and where they are of doubtful import, will be construed against the company, and the passenger will be held to have the right to stop over at terminal points. *Auerbach v. New York Cent., etc., R. Co.*, 89 N. Y. 281; 6 Am. & Eng. R. Cas. 334; 42 Am. Rep. 290. In this case the passenger bought a ticket for passage from St. Louis, over the several roads mentioned in coupons annexed to the ticket, to the city of New York. It was specified on the ticket that it was "good for one continuous passage to point named in the coupon attached." The court said: "The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import, the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous, from St. Louis to New York, such intention should have been plainly expressed, and not left in such doubtful manner, and naturally would mislead the passenger."

2. *Hobbs v. London, etc., R. Co.*, L. R., 10 Q. B. 111; *Robson v. North*

*Eastern R. Co.*, 2 Q. B. Div. 85; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Southern R. Co. v. Kendrick*, 40 Miss. 375; 90 Am. Dec. 332; *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478; *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180; *Thompson v. New Orleans, etc., R. Co.*, 50 Miss. 315; 19 Am. Rep. 12; *Ohio, etc., R. Co. v. Hatton*, 60 Ind. 12; *Columbus, etc., R. Co. v. Farrell*, 31 Ind. 408; *Baltimore, etc., R. Co. v. Pixley*, 61 Ind. 22; *International, etc., R. Co. v. Terry*, 62 Tex. 380; 21 Am. & Eng. R. Cas. 323; 50 Am. Rep. 529; *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 294; *Brulard v. The Alvin*, 45 Fed. Rep. 766; *Nunn v. Georgia R. Co.*, 71 Ga. 710; 51 Am. Rep. 284; *Chicago, etc., R. Co. v. Fisher*, 66 Ill. 152; *Evansville, etc., R. Co. v. Kyte (Ind. 1893)*, 32 N. E. Rep. 1134.

Where a passenger on defendant's train left his seat, as the train approached his station, with a view to getting off, and went to the rear platform, whereupon the conductor, looking into the car, failed to see him, and supposing that he had got off, omitted to call the name of the station and ordered the train, which had not stopped, to move on, whereby the passenger was compelled to alight some five or six hundred yards beyond his station and in consequence incurred injuries from which he died, it was held that the company was liable in more than nominal damages. *Louisville, etc., R. Co. v. Mask*, 64 Miss. 738; 30 Am. & Eng. R. Cas. 564.

It is not sufficient that the speed of a train is slackened. And if, after passing a station, the speed of the car is



sleeping passenger when he reaches his station,<sup>1</sup> and a failure to comply with an agreement made by the conductor to that effect, whereby the passenger is carried beyond, imposes no liability upon the company.<sup>2</sup>

again slackened that the passenger may get off, and under the direction of the company he does get off and in so doing is injured, the company is liable. *Georgia R., etc., Co. v. McCurdy*, 45 Ga. 288; 12 Am. Rep. 577.

It is culpable negligence on the part of a railroad corporation not to stop a train entirely at a regular station to which it has sold a ticket, and give a passenger time and opportunity to alight. It is also negligence for its officers to induce a passenger to leave a train while in motion. *Bucher v. New York Cent. R. Co.*, 98 N. Y. 128; 21 Am. & Eng. R. Cas. 361.

Thus in *St. Louis R. Co. v. Cantrell*, 37 Ark. 519; 40 Am. Rep. 105, a passenger was aroused at ten o'clock at night by the conductor, and informed that his station was reached, and told by the brakeman to hurry and get off. The train was moving very slowly and he stepped off, and as it had gone past the platform he fell and was injured. It was held that an action was maintainable therefor.

But where the air-brakes were in good condition when the train started, but became unmanageable from a cause which could not have been prevented, and on this account the train ran past the station, it was held that this did not constitute negligence on the part of the company. *Porter v. Chicago, etc., R. Co.*, 80 Mich. 156; 20 Am. St. Rep. 511. Nor is it *per se* negligence for a railroad company to run a passenger train beyond the usual stopping place at a station, and then to pause a sufficient length of time and reverse the motion, so as to back the train to the proper place; but whether the pause was so long that it indicated an invitation to passengers to alight, and whether the backward movement was made without warning while they were alighting, are questions of fact for the jury. *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374; 44 Am. & Eng. R. Cas. 337.

Where the arrival of the train was announced by the servants of the company, but, at the time, it had passed beyond the platform, and the plaintiff, who was well acquainted with the station, alighted at night and was injured, and the train, only a brief interval having

elapsed, backed up to the platform, it was held that the company was not liable nor guilty of negligence. *Lewis v. London, etc., R. Co.*, L. R., 9 Q. B. 66. In a like case where the train was not backed up, it was held that there was evidence from which the jury might infer negligence on the part of the company. *Weller v. London, etc., R. Co.*, L. R., 9 C. P. 126; *Bridges v. North London R. Co.*, L. R., 6 Q. B. 377.

Under *South Carolina Gen. Stat.*, § 1486, providing that railroad companies shall cause all their passenger trains to entirely stop at all stations advertised as stations for receiving passengers, for a time sufficient to receive and let off passengers, a company, receiving a passenger on board a mixed train and collecting his fare, is obliged to carry him safely, and stop the train at the station to which he has paid fare. *Thomas v. Charlotte, etc., R. Co.* (S. Car. 1893), 17 S. E. Rep. 226.

**Duty to Back Train.**—When the train over-shoots the station, it is the duty of the conductor to back the train to the usual stopping place, when requested to do so by a passenger. *New York, etc., R. Co. v. Doane*, 115 Ind. 435; 37 Am. & Eng. R. Cas. 87; 7 Am. St. Rep. 451; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466; 7 Am. Rep. 699; *Foy v. London, etc., R. Co.*, 18 C. B., N. S. 225. And in *Gulf, etc., R. Co. v. Head* (Tex. 1891), 15 S. W. Rep. 504, it was held to be error to refuse to charge that if the plaintiff got off the train without protest or objection, and without requesting the conductor or other agent of the company to back the train to the station, she could recover no damages by reason of having had to walk back to the station.

1. *Nichols v. Chicago, etc., R. Co.*, 90 Mich. 203; *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276; 18 Am. & Eng. R. Cas. 260—a case of a drunken passenger.

2. *Sevier v. Vicksburg, etc., R. Co.*, 61 Miss. 8; 18 Am. & Eng. R. Cas. 245; 48 Am. Dec. 74; *Nunn v. Georgia R. Co.*, 71 Ga. 710; 51 Am. Rep. 284; the court in this last case declining to decide how far a custom on the part of conductors, known, or which may be presumed to be known, to the com-

If the train does not regularly or ordinarily stop at the passenger's place of destination, the company is not, in the absence of a special contract, bound to stop at that station;<sup>1</sup> its duty towards a passenger in such a case is fully satisfied by notifying him in due time that the train will not stop, and giving him an opportunity to alight at some other station on the road, from which he may take passage on the first train of the company which regularly stops at the station named in his ticket.<sup>2</sup> And a railroad company does not waive its rights, under certain regulations by which certain trains do not stop at certain stations, by the conductor punching and taking up the ticket, after having told the holder that the train does not stop at his place of destination;<sup>3</sup> and this is the rule, even though the conductor agrees with the passenger when he punches his ticket, that he will stop.<sup>4</sup> A refusal by the agent to sell an intending passenger a ticket because the train which he proposes to take, is not, under the regulations of the company, allowed to stop at his point of destina-

pany, to assist unattended females, or children, or infirm persons, would modify this rule, as there was nothing in the case falling within such a principle.

1. *Platt v. Chicago, etc., R. Co.*, 63 Wis. 511; 21 Am. & Eng. R. Cas. 319; *Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510; *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703; *Ohio, etc., R. Co. v. Applewhite*, 52 Ind. 540; *Lake Shore, etc., R. Co. v. Pierce*, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340; *Pittsburgh, etc., R. Co. v. Lightcap* (Ind. 1893), 34 N. E. Rep. 243.

In *Humphries v. Illinois Cent. R. Co.*, 70 Miss. 453, under the circumstances of the case, it was held to be a question for the jury, whether the plaintiff had a special contract with the defendant company that he should be allowed to get off at a certain station, which, by the custom of the company, was not a regular stopping place for that particular train.

In *Sira v. Wabash R. Co.*, 115 Mo. 127, the plaintiff sued the company for compelling him to leave the train before reaching his destination, on the ground that the train did not stop there. It was held that proof that the train sometimes stopped at plaintiff's station was sufficient to show a wrongful expulsion, and to cast upon the company the burden of showing that such stops were exceptional and in pursuance of special instructions only.

2. *Platt v. Chicago, etc., R. Co.*, 63 Wis. 511; 21 Am. & Eng. R. Cas. 319.

See also *Louisville, etc., R. Co. v. Lewis* (Ky. 1893), 21 S. W. Rep. 341.

3. *Trotlinger v. East Tennessee, etc., R. Co.*, 11 Lea (Tenn.) 533; 13 Am. & Eng. R. Cas. 49; *Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510.

It has been held that if the conductor accepts a passenger's fare after having been told at what station he desires to stop, it is his duty to stop the train there and permit him to alight. *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550.

4. *Ohio, etc., R. Co. v. Hatton*, 60 Ind. 12. And it was further held that where, in such case, the passenger has a ticket containing a stipulation that it is "good only on trains stopping at station named," and he is informed by the conductor that the train does not stop at that station, he cannot infer any right on the part of the conductor to agree to stop at such station.

But where a passenger after getting upon a train told the conductor that he wished to be put off at a point on the road which was not a regular station, but at which the conductors of the company's trains, to the company's knowledge, were frequently in the habit of stopping and putting off passengers, and he paid the fare claimed for transporting him to that place, and the conductor refused to put him off there, but carried him to the next station, it was held that this was a violation of the contract of carriage, for which the plaintiff could recover. *Hull v. East Line, etc., R. Co.*, 66 Tex. 619; 28 Am. &

tion, is sufficient notice to him that any agreement the conductor may make to stop at such station is beyond his authority, and not binding on the company.<sup>1</sup> The words "good on passenger trains only," contained in a ticket, do not amount to an agreement on the part of the company that all of its passenger trains will stop at the stations designated on the ticket.<sup>2</sup>

**2. Duty of Passenger.**—It is the duty of the passenger to inform himself whether the train on which he intends taking passage stops at the station for which he holds a ticket, and if he fails to take this precaution, and boards a train which does not, under regulations of the company, stop at his point of destination, the company will not be liable for not stopping thereat, provided the passenger's mistake was not induced by the company or its agents.<sup>3</sup> The passenger may rely upon the representations of the ticket agent,<sup>4</sup> unless indeed he is subsequently afforded such additional information as no prudent or reasonable man would fail to regard.<sup>5</sup> When the passenger holds a ticket for a flag

Eng. R. Cas. 221. See also *Western R. Co. v. Young*, 51 Ga. 489.

1. *Alabama G. S. R. Co. v. Carmichael*, 90 Ala. 19; 44 Am. & Eng. R. Cas. 286.

2. *Ohio, etc., R. Co. v. Swarthout*, 67 Ind. 567; 33 Am. Rep. 104. Nor do the words, "for this day and train only," on a ticket, amount to a representation that a particular train will stop at the station named in the ticket. *Duling v. Philadelphia, etc., R. Co.*, 66 Md. 120; 27 Am. & Eng. R. Cas. 84. In both of these cases it was held that the sale of a ticket to a particular station, just before the departure of a train, did not constitute a representation that that train would stop at that station.

3. *Ohio, etc., R. Co. v. Applewhite*, 52 Ind. 540; *Ohio, etc., R. Co. v. Hatton*, 60 Ind. 12; *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703; *Platt v. Chicago, etc., R. Co.*, 63 Wis. 511; 21 Am. & Eng. R. Cas. 319; *Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510; *Lake Shore, etc., R. Co. v. Pierce*, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340; *Logan v. Hannibal, etc., R. Co.*, 77 Mo. 663; 12 Am. & Eng. R. Cas. 140; *Atchison, etc., R. Co. v. Gants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; 5 Am. St. Rep. 780; *Beauchamp v. International, etc., R. Co.*, 56 Tex. 239; 9 Am. & Eng. R. Cas. 307; *Duling v. Philadelphia, etc., R. Co.*, 66 Md. 120.

And so, where a passenger takes a train which he knows does not, according to the rules and regulations of the company, stop at his station. Thus, in

*Texas, etc., R. Co. v. White* (Tex. 1891), 17 S. W. Rep. 419, the plaintiff brought suit against a railroad company for carrying him beyond the station for which he purchased a ticket. The day before, a new schedule went into effect, by which the night train each way was no longer advertised to stop at the said station as formerly, but the two day trains, however, were unchanged, and these latter afforded sufficient accommodation for the business at that and other small stations along the road. The plaintiff was told by the agent when he purchased the ticket that the train he was about to take would not stop at his station. The conductor told him the same thing before the train started, and requested him to alight, which he declined to do; the conductor remarked to him at the time that he was "hunting a law suit." He was carried past his destination to the station beyond, at which place he boarded the train returning, notwithstanding the fact that he was informed that it made no stop, and so was a second time carried past to the place from which he started. Notice of the change was published at the station. It was held that under the Rev. Stats. of *Texas*, art. 4226, the regulation that one train each way should not stop at all stations was reasonable, and that as it had been advertised, and the plaintiff was informed of it, he could not recover.

4. *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703.

5. *Lake Shore, etc., R. Co. v. Pierce*, 47 Mich. 277; 3 Am. & Eng. R. Cas.

station, and knows it to be such, and that the trains do not stop there "unless some request is made upon the conductor to do so," it is held to be his duty to seasonably make the request, and failing to do so, he cannot recover from the company for carrying him beyond his destination.<sup>1</sup>

**3. Measure of Recovery—Contributory Negligence, etc.**—When the passenger is carried beyond his destination by the negligence of the carrier, but without any circumstances of aggravation, the true measure of damages is compensation for any injury or inconvenience naturally resulting from the wrong and traceable to it as the proximate cause;<sup>2</sup> but behind such cause the law will not go, as it would involve an investigation endless as well as useless.<sup>3</sup> In order that the aggrieved passenger may recover

340; *Dye v. Virginia, etc., R. Co.*, 19 Wash. Law Rep. 369. See also *Barker v. New York Cent. R. Co.*, 24 N. Y. 599; *Page v. New York Cent. R. Co.*, 6 Duer (N. Y.) 523.

1. *Gulf, etc., R. Co. v. Ryan* (Tex. 1892), 18 S. W. Rep. 866; *Chattanooga, etc., R. Co. v. Lyon*, 15 L. R. A. 857.

2. *Kelly v. Hannibal, etc., R. Co.*, 70 Mo. 604; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147; 6 Am. & Eng. R. Cas. 345; 41 Am. Rep. 305; *Southern R. Co. v. Kendrick*, 40 Miss. 375; 90 Am. Dec. 332; *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466; 7 Am. Rep. 699; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456; 6 Am. & Eng. R. Cas. 341; *International, etc., R. Co. v. Terry*, 62 Tex. 380; 21 Am. & Eng. R. Cas. 323; 50 Am. Rep. 529; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 478; 18 Am. & Eng. R. Cas. 254; *Fink v. Albany, etc., R. Co.*, 4 Lans. (N. Y.) 147.

Where the train ran two miles beyond the plaintiff's station to a water-tank, when he demanded of the conductor that the train return, and the conductor said he could either leave the train then or ride to the next station, and the plaintiff then left the train, it was held that this was a compulsory choice; but no insult having been offered the plaintiff by the company's officers, he was entitled to recover pecuniary damages, but not punitive damages. *Thompson v. New Orleans, etc., R. Co.*, 50 Miss. 315; 19 Am. Rep. 12. If the plaintiff was at the time suffering with a disease, testimony thereof may be given on the trial. *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180.

**Excessive Damages.**—Where a female passenger was taken beyond her desti-

nation, and in consequence thereof lost two hours' time and incurred an expense of \$1.50, a verdict for \$750 damages was held to be excessive, and the judgment reversed. *Marshall v. St. Louis, etc., R. Co.*, 78 Mo. 610; 18 Am. & Eng. R. Cas. 248.

And a verdict of \$300 is excessive for carrying a passenger less than 300 yards past his station and putting him off the train in the night at a muddy place, where the exposure did not affect his health, and about the only inconvenience experienced was the walk. *Texas, etc., R. Co. v. Florence* (Tex. 1889), 14 S. W. Rep. 1070.

**Burden of Proof.**—In an action to recover damages for carrying plaintiff beyond her destination, it appeared that she was seventy years of age, and was only carried a few hundred yards beyond the station where she intended to alight. It was between eight and nine o'clock at night, the ground was wet, and it was raining slightly. At the time of the trial the plaintiff was shown to be suffering from a bronchial trouble, which was serious and probably permanent. It was held that to enable plaintiff to recover for her sickness, she was bound to show affirmatively that it resulted from the exposure, and that the burden of proof to establish that fact rested upon her throughout the trial and did not shift upon the defendant. *St. Louis, etc., R. Co. v. Burns*, 71 Tex. 479. To the same effect is *Gulf, etc., R. Co. v. Head* (Tex. 1891), 15 S. W. Rep. 504.

3. *Lewis v. Flint, etc., R. Co.*, 54 Mich. 55; 18 Am. & Eng. R. Cas. 263; 52 Am. Rep. 790; *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276; 18 Am. & Eng. R. Cas. 260.

In *Hobbs v. London, etc., R. Co.*,

exemplary damages the carrier's wrong must be attended with circumstances of fraud, malice, oppression, insult or other willful misconduct.<sup>1</sup> If the passenger is negligent in not leaving the

L. R., 10 Q. B. 111, the plaintiff and his wife took a train from London at midnight, which they were told went to Hampton Court, where they resided. The train landed plaintiff and his wife, at one o'clock in the morning, at a station about six miles from their destination. They could find no public house open and were forced to walk home, in consequence of which the wife was made sick. It was held that damages could be recovered for the long walk the plaintiff was compelled to take, but that the damages arising from the wife's sickness were too remote and were not recoverable.

But where a passenger was, through no fault of his own, carried some distance beyond his station and there put off the train, and in going back to the station fell through a cattle-guard or trestle and was injured, it was held, that he was entitled to recover damages from the company. In such a case, the injury received is not the remote consequence of the wrong done by the company, in carrying him beyond the station and putting him off at a point beyond where he was entitled to get off, but is the natural and proximate consequence of the wrong done in carrying him to the point beyond the station. *Winkler v. St. Louis, etc., R. Co.*, 21 Mo. App. 99. The court, by Thompson, J., said: "If a railway carrier, instead of discharging his passenger at the place of destination called for by the contract of carriage, lands him at another place from which he cannot reach the place of destination by any practicable route without encountering a serious danger, and the passenger immediately thereafter, proceeding by the only practicable route to the place of destination, without fault or negligence on his part, encounters such danger and is hurt, we have no difficulty in saying that the hurt is a proximate consequence of the wrong done by the carrier. A prudent carrier would foresee such danger to the passenger, and should, we think, be held bound to foresee it, and to answer the consequences of it."

1. *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Dawson v. Louisville, etc., R. Co.* (Ky. 1883), 11 Am. &

Eng. R. Cas. 134. See also *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588.

In an action against a railroad company by a passenger, for damages, it appeared that she purchased a ticket to a certain station; that she was carried beyond the station without an opportunity to alight; that on the discovery of such fact, she requested the conductor to return to the station, but he refused to do so and expelled her from the train. It was held that in absense of proof by the defendant, of some controlling exigency, the refusal to return to the station, and the ejection, were willful and malicious, and entitled the plaintiff to exemplary damages. In such a case a request to charge the jury that "there is no proof to show willfulness or oppressiveness or cruelty on the part of the conductor, without which a jury can only find a verdict for actual damages sustained by the plaintiff, and that in the absence of such proof a verdict for exemplary damages cannot be sustained," was properly refused as too narrow. *Samuels v. Richmond, etc., R. Co.*, 35 S. Car. 493.

And where a woman was carried beyond her station, at which the servants of the company refused to put her off, and to whom they were "indecorous or insulting, either in words, tone, or manner," it was held that punitive damages were recoverable. *Louisville, etc., R. Co. v. Ballard*, 2 L. R. A. 694.

But punitive damages cannot be recovered on proof of mental anxiety occasioned by the separation of the plaintiff from his family, it not appearing that the failure to stop at his station was willful or attended with circumstances of malice, insult, or oppression. *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14; 30 Am. & Eng. R. Cas. 576. And in *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456; 6 Am. & Eng. R. Cas. 341, where the plaintiff was carried 8 miles beyond his destination, and was given a pass to return to his station by a train due in a few hours, and the conductor's demeanor was courteous throughout, the only claim of suffering being that while at the place at which he left the train "he suffered

train at his station,<sup>1</sup> or voluntarily jumps from the train while in motion in order to avoid being carried beyond,<sup>2</sup> or is otherwise

some from cold," it was held that the circumstances did not justify the imposition of punitive damages. The court, by Chalmers, C. J., said: "Did the proof warrant the rendering of exemplary damages? By a long train of decisions in this state, which simply announce the rule everywhere recognized, such damages are permissible only where there has been some element of intentional wrong, or, in the absence of intention, a negligence so gross as to evince a reckless disregard of consequences. The idea is variously expressed by different text writers and judges, and sometimes with a multitude of words; but if to the words 'negligence' and 'intention' we add the word 'insult,' we will perhaps sufficiently embrace all the states of case in which such damages should be awarded by a jury or sanctioned by a court. Where the negligence of which a defendant has been guilty bears no aspect of recklessness or willfulness, and is wholly free from any element of insult or rudeness, there is no justification for the imposition of any damages beyond such as will fully compensate for all injuries actually sustained. Full compensation for all actual damage may, in the case of severe injuries, or the disappointment of important engagements, embrace amounts as large as if given by way of punishment; but if the injuries have sprung from that sort of negligence, carelessness, or forgetfulness to which mankind generally are prone, the essential idea of punishment must be discarded. In the case at bar defendant's conductor was clearly remiss in duty, but it is quite as apparent that he was neither willfully, recklessly, nor rudely so. His negligence was inexcusable as to one who demanded compensation for all losses thereby sustained, but it affords no ground whatever for the imposition upon his superior of that kind of punishment which would stamp his act as criminal. It sprang from that temporary thoughtlessness and inattention of which we are all more or less guilty in the discharge of our daily duties. For it we must respond in full compensation to those who have a right to demand fidelity and care at our hands; but to punish us beyond this would be to inflict a wrong more

grievous than that of which we have ourselves been guilty."

1. A passenger at night was asleep when the train stopped at his destination, and he failed to get off. He was awakened by the conductor, who stated that he was still near the station. Rather than go a long distance to the next stopping place, the train was stopped at his request and he got off; he then discovered that he was in a swamp a mile from the depot and would have to walk over a long bridge in returning. While on the bridge carrying his child, he saw an approaching freight train, and hurrying back barely escaped being run over; he was feeble, and the exertion and excitement caused injury to his health, and he sued the railroad company for damages. It was held that he could not recover, though probably misled by what the conductor said as to where the train was; he was negligent in not getting off at the station, and the conductor was serving him and not the company in subsequently stopping. *Wilson v. New Orleans, etc., R. Co.*, 68 Miss. 9. See also *Tillery v. Bond*, 38 Fed. Rep. 825.

2. *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Damont v. New Orleans, etc., R. Co.*, 9 La. Ann. 441; 61 Am. Dec. 214; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131; *Jeffersonville, etc., R. Co. v. Hendricks*, 26 Ind. 228; *Jeffersonville, etc., R. Co. v. Swift*, 26 Ind. 459; *Watson v. Georgia Pac. R. Co.*, 81 Ga. 476; *Kelly v. Hannibal, etc., R. Co.*, 70 Mo. 604; *Walker v. Vicksburg, etc., R. Co.*, 4 La. Ann. 795; 41 Am. & Eng. R. Cas. 172; 17 Am. St. Rep. 417; *Reibel v. Cincinnati, etc., R. Co.*, 114 Ind. 476.

Just before the station which was the passenger's destination, was reached, the conductor called out its name. The train moved on about 165 yards past the platform, and the passenger thereupon jumped off while the train was still in motion, and was injured thereby. After he jumped, the train proceeded a little further, and then backed down on a side track. It was held that the passenger's negligence in jumping from the train while in motion was the cause of the accident, and that a non-suit should have been granted. *Savannah, etc., R. Co. v. Watts*, 82 Ga. 229.

**Child Jumping From Train.**—The foregoing rule seems to be relaxed in

guilty of contributory negligence,<sup>1</sup> it will constitute a bar to his recovery. In actions of this kind the complaint should aver,

the case of children thus: The plaintiff, an infant ten years old, was sent by his mother on an errand to a town a few miles distant, and was warned by her generally not to leave the train while in motion. He boarded a freight train; the conductor took his fare and asked him where he was going, but failed to inform him that the train ran past the station for which he was bound to a switch, then backed into the station. The plaintiff did not know these facts, and on the train passing the station, becoming alarmed, and fearing that he would be carried beyond his destination, he jumped from the train and was injured, the conductor using no precaution to prevent him from jumping. It was held that the plaintiff acted in the emergency as a boy of his age would be likely to act, and could not be held guilty of contributory negligence. *Hemmingway v. Chicago, etc., R. Co.*, 72 Wis. 42; 33 Am. & Eng. R. Cas. 511; 7 Am. St. Rep. 823.

Again, in an action against a railroad company for injury to a boy ten years of age, the petition alleged that the boy made an agreement with the company to carry him to a certain flag station where he resided; that on the train approaching the said station, it was signalled to stop; that the company negligently disregarded such signal and failed to stop the train; that the boy, being confused and frightened by being so carried past his destination, jumped from the train and was injured. It was held that the petition did not show on its face that the boy was guilty of contributory negligence, since whether the mind of a boy ten years of age is mature enough to make him responsible, is a question for the jury. *Avey v. Galveston, etc., R. Co.*, 81 Tex. 243.

**Jumping by Direction of the Conductor.**—But it is held not to be negligence *per se* for the passenger to leave the train while in motion; if he is told by the conductor to get off, or given by him to understand that he can do so in safety, and the surrounding circumstances are such as to give him reason to believe he may, he is justified in making the attempt. *Bucher v. New York Cent., etc., R. Co.*, 98 N. Y. 128; 21 Am. & Eng. R. Cas. 361; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Lambeth v. North*

*Carolina R. Co.*, 66 N. Car. 494; 8 Am. Rep. 508; *Georgia R., etc., Co. v. McCurdy*, 45 Ga. 288; 12 Am. Rep. 577. It is otherwise, however, if he is induced to jump by being told by some one on the train that it will not stop at his station, and it does not appear that his informant is connected with the company. *Herman v. Chicago, etc., R. Co.*, 79 Iowa 161.

1. In *Texas, etc., R. Co. v. Cole*, 66 Tex. 562; 27 Am. & Eng. R. Cas. 144, a ticket agent of the company negligently sold a ticket to a point on its line at which the train did not stop. Upon the train reaching the point, the conductor refused to stop, and carried the passenger to the next station, at which she left the train. She failed to make any inquiry for a place to find shelter, when she might have found it upon inquiry. There were no houses or lights in sight known to her and the agent closed the depot almost immediately upon her arrival. It was held that by walking back to her destination, instead of trying to find shelter, she contributed to her own injury and was not entitled to recover.

In *International, etc., R. Co. v. Willard* (Tex. 1886), 27 Am. & Eng. R. Cas. 280, the plaintiff was carried beyond his destination and put off at one end of a trestle, and his gun at the other. In re-crossing the trestle after getting his gun, he got his feet wet and muddy, which caused him to slip and fall, thereby sustaining an injury, for which he sought a recovery. It was held that he was guilty of contributory negligence and not entitled to recover.

Where the plaintiff was carried 500 yards beyond her destination, from which point she walked back to the depot, and then, refusing the assistance of friends to take her home safely, walked there, a greater distance, it was held error to refuse a charge that if walking back to the depot did not cause her sickness, and if her friends offered to take her home from the depot, and she refused and then walked a greater distance to her home, and this last walk caused or contributed to her sickness, then she could not recover. *Gulf, etc., R. Co. v. Head* (Tex. 1891), 15 S. W. Rep. 504. See generally CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15.

either that the train upon which the plaintiff took passage should, under the rules and regulations of the company, have stopped at his station, or that by a special contract the company bound itself to stop there; if either of these allegations be true, the company has no excuse for its failure to stop.<sup>1</sup>

**IX. EXHIBITION AND SURRENDER OF TICKET.**<sup>2</sup>—A railroad company has the right to make regulations requiring passengers to exhibit and surrender their tickets to the proper train officials, at suitable and reasonable times,<sup>3</sup> and such regulations should not

1. Ohio, etc., R. Co., *v. Hatton*, 60 Ind. 12; Ohio, etc., R. Co. *v. Swarthout*, 67 Ind. 567; 33 Am. Rep. 104; *Porter v. The New England*, 17 Mo. 290.

2. For an exhaustive treatment of the right of the carrier generally to expel passengers from his vehicles for non-compliance with the regulations here mentioned; what time should be allowed the passenger to produce his ticket; the manner of expulsion, and related subjects, the reader is referred to the article RAILROADS, vol. 19, p. 903 *et seq.*

3. Louisville, etc., R. Co. *v. Fleming*, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 347; Baltimore, etc., R. Co. *v. Blocher*, 27 Md. 277; *Loring v. Aborn*, 4 Cush. (Mass.) 608; *State v. Campbell*, 32 N. J. L. 309; *People v. Caryl*, 3 Park. Cr. Cas. (N. Y.) 326; *Cresson v. Philadelphia, etc., R. Co.*, 11 Phila. (Pa.) 597; *Woodard v. Eastern Counties R. Co.*, 30 L. J. M. C. 126; *Havens v. Hartford, etc., R. Co.*, 28 Conn. 69; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342; 26 Am. Rep. 531.

In *Hibbard v. New York Cent. R. Co.*, 15 N. Y. 455, it was held that by refusing to exhibit his ticket, the passenger forfeits his right to proceed further on the train, and does not regain such right by offering to show his ticket after the train has been stopped for the purpose of putting him off.

And the fact that the conductor knows that the passenger is in the habit of using a commutation ticket regularly, which has not expired, will not prevent the enforcement of such a regulation. *Bennett v. Railroad Co.*, 7 Phila. (Pa.) 11; *Ripley v. New Jersey R., etc., Co.*, 31 N. J. L. 388; *Downs v. New York, etc., R. Co.*, 36 Conn. 287; 4 Am. Rep. 77. But see *Maples v. New York, etc., R. Co.*, 38 Conn. 57; 9 Am. Rep. 434. See *supra*, this title, *Kinds of Tickets—Commutation.*

In *Butler v. Manchester, etc., R. Co.*,

21 Q. B. Div. 207; 33 Am. & Eng. R. Cas. 551, the English court of appeals declined to pass upon the validity of such a regulation, but upon the whole were inclined to doubt it. (See especially judgment of Lopes, J.) But this case is in conflict with a long line of American decisions.

**Reason of the Rule.**—The reasons for upholding the validity of such a rule as this are clearly stated by Denio, C. J., in *Hibbard v. New York Cent. R. Co.*, 15 N. Y. 455. He said: "It was proved that the defendant's company had established a regulation by which passengers were required to exhibit their tickets, when requested to do so, by the conductor, and that in case of refusal they might be removed from the cars. If this was a reasonable regulation, the plaintiff was bound to submit to it, or he forfeited his right to be carried any further on the road. In my opinion, the rule was reasonable and proper, and in no way oppressive or vexatious. In the first place, it was easy to be complied with. The railroad ticket is a small slip of paper or pasteboard, which may be conveniently carried about the person; and it involves no conceivable trouble to the passenger, when called upon at his seat by the conductor, to exhibit it to him. Then, no one can question but that this or some similar arrangement is absolutely necessary for the company, unless they are willing to transport passengers free. A train of railroad cars frequently contains several hundred passengers, a portion of them constantly changing as the train passes a station where persons are received and discharged. The tickets, which are given as evidence of the payment of fare, are of as many different kinds as there are stopping places on the road; each being for the distance or to the place for which the passenger has paid his fare. The conductor must necessarily be a stranger to all or a large portion of his passengers.



be condemned unless they are palpably unjust and oppressive.<sup>1</sup> A passenger may be lawfully required to produce his ticket

Unless he is allowed a sight of these evidences of the payment of fare, whenever he may require it, he is exposed to the chance of carrying the holder of them beyond the place to which he is paid, or of carrying persons who have not paid at all. If the conductor is not allowed to ascertain whether a passenger who has obtained a ticket still keeps it, there is nothing to prevent its being given to another passenger who has not procured one, and thus serving as a passport for several passengers. But it is argued that if the ticket has been once shown to a conductor, the passenger cannot reasonably be required to exhibit it a second time. If the duty of showing it were at all difficult and arduous, it might be a question whether the company would not be bound to devise some easier arrangement; or, if it were possible that the memory and other faculties of persons employed as conductors could be so cultivated that they could know and remember the persons of several hundred people, upon seeing them for the first time, and could, moreover, retain the recollection of the terms of the several tickets held by them upon their being once shown, it might be considered unreasonable to require a second exhibition of a ticket in any case. As this degree of perfection is unattainable in the present condition of mankind, I am of opinion that it was lawful, for this railroad company to require that persons engaging passage in its cars should show their tickets whenever required by the company's, servants intrusted with that duty, upon pain of being left to travel the remaining distance in some other way in case of refusal."

**Right to Demand Seat Before Surrendering Ticket.**—It is held that a passenger who exhibits his ticket and demands a seat, need not surrender his ticket until a seat is furnished. *Davis v. Kansas, etc., R. Co.*, 53 Mo. 317; 14 Am. Rep. 457. But he may not dictate where he will sit or in what car he will ride. *Memphis, etc., R. Co. v. Benson*, 85 Tenn. 627; 31 Am. & Eng. R. Cas. 112; 4 Am. St. Rep. 776; *Chesapeake, etc., R. Co. v. Wells*, 85 Tenn. 613; 31 Am. & Eng. R. Cas. 111; *Pittsburgh, etc., R. Co. v. Van Houten*, 48 Ind. 90. In this last case it was held

that where all the seats in one of two passenger cars are already filled with passengers, another passenger has no right to demand a seat in that particular car and to refuse to deliver his ticket unless furnished a seat therein; and if he refuses under such circumstances, the persons in charge of the car may eject him.

Nor can the passenger avail himself of the benefit of the transportation, and at the same time withhold from the carrier his ticket. The right and duty of the passenger in the premises are well stated by Cockrill, C. J., in *St. Louis, etc., R. Co. v. Leigh*, 45 Ark. 368. He said: "When the carrier proffers transportation without a seat, and the passenger refuses to surrender his ticket, what is then the attitude of the parties under the contract? It is simply this: The carrier has offered the passenger less than his contract calls for, and the passenger has refused it in satisfaction. This he has the unquestioned right to do. If he is not accommodated in a manner which may be deemed a fair compliance with the duty of the carrier, he may decline any compromise and resort to his action against the company for refusing to carry him as their contract or their duty requires. But he cannot accept the part that is offered him in lieu of the whole—that is, the transportation without the seat—and at the same time refuse to comply with his own undertakings, in this any more than in another contract. Upon the carrier's neglect or refusal to comply with the terms of the contract of carriage, without a just excuse, the passenger is at liberty to treat the contract as violated by the company, and he may leave the train and sue for a breach of the contract."

1. *Vedder v. Fellows*, 20 N. Y. 126. Where it is the custom of the company to open the gate through which passengers must pass in order to reach the cars, only a few minutes before the departure of the train, a regulation that renders it necessary for a passenger, who in good faith presents his ticket to the gateman in the same condition as when it was purchased from the ticket agent, to go to the receiver's office and get his indorsement of the ticket when its genuineness is questioned by the gateman, is unreasonable.

before entering the train,<sup>1</sup> and to render it up at any time in the course of his journey, provided a conductor's check is given him in exchange.<sup>2</sup> And he is in like manner bound to deliver it up without receiving such a check; provided the next station at which the train stops is his point of destination.<sup>3</sup> But he ought not to be required to part with his ticket without receiving a check or other adequate token of payment of fare at a considerable distance from his point of destination, when there are intervening stations at which the train stops.<sup>4</sup> A carrier may not detain or imprison a passenger who, after the trip is completed, is unable to produce his ticket, as the charge for carriage is a debt which must be enforced by the same remedies that any creditor has against his debtor.<sup>5</sup>

In some states, statutes have been enacted making a fraudulent evasion of, or attempt to evade, the payment of fare by a passenger, either by giving a false answer to the collector, or by traveling beyond the point to which he has in fact paid, or by leaving the train without having paid, or otherwise, punishable by the forfeiture of a specified sum of money; and, also, in case of a refusal to pay fare authorizing the carrier's police officer, without a warrant to arrest the passenger and remove him to the baggage, or other suitable, car of the train, and confine him there until the arrival of the train at some station where he can be placed in charge of an officer who shall take him to a place of lawful detention.<sup>6</sup>

Northern Cent. R. Co. v. O'Connor (Md. 1892), 24 Atl. Rep. 449.

1. Chicago, etc., R. Co. v. Boger, 1 Ill. App. 472; Pittsburgh, etc., R. Co. v. Vandyne, 57 Ind. 576.

2. Northern R. Co. v. Page, 22 Barb. (N. Y.) 130.

3. Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; 12 Am. Dec. 138.

4. State v. Thompson, 20 N. H. 251.

5. Lynch v. Metropolitan El. R. Co., 90 N. Y. 77; 12 Am. & Eng. R. Cas. 119; 42 Am. Rep. 141.

But it has been held that if it is the custom of carriers by steamboat, to

collect the tickets as passengers are leaving the boat, and a passenger attempts to land without producing a ticket, alleging that it has been lost, the carriers have a right to detain him a reasonable time to inquire on the spot into the circumstances of the case. Standish v. Narragansett Steamship Co., 111 Mass. 512.

6. See *Massachusetts Pub. Sts.* (1882), ch. 103, §§ 18, 19; ch. 112, § 197. For a construction of these statutes, see *Krulevitz v. Eastern R. Co.*, 143 Mass. 228; *Beckwith v. Cheshire R. Co.*, 143 Mass. 68.

# INDEX.

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Taxation, 5  
 Abatement, 456  
 Abbreviations, 220  
 Accounting, 348  
 Accounting between subdivisions of the state, 441  
 Actions against defaulting collector, 350  
 Actions against defaulting collector, how prosecuted, 351  
 Actions in personam, 315  
 Actions in rem, 316  
 Affidavit of service and publication of notice, 433  
 Amount required for redemption, 424  
 Animals, 139  
 Appeal and review, 265  
 Appeal and review in actions for taxes, 332  
 Application for judgment in actions for taxes, 326  
 Apportionment of assessments, 281  
 Apportionment of levy, 183  
 Appropriations, 442  
 Arrest and imprisonment, 310  
 Assessment, by whom made, 202  
 Assessment, how made, 204  
 Assessment roll, 210  
 Authentication of assessment roll, 231  
 Authority and jurisdiction of board of equalization, 246  
 Authority of collector, 292  
 Boards of equalization, 247  
 Boards of review, 249  
 Bonds, 103, 104  
 Bounties, 96  
 Business taxes, 479  
 Capitation taxes, 18  
 Case, 478  
 Certiorari, 453, 455, 456  
 Charities, 95  
 Choses in action, 151  
 Claim for damages, 104  
 Classification of taxes, 16  
 Collateral inheritance tax, 158  
 Collection, 288  
 Collection and distribution of school taxes, 615  
 Collection by action, 312

## Taxation—*Continued.*

Collection of occupation and privilege taxes, 492  
 Collector, 289  
 Collector's liability for official action, 339  
 Collector's liability to account for collections, 343  
 Collector's warrant, 294  
 Commutation of tax, 198  
 Compensation of assessors, 240  
 Compensation of collectors, 363  
 Composition of board of equalization and review, 244  
 Conclusiveness and effect of acts of boards of equalization and review, 261  
 Conclusiveness and effect of assessment, 236  
 Conclusiveness and effect of levy, 192  
 Constitutionality of summary processes, 299  
 Constitutionality of statutes providing for forfeiture, 405  
 Constitutional limitations upon the right to impose occupation taxes, 479  
 Constitutional restrictions upon power to tax, 21  
 Construction of provisions for action, 315  
 Construction of redemption statutes, 410  
 Construction of special statutory terms, 144  
 Construction of statutes allowing summary process, 357  
 Construction of statutes authorizing summary process, 299  
 Construction of statutes providing for forfeiture, 405  
 Construction of summary processes, 299  
 Contents of collector's warrant, 295  
 Contents of notice, 431  
 Corporate franchises, 105  
 Corporate property, 152  
 Customary exemptions, 163  
 Customs, 16  
 Debts, 146

Taxation—*Continued.*

Deduction of liabilities, 227  
 Defenses to actions for taxes, 323  
 Definition, 11  
 Definition of assessment, 199  
 Delegation of power, 79, 482  
 Deposit notes, 103  
 Description of distinct and separate parcels of realty, 222  
 Description of personalty, 218  
 Description of realty, 218  
 Designation of property taxed, 217  
 Designation of the person taxed, 212  
 Detention of property, 301  
 Determination of boards of equalization and review, 259  
 Different kinds of action, 315  
 Different kinds of summary process, 301  
 Direct taxation upon property as such, 38  
 Direct taxes, 16  
 Distribution and disposition of the avails of taxation, 437  
 Dog taxes, 489  
 Domicile, 135  
 Double taxation, 66  
 Due process of law, 54, 299  
 Duties, 16  
 Duties of tonnage, 43  
 Effect of redemption, 411  
 Equality and uniformity, 55  
 Equalization and review, 241  
 Equalization and review the exclusive remedy, 242  
 Equal privileges and immunities, 40  
 Equitable redemption, 424  
 Evidence, 435  
 Excise, 15  
 Execution and delivery of warrant, 296  
 Exemption of cemeteries, 169  
 Exemption of educational institutions, 165  
 Exemption of eleemosynary institutions, 167  
 Exemption of manufacturers, 174  
 Exemption of railroads, 170  
 Exemption of religious societies, 163  
 Exemption of stock, 177  
 Exemptions, 156  
 Exemptions restricted to exempt uses, 162  
 Exemptions strictly construed, 157  
 Exhaustion of power, 193  
 Export and import taxation, 23  
 Extending taxes, 230  
 Extent and nature of power to tax, 18  
 Fire apparatus, 92  
 Forfeiture for non-compliance with tax laws, 403  
 Formal errors or omissions in assessment, 212

Taxation—*Continued.*

Form and contents of assessment roll, 210  
 Fraud of purchaser, 424  
 Function of the courts, 74  
 Gas and electric light, 92  
 General requisites of notice, 430  
 General rights of the taxpayer as to remedies, 448  
 General rule of construction, 88  
 General taxes, 17  
 Goods in stores, shops, etc., 144  
 Governmental agencies, 108  
 Growing crops, 102  
 Harbors, 91  
 Highway districts and street and highway taxes, 616  
 Impairment of the obligation of contracts, 47  
 Imposition of penalties, 302  
 Imposts, 15  
 Income taxes, 18, 115  
 Indian lands, 114  
 Indirect taxes, 17  
 Injunction, 453, 465  
 Inspection laws, 23  
 Instrumentalities of government, 106  
 Intangible personal property, 146  
 Issuance of warrant, 294  
 Judgment in actions against collector, 360  
 Judgments, 103  
 Kind of money required for payment, 422  
 Land twice assessed, 287  
 Law governing the right of redemption, 410  
 Legal process, 116  
 Legislative exercise of power, 71  
 Legislative function, 71  
 Levee districts and taxes, 623  
 Levy by subordinate political division, 186  
 Levy, how made, 181  
 Liability of assessors, 238  
 Liability of collector and sureties, 339  
 Liability of collector upon his official bond, 360  
 Lien of municipal taxes, 268  
 Liens, 267  
 Liens, effect of alienation, 276  
 Liens, effect of judicial sales, 277  
 Liens, priority of, 273  
 Liens, statutory limitation, 275  
 Lien, termination of, 275  
 Lien, to what property it attaches, 272  
 Lien, validity of, 269  
 Lien, when it attaches, 270  
 Listing, 205  
 Local assessments, 494  
 Action to quiet title, 575  
 Agricultural lands in cities, 531

**Taxation—Continued.**

Appeal, 571  
 Appointment, qualification, and oath of commissioners, assessors, etc., 554  
 Apportionment, 516  
 Apportionment according to area, 526  
 Apportionment according to frontage, 524  
 Apportionment according to value, 526  
 Assessment proceedings, 531  
 By whom the plans and estimates are made, 552  
 Certiorari, 752  
 Collection of assessments, 564  
 Compliance with statutory provisions, 531  
 Confirmation of report and assessment, 560  
 Constitutionality, 501  
 Construction of statutes, 507  
 Defenses, 570  
 Demand, 564  
 Determination of benefits, 554  
 Determination of necessity of improvements, 532  
 Distinguished from taxation generally, 494  
 Drains, 512  
 Duties of commissioners in assessing benefits, 556  
 Enactment of ordinance, 537  
 Enforcement of lien, 567  
 Equitable relief, 572  
 Estoppel, 576  
 Evidence, 569  
 Examples of improvements for which local assessments have been made, 515  
 Improvements for which made, 507  
 Injunction, 574  
 Legislative power to validate void assessments, 562  
 Levees and dikes, 513  
 Lien on property, 566  
 Nature and purpose, 494  
 Necessity of notice, 545  
 Necessity of ordinance, 537  
 Notice, 545  
 Ordinances, 537  
 Parks, 514  
 Personal liability, 564  
 Petition of property owners, 533  
 Plans and estimates of expenses, 552  
 Pleadings, 569  
 Power to make, 498  
 Principle of the imposition—benefits, 496  
 Property assessable, 527

**Taxation—Continued.**

Property of railroads, 528  
 Publication of ordinance, 544  
 Public property, 527  
 Purpose of notice, 548  
 Reassessment, 562  
 Recovery back of the assessment, 575  
 Remedies, 571  
 Report of commissioners, 558  
 Requisites as to form and sufficiency of ordinance, 540  
 Requisites of notice, 546  
 Sewers, 510  
 Sidewalks, 508  
 Statutes and city ordinances, 498  
 Streets, 507  
 The assessment, 551  
 Time of assessment, 551  
 Waiver of notice, 550  
 Water pipes, 514  
 What to be included in the estimate, 553  
 Who may collect, 567  
 Logs and lumber, 141  
 Mandamus, 302  
 Mandatory and directory provisions, 76, 77, 78  
 Measure of damages in action against defaulting collector, 353  
 Medium of payment, 284  
 Meetings of board of review, 251  
 Merchants, dealers, and manufacturers, 487  
 Method of collection, 297  
 Miscellaneous exemptions, 179  
 Mistake or fraud of officer, 423  
 Mode of exercise, 75  
 Mode of imposing occupation taxes, 489  
 Mode of redemption, 411  
 Money taxes, 17  
 Mortgages, 122, 149  
 Municipal taxation, 576  
   Agricultural lands, 605  
   Amount which may be assessed for school purposes, 615  
   Assessment, 608  
   Assessment for school taxes, 613  
   Collection, 609  
   Collection and distribution of school taxes, 615  
   Compulsory taxation, 595  
   Detached territory, 606  
   Division and consolidation of districts, 594  
   Exemptions, 606  
   Highway districts and street and highway taxes, 616  
   Implied power to impose taxes, 584  
   Legislative compulsion, 595  
   Levee districts and taxes, 623

Taxation—*Continued.*

Limitations on power to impose taxes, 585  
 Municipal and corporate purposes, 577  
 Nature of municipal taxation, 576  
 Notice of election, 598  
 Power of municipality to impose taxes, 580  
 Power to impose special taxes, 593  
 Proceedings at election, 599  
 Property in adjacent territory, 605  
 Public property, 604  
*Quasi* municipalities, 610  
 Road labor, 621  
 School districts and school taxes, 611  
 Sinking fund taxes, 579  
 Subjects of municipal taxation, 602  
 Submission to popular vote, 596  
 Taxation in aid of railroads, 578  
 Taxes in particular districts, 610  
 Withdrawal or alteration of power to impose taxes, 590  
 Must benefit the locality taxed, 98  
 Nature and validity of summary process against defaulting collector, 356  
 Nature of the right of redemption, 411  
 Negotiable paper, 146  
 Non-resident, 127  
 Notice, 54  
 Notice of meetings of board of equalization, 251  
 Notice of meetings of board of review, 251  
 Notice to redeem, 426  
 Notice to the occupant, 429  
 Notice to the owner, 428  
 Notice to the person in whose name the land is assessed, 430  
 Occupancy, 121  
 Occupation and privilege taxes confined to the taxing district, 492  
 Occupation taxes, 479  
 Offices and officers, 106  
 Official liability, 474  
 Origin of right of redemption, 409  
 Ownership, 120  
 Particular estates, 122  
 Partnership property, 152  
 Payment, 278, 421  
 Payment as between owners of different estates, 281  
 Payment, by whom made, 279  
 Payment, how established, 285  
 Payment, how made, 282  
 Payment, medium of payment, 284  
 Payment, to whom made, 282, 422  
 Payment, when made, 279  
 Penalties and costs, 330  
 Period for redemption, 418

Taxation—*Continued.*

Personal property, 102  
 Persons under disability, 419  
 Pipes and water mains, 105  
 Place of levy, 190  
 Place of taxation, 129  
 Place of taxation where land lies in two districts, 132  
 Pleadings and proof in actions for taxes, 320  
 Poll taxes, 100, 155  
 Power of the legislature to bind the state permanently, 86  
 Power to exempt, 156  
 Power to impose occupation, business, and privilege taxes, 479  
 Power to tax, 18  
 Power to tax distinguished from eminent domain, 18  
 Power to tax distinguished from police power, 20  
 Priority of lien, 272  
 Privilege taxes, 479  
 Procedure, 359  
 Procedure in actions against collector, 359  
 Procedure in actions for taxes, 319  
 Proceedings of boards of equalization and review, 255  
 Professional occupations, 486  
 Prohibition, 465  
 Property in hands of guardians, etc., 154  
 Property *in transitu*, 142  
 Property in trust, 153  
 Property of decedents, 154  
 Property taxes, 18, 101  
 Property, to whom taxed, 119  
 Property used as a means of government, 107  
 Publication of notice, 432  
 Public property, 109  
 Purpose must be public, 87  
 Purposes of taxation, 87  
 Qualification of collector, 290  
 Railroad property, 152  
 Railroads, 91, 105  
 Rate of taxation, 69  
 Reassessment, 447  
 Reclamation of land, 91  
 Record of proceedings of boards of equalization and review, 262  
 Record of the levy, 195  
 Redemption, 408  
 Redemption by mortgagees, 415  
 Redemption by part owners, 416  
 Redemption by persons having particular interests, 413  
 Redemption by stranger, 416  
 Redemption from forfeiture, 407  
 Refunding and recovery of taxes paid, 465  
 Regulation of commerce, 27

*Taxation—Continued.*

Remedies, 435  
 Remedies against defaulting collector, 350  
 Remedies against public officers, 474  
 Remedies by legislative action, 445  
 Remedies for erroneous and illegal taxation, 445  
 Remedies of the taxpayer, 448  
 Removal of collector, 289  
 Residence, 137  
 Resignation of collector, 289  
 Restriction by treaty, 71  
 Restriction of rights, 305  
 Restrictions in federal constitution, 23  
 Restrictions in state constitutions, 55  
 Restrictions upon state taxation, 22  
 Return as evidence, 338  
 Return of assessment roll, 234  
 Return of delinquency, 333  
 Return of tax warrant, 333  
 Right to proceed by action, 312  
 Road labor, 621  
 Salaries of public officers, 115  
 School districts and school taxes, 611  
 Schoolhouses, 95  
 Schools, 94  
 Seated and unseated property, 127  
 Seizure, levy, or distress of property, 306  
 Selection of collector, 289  
 Settlement between state and county, 437  
 Shares of stock, 151  
 Specific taxes, 17  
 Stock in trade, 145  
 Street cleaning, 15  
 Street railroads, 105  
 Submission to popular vote, 187  
 Summary process against defaulting collector, 354  
 Summary processes, 299  
 Support of poor, 95  
 Tangible personal property, 138  
 Taxable subjects, 484  
 Taxation by value, 65  
 Taxation without representation, 118  
 Taxes, definition of, 11  
 Taxes distinguished from debts, 12  
 Taxes distinguished from other impositions, 14  
 Taxes in kind, 17  
 Taxes on personal property, 133  
 Taxes on real property, 130  
 Taxes upon amusements, 18  
 Taxes upon capital of corporation, 33  
 Taxes upon franchises, 33  
 Taxes upon freight, 31  
 Taxes upon gross receipts, 33  
 Taxes upon means by which interstate commerce is transacted, 32  
 Taxes upon passengers, 31

*Taxation—Continued.*

Taxes upon privileges, 33  
 Taxes upon sleeping cars, 40  
 Taxes upon steamboats, 46  
 Tax liens, 267  
 Tax sales, 367  
   Certificate, 399  
   Certificate as evidence, 400  
   Competition at sale, 391  
   Conduct of sale, 381  
   Confirmation, 398  
   Fraud, 391  
   Must be by proper officer, 383  
   Notice, 372  
   Personal property, 367  
   Power to sell lands, 368  
   Primary liability of personalty, 370  
   Proceedings after sale, 396  
   Proceedings before sale, 372  
   Quantity to be sold and in what parcels, 384  
   Report and record, 396  
   Terms of sale, 394  
 Telegraph lines, 105  
 Tenant for life, 122  
 Tender, 288, 421  
 Termination of actions in personam, 327  
 Termination of actions in rem, 327  
 The assessment, 199  
 The levy, 181  
 Things taxable, 100  
 Tolls, 16  
 Tort, 477  
 To whom notice to redeem must be given, 428  
 Trespass, 477  
 Trover, 479  
 Trustees, executors, administrators, etc., 124  
 Upon whom imposed, 117  
 Upon whom occupation taxes are imposed, 491  
 Validity and effect of judgment for taxes, 330  
 Valuation, 224  
 Vessels, 102  
 Voluntary payment, 278  
 Waiver of forfeiture, 407  
 Waiver of requirements as to time, 419  
 Waiver or relinquishment of the power, 83  
 Warrant, 294  
 Water craft, 140  
 Water rates, 15  
 What purposes are not public, 97  
 What purposes are public, 90  
 When the assessment is made, 200  
 Whether exemptions include local assessments, 160  
 Who may redeem, 412

## Taxation (Corporate), 624

Capital stock as personal property, 642

Capital stock of interstate corporations, 644

Capital stock tax, 638

Classification for taxation, 627

Collection, 630

Consolidated railroads, 658

Corporate residence, 629

County aid, 659

Definition of capital stock, 638

Definition of "doing business," 661

Definition of franchise, 630

Direct tax upon shareholders, 662

Dividend tax, 650

Double taxation, 666

Foreign corporations, 659

Franchise distinguished from property tax, 636

Franchise tax, 630

General method of taxing railroads, 650

Gross receipts, 646

Income from interstate commerce, 647

Income tax, 646

Indebtedness tax, 649

Interstate commerce, 655

Interstate railroads, 658

Introduction, 624

Leased railroads, 659

Measurement of franchise taxes, 635

Method of taxing corporations, 626

National railroads, 657

Net income, 646

Non-resident shareholder, 664

Non-resident shareholder in domestic corporations, 664

Non-resident shareholder in foreign corporations, 665

Railroads, 650

Railroad's residence, 656

Railroad tracks, 651

Real property, 651

Resident shareholder, 662

Retaliatory legislation, 661

Right of way, 651

Roadways, 651

Rolling stock, 654

Shareholder in domestic corporations, 662

Shareholder in foreign corporations, 663

Sleeping cars, 656

Taxability of capital stock, 641

Taxability of corporations, 625

Taxability of dividends, 650

Taxability of franchise, 631

Taxation of the corporation, 625

Taxation of the shareholder, 662

Tax collected from corporation, 665

Union stations, 659

## Taxation (Corporate)—Continued.

Valuation, 657

Valuation of capital stock, 644

## Tax titles, 674

Acknowledgment of tax deed, 691

Action by owner to remove cloud from title, 731

Action by owner to set aside sale, 730

Action by tax title claimant, 726

Actions concerning tax titles, 726

Action to obtain possession, 726

Action to quiet and confirm title, 727

Agent, 711

Attorney, 711

By what law governed, 706

Compensation for improvements, 725

Conditions of relief, 735

Definition, 674

Delivery and acceptance of tax deed, 692

Deputies as purchasers, 713

Description in deed, 686

Execution of tax deed, 691

Form of tax deed, 681

General requisites, 674

Grantee of tax deed, 690

Grantor of tax deed, 689

Guardian, 711

How to make the deed, 675

Husband and wife, 711

Limitation of actions, 736

Mortgagee, 710

Mortgagor in possession, 710

Nature of title acquired, 716

Nature of title acquired after execution and delivery of deed, 717

Nature of title acquired before execution and delivery of deed, 716

Officers, 712

Officers as purchasers, 712

Officers purchasing as agents, 713

Parties to tax deed, 689

Persons bound for taxes, 706

Purchaser's right to the deed, 677

Recitals in tax deed, 683

Recording tax deed, 693

Requisites of tax deed, 681

Requisites of tax titles, 674

Restraining execution of the deed, 680

Rights of purchasers of defective titles, 719

Seal to tax deed, 688

State or municipality as purchaser, 714

Tax deed as color of title, 704

Tax deed as evidence, 694

Tax deed as evidence under statutes, 695

Tenant in common, 709

The deed, 675



Tax titles—*Continued.*

- To whom the deed should be executed, 675
- Whether deed is necessary to convey title, 715
- Who may acquire, 706
- Telegraphs and telephones, 744
  - Actions for damages resulting from negligent transmission or delay, 824
  - Are not insurers, 748
  - As common carriers, 747
  - As ordinary bailees for hire, 751
  - As public servants, 750
  - Burden of proof, 831
  - Construction and maintenance, 752
  - Contracts by telegraph, 886
  - Contributory negligence, 808
  - Corporate rights and franchises, 751
  - Damages where message is in cipher, 842
  - Damages where message is in cipher and contains the only evidence of its importance, 845
  - Damages where message is in cipher and the company has external evidence of the importance of the message, 846
  - Definition, 745
  - District telegraph companies, 893
  - Duty of telephone companies to furnish equal facilities to all, 775
  - Duty to transmit without error or delay, 780
  - Effect of special circumstances upon damages, 841
  - Evidence, 834
  - Evidence of assent to stipulations, 804
  - Exemplary and excessive damages, 864
  - Federal and state grants of right of way, 758
  - Federal control, 774
  - Forged or fraudulent messages, 819
  - Gambling transactions, 812
  - Immoral messages, 812
  - Injury to telegraph or telephone lines, 763
  - Instructions, 836
  - Interference of other electric appliances with telephone, 764
  - Interstate messages, 818
  - Legal status of telegraphs and telephones, 747
  - Liability for injuries caused by improper construction, 761
  - Liability of telegraph companies for negligent transmission or delivery, 778
  - Liability where company acts under contract to furnish market reports and other news, 811

Telegraphs and telephones—*Contin'd.*

- Liability where message passes over connecting lines, 821
- Libelous messages, 821
- License fees, 773
- Losses which might have been prevented but for the negligence of the company, 854
- Loss of expected employment or of professional fees, 852
- Loss of expected profits in transactions of sale, 848
- Matters of pleading, practice, and evidence, 830
- Measure of damages, 836
- Mental anguish, 855
- Municipal control, 773
- Negligence, 808
- Night messages, 803
- On railroad right of way, 756
- Parties to action, 824
- Pleadings in actions for damages, 832
- Pleadings in actions for statutory penalties, 833
- Presumption arising from sending telegram, 881
- Presumption of negligence, 831
- Primary and secondary evidence, 877
- Regulation of charges, 771
- Regulations as to office hours, 785
- Remote or speculative damages, 838
- Right of city to authorize occupation of streets, 753
- Right of sender to sue for negligence, 824
- Right of state to require wires to be placed under ground, 768
- Right of third party to sue for negligence, 828
- Right of way, 752
- Right to suit under special statutes, 829
- Rules and regulations of the company as affecting its liability, 783
- State regulation and control, 767
- Statutory penalties, 867
- Stipulations, 803
- Stipulations as to repeating messages, 790
- Stipulations in contract of sending, 786
- Stipulations requiring claims to be presented within a certain time, 798
- Stocks, bonds, and mortgages, 752
- Sunday messages, 815
- Taxation, 871
- Taxation of telegraph companies, 871
- Taxation of telephone companies, 875

- Telegraphs and telephones—*Contin'd.*  
 Telegrams as privileged communications, 882  
 Telegrams in evidence, 876  
 Telegraph company ordinarily agent of sender, 890  
 "Telegraph" embraces "telephones," 746  
 Telegraph lines an additional burden to the fee, 753  
 Telephonic communications as evidence, 885
- Tender, 897  
 Acceptance must be absolute, 927  
 Acceptance or refusal of tender, 927  
 By or to whom made, 918  
 Definition, 897  
 Effect of payment of money into court, 940  
 Effect of tender, 924  
 Effect of tender of money, 924  
 Effect of tender of property, 925  
 Effect of tender on lien of mortgage, 927  
 Effect on interest and costs, 926  
 Election to pay in money or property, 909  
 Equity will not supply defects, 922  
 Keeping tender good, 922  
 Medium, 907  
 Mere readiness and willingness to pay, not sufficient, 916  
 Money paid into court belongs to plaintiff, 943  
 Must be absolute and without conditions, 912  
 Must cover debt, 910  
 Necessity of tender, 898  
 Parties, 918  
 Payment of money admits plaintiff's right to sue, 942  
 Payment of money into court, 935  
 Payment of money into court admits the contract and the breach, 940  
 Payment of money into court as security for costs, 940  
 Payment of money into court in satisfaction, 935  
 Payment of money into court to abide the event, 939  
 Payment of money into court to keep tender alive, 940  
 Place of tender, 920  
 Pleading tender, 932  
 Premature tender, 909  
 Tender of specific property, 918  
 Time of tender, 921  
 Unliquidated damages, 900  
 Waiver of objections, 916  
 Waiver of tender, 900  
 What constitutes a valid tender, 901  
 When actual production of money is excused, 904
- Term, 949  
 In general, 949  
 Term of agreement, 951  
 Term of court, 949  
 Term of years, 951
- Territories, 953  
 Appellate power of federal supreme court, 969  
 Appointment and removal of territorial judges, 966  
 Courts, 967  
 Criminal prosecutions, 957  
 Delegation of powers, 960  
 Due process of law, 957  
 Executive power, 964  
 Immunity from taxation, 958  
 Incorporation of municipal corporations, 962  
 Incorporation of private corporations, 962  
 Judicial control of, 965  
 Judicial powers, 965  
 Jurisdiction of district courts, 967  
 Jurisdiction of inferior courts, 968  
 Jurisdiction of supreme court, 967  
 Laws of congress applicable to, 955  
 Legislative power of territories, 956  
 Legislative sessions; records of, 960  
 Limitation of the right of acquisition by corporations, 959  
 Officers and attachés of territorial legislature, 961  
 Police power, 962  
 Power of appointment, 964  
 Power of congress over, 953  
 Power of removal, 965  
 Power to fill vacancies, 964  
 Practice, 968  
 Public domain, 958  
 Restraints upon legislative power of territories, 957  
 Right of suffrage, 959  
 Scope of territorial legislative power, 961  
 Special sessions, 961  
 Taxation of federal property, 958  
 Taxation of national banks, 964  
 Taxation of public lands, 963  
 Taxation of railroads, 963  
 Trial by jury, 957
- Testamentary capacity, 970  
 Deaf, dumb, and blind persons, 975  
 Declarations of devisees and legatees, 1007  
 Declarations of testator, 1005  
 Degree of mental capacity required, 970  
 Delirium, 989  
 Delusions, 982  
 Drunkenness, 990  
 Eccentricity, 988  
 Evidence, 1003

Testamentary capacity—*Continued.*

Experts, 1014  
 Feeble-minded persons, 992  
 Inquisitions of lunacy, 1004  
 Lucid intervals, 978  
 Lunatics, 977  
 Monomaniacs, 980  
 Old age, 994  
 Opinion evidence, 1010  
 Persons in extremis, 994  
 Persons partially insane, 980  
 Presumption and burden of proof, 996  
 Probate and contest, 996  
 Province of court and jury, 1017  
 Revocation, 974  
 "Sound mind" and "disposing memory," 971  
 Subscribing witnesses, 1016  
 Time to which question of testamentary capacity relates, 974  
**Theaters, 1020**  
 Carriage, transportation, and baggage, 1053  
 Characters and parts, 1047  
 Construction of statutes requiring licenses, 1029  
 Contracts with actors for Sunday performances, 1040  
 Criticisms of the press, 1051  
 Damages, 1046  
 Definition, 1021  
 Delegation of power to municipalities, 1027  
 Discharge of actor, 1047  
 Discretion as to granting license, 1027  
 Employment of children, 1045  
 Erection, 1022  
 Exclusion of colored persons, 1038  
 Fixtures, 1023  
 Forgery of theater tickets, 1038  
 Free admission, 1036  
 Furnishings, 1023  
 Hissing, 1052  
 Illness of actor, 1045  
 Injunctions restraining actors, 1049  
 Lease, 1023  
 Liability for failure to procure license, 1028  
 Liability of manager, 1041  
 License, 1026  
 Literary property in dramatic productions, 1054  
 Lithographing, 1031  
 Municipal control over erection, 1022  
 Necessity for license, 1028  
 Nuisances, 1041  
 Prospective profits, 1046  
 Reserved seats, 1035  
 Right of city to lease municipal buildings for theatrical purposes, 1025

Theaters—*Continued.*

Right of legislature to impose license, 1026  
 Right to assign particular seats to colored persons, 1039  
 Right to exclude colored persons, 1038  
 Scope of license, 1028  
 Stage costumes, 1047  
 Statutes prohibiting Sunday performances, 1040  
 Sunday performances, 1040  
 Theatrical advertising, 1031  
 Tickets of admission, 1033  
 Transferability of tickets, 1035  
**Threats and threatening letters, 1060**  
 Considered as private injuries, 1061  
 Considered as public wrongs, 1064  
 Considered in connection with other offenses, 1068  
 Constructive violence in burglary and robbery, 1067  
 Definition of threatening letters, 1068  
 Definition of threats, 1061  
 Evidence, 1072  
 Evidence explanatory of the letter, 1073  
 Evidence of the intent, 1073  
 Evidence of threats in trials for homicide and assault, 1066  
 Extortion by means of threats, 1065  
 Former threats by deceased in homicide trials, 1066  
 Indictment, 1072  
 Offense of making threats, 1064  
 Offense of sending threatening letters, 1069  
 Proof of sending, 1072  
 Threats which interfere with one's business, 1061  
 Threats which interfere with one's freedom of person, 1063  
 Threats which interfere with one's freedom of will, 1062  
 Venue, 1072  
**Tickets and fares, 1074**  
 As evidence of the passenger's rights, 1076  
 Carrying beyond destination, 1112  
 Commutation, 1088  
 Condition in pass exempting carrier from liability, 1097  
 Contributory negligence, 1116  
 Drivers' passes, 1102  
 Excursion tickets, 1091  
 Exhibition and surrender of ticket, 1120  
 Extent of liability, 1085  
 Fare paid on train, 1104  
 Interstate commerce act, 1101  
 Kinds of tickets, 1085  
 Limited tickets, 1093

Tickets and fares—*Continued.*

- Measure of damages when carried beyond destination, 1116
- Nature of ticket, 1074
- Non-transferable tickets, 1091
- Partnership arrangement, 1087
- Passenger's duty when carried beyond destination, 1115
- Passes, 1096
- Power to regulate rates of fare, 1078
- Rates of fare, 1078
- Scalpers, 1095
- Stop-over privileges, 1109
- Through tickets over connecting lines, 1085
- Ultra vires, 1088
- Voucher not contract, 1074
- Who are passengers, 1081

Words and phrases

- Take, 1
- Tales, 2
- Talesman, 3
- Tallage, 3
- Tare, 3
- Tariff, 3
- Tavern, 3
- Teach, 741
- Teacher, 741
- Team, 741
- Teamster, 743
- Teller, 893
- Temperance, 893
- Temperate, 893
- Tempest, 894
- Temporary, 894
- Tenancy, 894
- Tenancy at sufferance, 894
- Tenancy at will, 894
- Tenant, 895
- Tenantable, 896
- Tenant's fixtures, 896
- Tenement, 944
- Tenendum, 944

Words and phrases—*Continued.*

- Tenor, 946
- Tent, 947
- Tenterden's Act, 948
- Tenure, 948
- Tenure of office, 948
- Terminate, 952
- Terminer, 952
- Terminus, 953
- Terre-tenant, 952
- Terrier, 953
- Testament, 970
- Teste, 1018
- Testimony, 1019
- Test-paper, 1019
- The, 1019
- Theft, 1054
- Their, 1054
- Then, 1055
- Thence, 1056
- Thereafter, 1057
- Therefore he brings suit, 1057
- Therein, 1057
- Thereon, 1058
- Thereupon, 1058
- These, 1058
- Thief, 1058
- Thing, 1058
- Things in action, 1058
- Think, 1058
- Third or thirds, 1059
- Third party, 1059
- This, 1059
- Thoroughfare, 1059
- Thoroughly dried, 1059
- Thousand, 1060
- Thread, 1060
- Three story, 1073
- Threshing machine, 1073
- Throat, 1073
- Through, 1073
- Thrust, 1074
- Ticket, 1074













